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

* * * * * * * *

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMITS 68173-41S AND 68174-41S BY FLOYD R. BLAIR	))))	ORDER

* * * * * * * *

On February 12, 1997, the Department received correspondence from Floyd R. Blair outlining his efforts to comply with the Final Order issued in the above-entitled matter concerning the submission of detailed plans to all objectors, the Lewistown Water Resources Regional Office, and the Hearing Examiner. Mr. Blair submitted a dam design and specifications for his proposed project to the Corps of Engineers in Helena on September 17, 1995. The Corps of Engineers have notified the public, Federal, state, and local agencies and officials; Indian Tribes; and other interested parties of the details of the proposed project. Comments were to be submitted to the Corps of Engineers no later than December 12, 1996. Any comments will be used to assess impacts of the proposed project. Comments are also used to determine the need for a public hearing. Considering the time needed for the Corps of Engineers to evaluate comments and conduct a public hearing, Mr. Blair will not be able to met the deadline for submission of detailed plans to all objectors, the Lewistown Water Resources Regional Office, and the Hearing Examiner.

CASE # 68174

THEREFORE, the Hearing Examiner makes the following:

ORDER

Permittee is granted an additional year from the date of this Order to provide detailed plans in compliance with the Final Order.

Dated this 14th day of February, 1997.

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record, first class mail, at their address or addresses this 18th day of February, 1997, as follows:

Floyd R. Blair
HCR 76 Box 45
Denton, MT 59430

Barber Ranch, Inc.
1106 Main
Denton, MT 59430

John R.Carter
P.O. Box 933
Denton, MT 59430

Vincent Linse
Denton, MT 59430

Merle Boyce
P.O. Box 74
Winifred, MT 59389

Richard Josephson
Attorney at Law
P.O. Box 1047
Big Timber, MT 59011-1047

Twin Butte Ranch
c/o John Barber
708 East Broadway
Lewistown, MT 59457

Tim O'Hare
Attorney at Law
701 E. Main, Suite A
Lewistown, MT 59457-2043

Wallace B. Ayers
Star Route
Denton, MT 59430

CASE # 68174

Hilltop Angus Ranch
Denton, MT 59430

John R. Christensen
Attorney at Law
82 Central Avenue
P.O. Box 556
Stanford, MT 59479

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
P.O. Box 438
Lewistown, MT 59457-2043

Cindy G. Campbell
Legal Assistant

CASE # 68174

FLOYD R. BLAIR

Telephone (406)567-2436

HCR 76 BOX 45
DENTON, MT 59430

February 11, 1997

RECEIVED
FEB 12 1997
DNRC

Ms. Vivian A. Lighthizer
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena MT 59620-2301

RE: Final Order, Permit No. 68173-S41s
FLOYD R. BLAIR

Dear Ms. Lighthizer:

On October 29, 1996, the Corps of Engineers assigned a new number, 199590585, to replace MT2 OXT 2 14470 on the matter of application for beneficial water use permit No. 68173-S41s.

The project 199590585 has been put out for Public Notice, a copy of which is enclosed. Responses to this Public Notice by the objectors are being received by the Corps. The dam design and specs were sent to Omaha office for review the end of January 1997. The Omaha office will determine if a Public Hearing will materialize after reviewing the project and responses.

In anticipation of the above, I am requesting an additional time of one year to submit the design to the Montana DNRC and to the objectors.

Sincerely,

Floyd R Blair

FLOYD R. BLAIR

Encl
CE Public Notice

CASE # 68174

PUBLIC NOTICE

US Army Corps of Engineers
Omaha District

Application No: 199590585
Applicant: Floyd Blair
Waterway: Wolf Creek
Issue Date: November 21, 1996
Expiration Date: December 12, 1996

21 DAY NOTICE

Helena Regulatory Office 301 South Park, Drawer 10014 Helena, Montana 59626-0014

JOINT PUBLIC NOTICE
FOR PERMIT APPLICATION SUBMITTED TO
U.S. ARMY CORPS OF ENGINEERS
AND
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

The application of Floyd Blair for approval of plans and issuance of a permit under authority of the Secretary of the Army is being considered by the District Engineer, U.S. Army Corps of Engineers, Omaha, Nebraska. An application for Department of the Army authorization for this project was originally submitted in November, 1989 (No. MT 2SB OXT 2 14470) but was subsequently withdrawn.

The applicant requests permission to construct an earthen dam across Wolf Creek in the NW1/4 Section 2, Township 18 North, Range 15 East, Fergus County, Montana.

The majority of the construction will be conducted by the applicant in accordance with recommendations contained in designs prepared by Delta Engineering, Inc. of Great Falls, Montana. The proposed activity will consist of constructing an earthen dam, utilizing approximately 60,300 cubic yards of earthen fill and 670 cubic yards of concrete. On average, the dam will be approximately 250' to 275' wide at the base and 16' wide at the crest (to allow one-lane vehicle passage). The crest of the dam will be constructed to 3363.4 feet. m.s.l. (varying from approximately 8' to 23' in height above the existing ground surface). Total length of the dam will be about 1,225 feet. Open channel drop spillways were selected for both the principal and emergency spillways. The principal spillway will be approximately 140 feet long and 30 feet wide (crest elevation 3354' m.s.l.). The emergency spillway will be 75 feet wide and approximately 112 feet in length (crest elevation 3357' m.s.l.). The spillways will be concrete-lined and will have the capacity to pass the 100 year flow with a full pool. The maximum side slopes of both spillways will be 6:1 to allow vehicle passage across the dam crest. The upstream face of the dam will be stabilized with a matrix of used tires and small stones which will be reinforced with rebar and grout. The drainage basin for Wolf Creek above the proposed dam is 370 square miles, consisting of Wolf Creek and Dry Wolf Creek as the major drainages. Both streams merge several miles upstream of the proposed dam. Delta Engineering, Inc. recommends a 3:1 slope for dams up to 20' high and a 4:1 slope for dams up to 30' high. A drain outlet pipe, capable of draining the full pool volume in 10 days, has been recommended by Delta Engineering, Inc. The smallest pipe that would satisfy this requirement would be a reinforced concrete pipe 24" in diameter (minimum). A 4' manhole entrance to the pipe situated on the upstream side of the dam core will provide easy access to an in-line valve in the culvert.

The applicant's stated project purpose is to impound 500 acre-feet of water for irrigation.

The Montana Department of Environmental Quality, P.O. Box 200901, 1520 East Sixth Avenue, Helena, Montana 59626-0014, will review the proposed project with the intent to certify in accordance with the provisions of Section 401 of the Clean Water Act. The certification, if issued, will express the State's

CASE # 68174

opinion that the operations undertaken by the applicant will not result in a violation of applicable water quality standards. The Montana Department of Environmental Quality hereby incorporates this public notice as its own public notice and procedures by reference thereto.

The Corps of Engineers, Omaha District will comply with the National Historic Preservation Act of 1966 and 36 CFR 800. We have checked the National Register of Historic Places and its current supplements and have also consulted with personnel at the University of Montana (Archeological Records) and there are no known National Register sites in the vicinity; however, we will evaluate input by the State Historic Preservation Officer and the public in response to this public notice, and we may conduct or require a reconnaissance survey of the permit area or check for unknown historic or prehistoric properties, if warranted.

Pursuant to the Endangered Species Act, the proposed project is being reviewed for impacts to threatened or endangered species and their critical habitat. Our preliminary review indicates there will be no effect, because no such species are known to utilize the project area.

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefits which reasonably may be expected to accrue from the proposed activity must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. In addition, the evaluation of the impact of work on the public interest will include application of the guidelines promulgated by the Administrator, Environmental Protection Agency, under authority of Section 404(b) of the Clean Water Act (40 C.F.R.; Part 230).

The Corps of Engineers is soliciting comments from the public; Federal, state, and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity. Any comments received will be considered by the Corps of Engineers to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity. **All public notice comments will be considered public information and will be subject to review by the applicant.**

Any person may request, in writing and within the comment period specified in this notice, that a public hearing be held for the purpose of gathering additional information. Requests for public hearings must be identified as such and shall state specifically the reasons for holding a public hearing and what additional information would be obtained. The request must be submitted to the U.S. Army Corps of Engineers, 301 South Park, Drawer 10014, Helena, Montana 59626-0014. If it is decided that additional information is required and that a public hearing should be held, interested parties will be notified of the date, time and location.

CASE # 68174

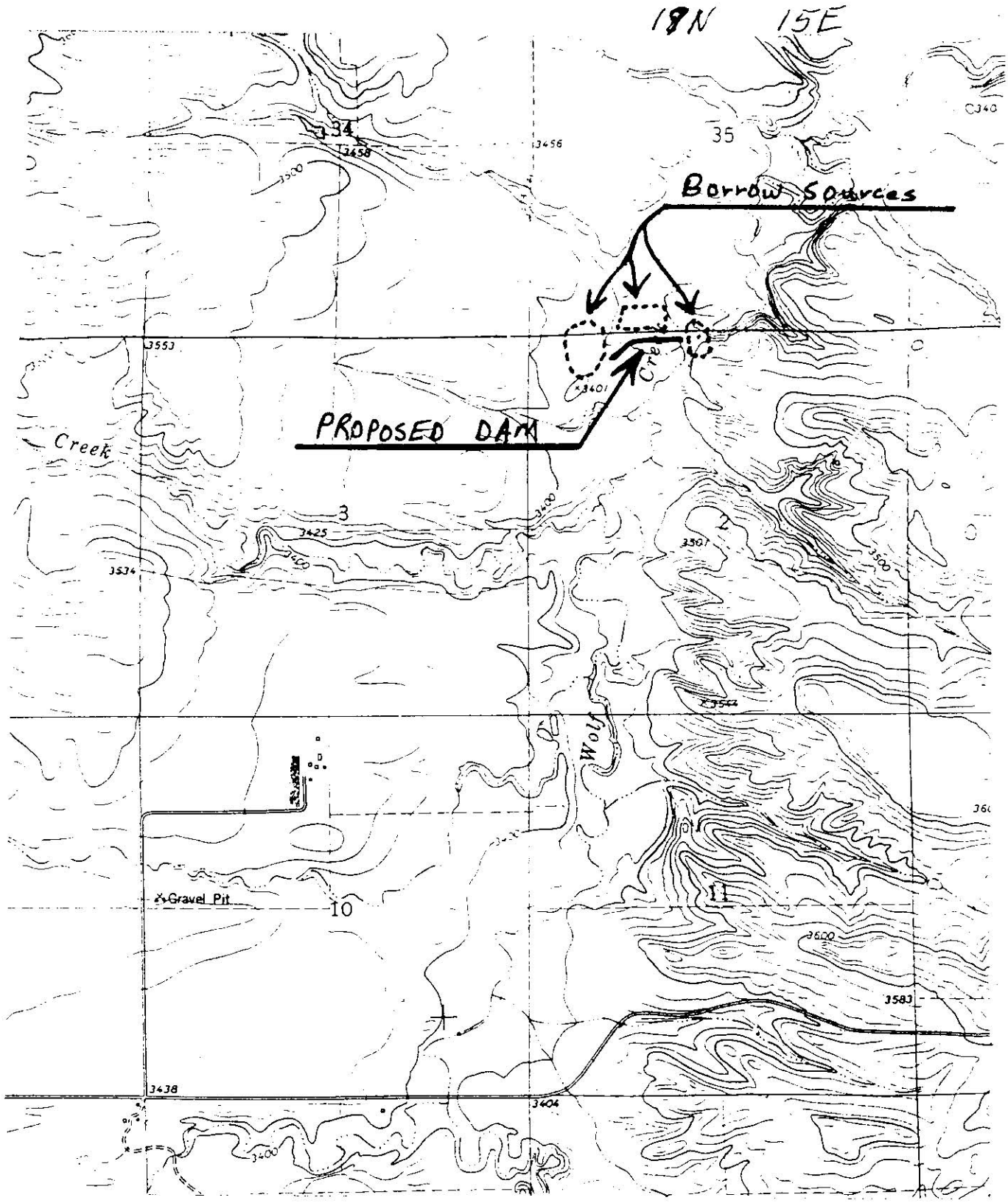
Any interested party (particularly officials of any town, county, state, federal agency, or local association whose interests may be affected by the work) is invited to submit to this office written facts, arguments, or objections on or before the expiration date listed on the front of this notice. Any agency or individual having an objection to the work should specifically identify it as an objection with clear and specific reasons. Comments, both favorable and unfavorable, will be accepted, made a part of the record and will receive full consideration in subsequent actions on this application. All replies to the public notice should be addressed to the address listed in the previous paragraph. Larry Robson, telephone number (406) 441-1375, may be contacted for additional information.

Comments received after the close of business on the expiration date of this public notice will not be considered.

A permit, if issued, will be under the provisions of Section 404 of the Clean Water Act.

Drawings showing the location and extent of the project are attached to this notice.

CASE # 68174



VICINITY MAP

CASE # 68174

199590585

Sheet 1 of 6

CASE # 187

LEGEND	
-OHE-	OVERHEAD ELECTRIC WIRES
-o-	FENCE
	VEGETATION
3340	CONTOUR LINE

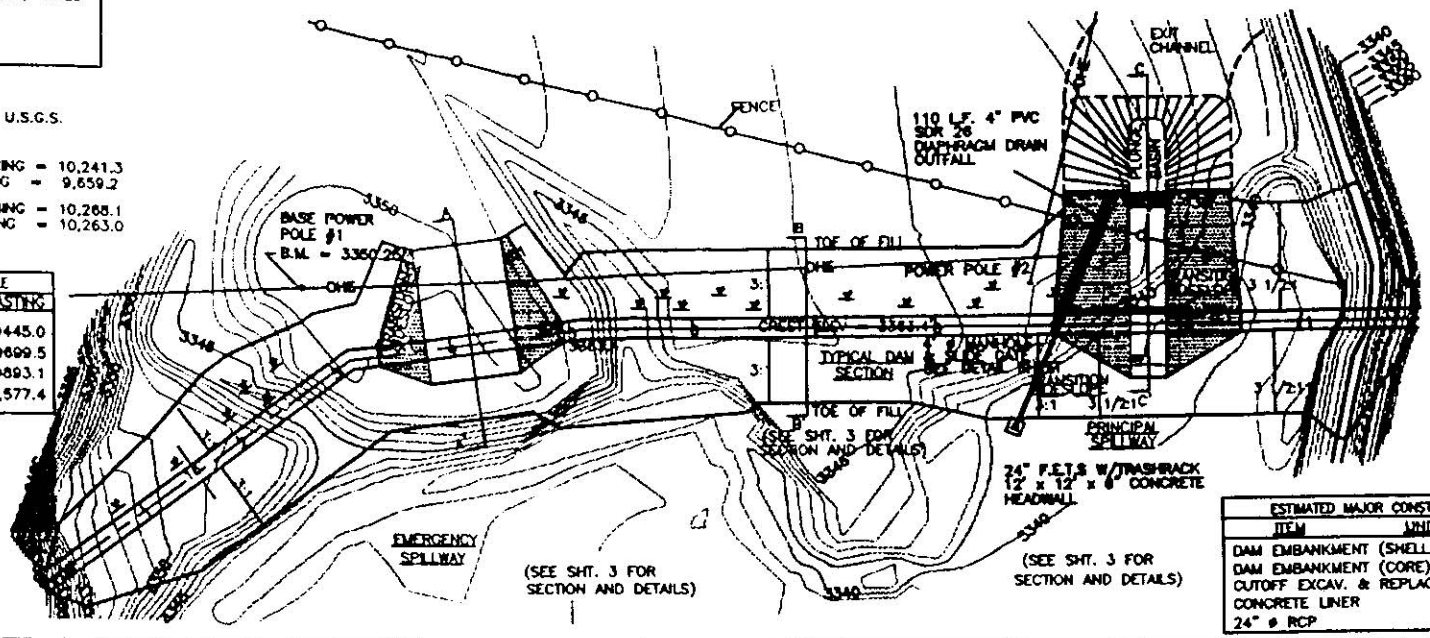
VERTICAL DATUM - APPROX. U.S.G.S.

HORIZONTAL CONTROL

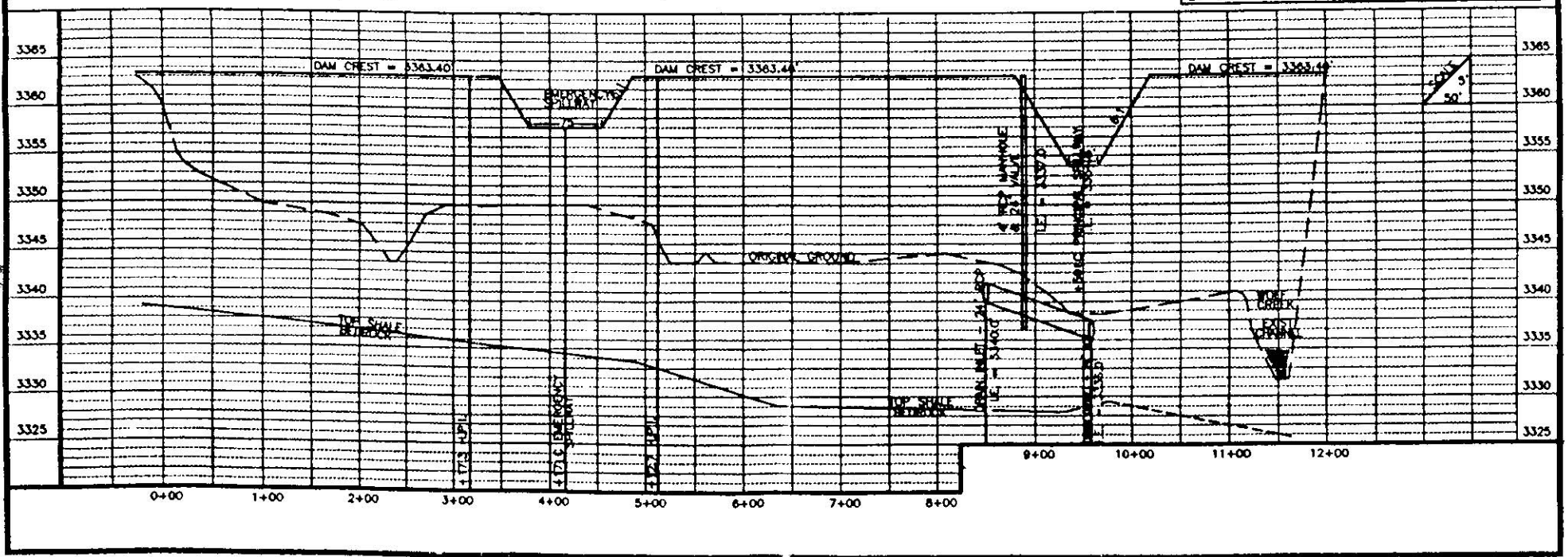
POWER POLE #1 - NORTHING = 10,241.3
EASTING = 9,659.2

POWER POLE #2 - NORTHING = 10,268.1
EASTING = 10,263.0

BASELINE COORDINATE TABLE		
STATION	NORTHING	EASTING
STA. 0+00	9993.4	9445.0
STA. 3+17.3 (P.I.)	10,182.8	9699.5
STA. 5+12.7 (P.I.)	10,209.0	9893.1
STA. 11+97.0	10,213.8	10,577.4



ESTIMATED MAJOR CONSTRUCTION QUANTITIES		
ITEM	UNIT	EST. QUANTITY
DAM EMBANKMENT (SHELL)	C.Y.	50,000
DAM EMBANKMENT (CORE)	C.Y.	10,300
CUTOFF EXCAV. & REPLACE	C.Y.	3,800
CONCRETE LINER	C.Y.	870
24" ø RCP	L.F.	215

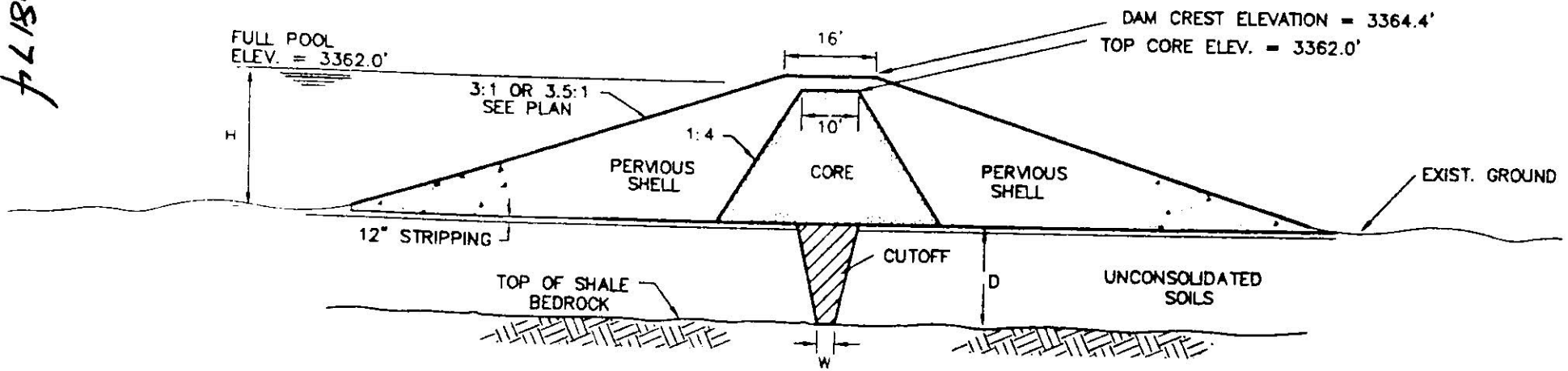


199590585

CASE # 0817 4

EMBANKMENT
SOIL REQUIREMENTS

			SOURCE
PREVIOUS SHELL	–	USE GW,GP,SW,(GRAVELLY) OR SP (GRAVELLY)	(WEST BORROW AREA)
CORE	–	SM,CL,ML,CH,MH OR SC	(NORTH OR EAST BORROW AREA)
CUTOFF	–	CL	(NORTH BORROW AREA)



W = H – D (3' MINIMUM)

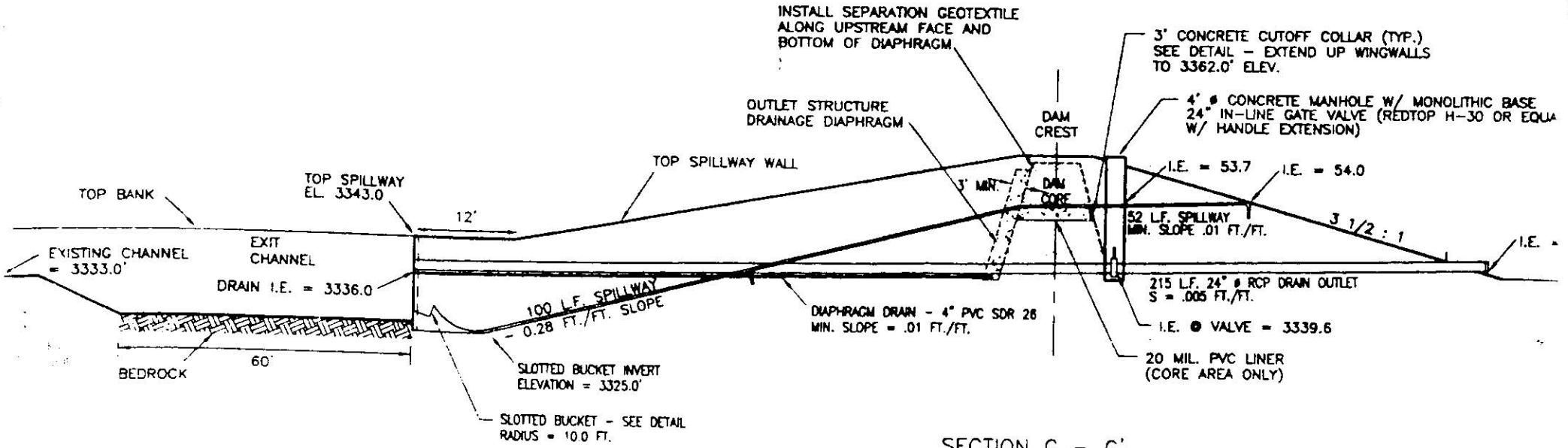
D = DISTANCE FROM GROUND SURFACE TO BEDROCK (VARIES – SEE PLAN SHEET)

H = DEPTH OF WATER AT FULL POOL (VARIES – FULL POOL ELEV. = 3362.0')

SECTION B – B'
TYPICAL DAM EMBANKMENT SECTION
NO SCALE

199590585
Sheet 3 c

CASE # 6817



SECTION C - C'

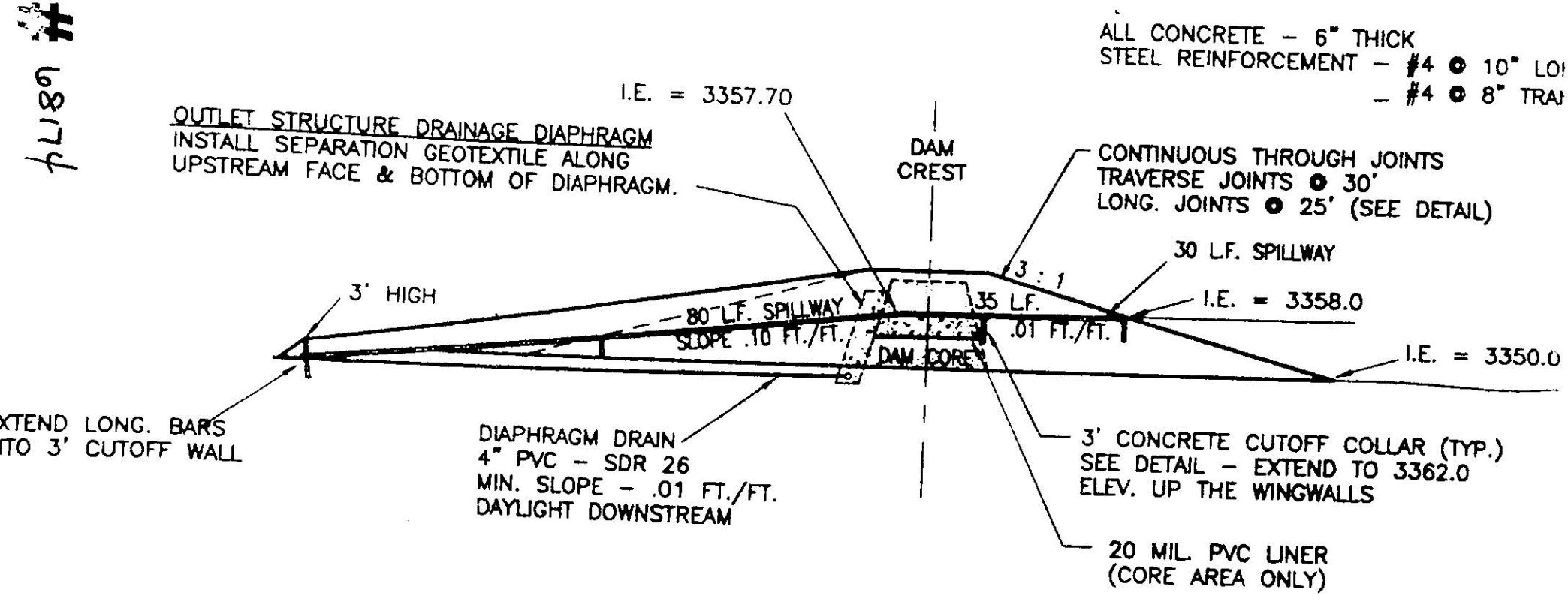
PRINCIPAL SPILLWAY & DRAIN OUTLET

NO SCALE

19590585

Sheet 4 of 6

CASE # 6817



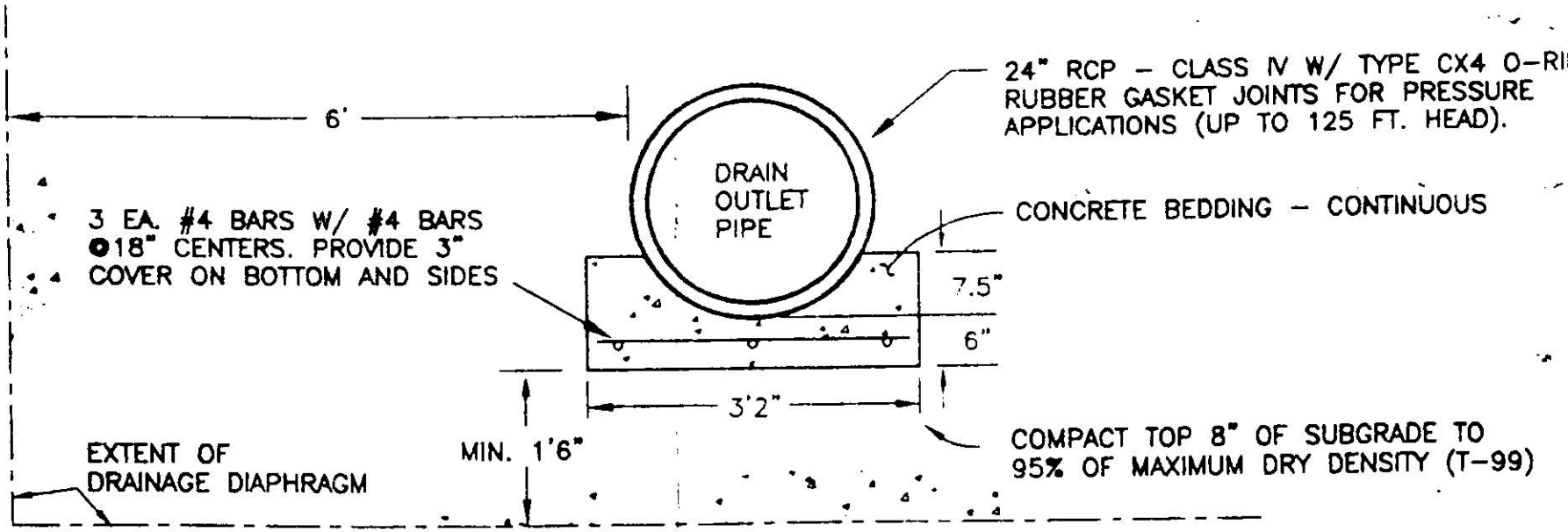
EMERGENCY SPILLWAY

SECTION A – A'

NO SCALE

1991 585

CASE # 6814



199590585

Sheet 6 of 6

US Army Corps of Engineers
301 South Park
Drawer 10014
Helena, Montana 59626-0014

OFFICIAL BUSINESS

CEMRO-OP-R

PUBLIC NOTICE

FLOYD BLAIR
HCR 76, B45
DENTON, MT 59430

CASE # 68174

59430-3801

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

* * * * * * * *

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMITS 68173-41S AND 68174-41S BY FLOYD R. BLAIR	))))	**ORDER**

* * * * * * * *

On February 22, 1996, the Department received correspondence from Floyd R. Blair outlining his efforts to comply with the Final Order issued in the above-entitled matter concerning the submission of detailed plans to all objectors, the Lewistown Water Resources Regional Office, and the Hearing Examiner. Mr. Blair submitted a dam design and specifications for his proposed project to the Corps of Engineers in Helena on September 17, 1995. However, with the federal government's budget problems, some of the federal agencies that need to review the detailed plans are short-staffed and cannot review the plans immediately. On February 4, 1996, Mr. Blair contacted the Corps of Engineers in Helena and was informed they have no idea when the review by all the agencies could be completed.

THEREFORE, the Hearing Examiner makes the following:

ORDER

Permittee is granted an additional year from the date of this Order to provide detailed plans in compliance with the Final Order.

CASE # 68174

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT)
68173-S41S AND 68174-S41S BY)
FLOYD R. BLAIR)

* * * * * * * * * * *

On March 1, 1995, the Department received correspondence from Floyd R. Blair outlining his efforts to comply with the Final Order issued in the above-entitled matter concerning the submission of detailed plans to all objectors, the Lewistown Water Resources Regional Office, and the Hearing Examiner. It appears Mr. Blair is striving to meet this requirement, but is being frustrated at each attempt. Therefore, the Hearing Examiner makes the following:

ORDER

Permittee is granted an additional year from the date of this Order to provide the objectors, the Lewistown Water Resources Regional Office, and the Hearing Examiner with detailed plans of the proposed dam that would meet or exceed NRSC specifications.

Dated this 3rd day of March, 1995.

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

CASE # 68173

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record at their address or addresses this 3rd day of March, 1995, as follows:

Floyd R. Blair
HCR76 B45
Denton, MT 59430

Barber Ranch, Inc.
1106 Main
Denton, MT 59430

John R. Carter
P.O. Box 933
Denton, MT 59430

Merle Boyce
P.O. Box 74
Winifred, MT 59389

Hilltop Angus Ranch
Denton, MT 59430

Richard W. Josephson
Attorney at Law
P.O. Box 1047
Big Timber, MT 59011-1047

Twin Butte Ranch
c/o John Barber
708 East Broadway
Lewistown, MT 59457

Tim O'Hare
Attorney at Law
701 East Main, Suite A
Lewistown, MT 59457-2043

John R. Christensen
Attorney at Law
82 Central Avenue
P.O. Box 556
Stanford, MT 59479

Wallace B. Ayers
Star Route
Denton, MT 59430

Vincent Linse
Denton, MT 59430

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
P.O. Box 438
Lewistown, MT 59457-2043

Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 48173

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 68173-s41S AND 68174-s41S BY FLOYD D. BLAIR	))))	ORDER

* * * * * * * * * *

Upon motion of Applicant and for good cause shown, Applicant is given an extension of time in which to provide the Hearing Examiner, the Lewistown Water Resources Regional Office, and all objectors with detailed plans of the proposed dam as drawn or approved by the Soil Conservation Service when the plans are prepared and prior to any construction of the dam. Such plans must be prepared and submitted no later than one year after the service date of this Order. When serving copies of the plans, Applicant shall attach a certificate of service indicating that the plans have been served on all parties, the Lewistown Water Resources Regional Office and the Hearing Examiner. The objectors shall have 30 days after the date of service to review the plans and submit comments to the Hearing Examiner and the Permittee. Permittee shall then have 15 days to file his response to the comments with the Hearing Examiner and the objectors. The Hearing Examiner shall review the plans and comments. If the plans are inadequate, good cause shall then exist for modification or revocation of the permit. The Permittee shall not commence construction until the plans have been approved by the Lewistown Water Resources Regional Office and the Hearing Examiner.

CASE # 68173

Dated this 9th day of March, 1994.

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record at their address or addresses this 9th day of March, 1994, as follows:

Floyd D. Blair
Route 1, Box 45
Denton, MT 59430

Barber Ranch, Inc.
1106 Main
Denton, MT 59430

Richard W. Josephson
Attorney at Law
P.O. Box 1047
Big Timber, MT 59011-1047

Vincent Linse
Denton, MT 59430

John R. Carter
P.O. Box 933
Denton, MT 59430

Merle Boyce
P.O. Box 74
Winifred, MT 59389

Twin Butte Ranch
c/o John F. Barber
708 East Broadway
Lewistown, MT 59457

Tim O'Hare
Attorney at Law
701 East Main, Suite A
Lewistown, MT 59457-2043

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

William Christians
P.O. Box 50
Denton, MT 59430

Wallace B. Ayers
Star Route
Denton, MT 59430

CASE # 68123

Hilltop Angus Ranch
Denton, MT 59430

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
P.O. Box 438
Lewistown, MT 59457-2043

Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 68173

Filed this 26 day
of Jan 1994
Grete M. Ross
Clerk of District Court
Deputy Clerk

MONTANA, TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 68173-S41S AND 68174-S41S BY FLOYD D. BLAIR	CAUSE NO. DV91-31

ORDER FOR DISMISSAL

On stipulation of VICTOR THOMSON and FLOYD D. BLAIR and good cause appearing,

IT IS HEREBY ORDERED that the petition for judicial review filed by VICTOR THOMSON is dismissed with prejudice and that both parties will pay their own attorney's fees.

DATED this 26th day of January, 1994.

DISTRICT COURT JUDGE

CASE # 68173

JAMES A. HUBBLE
CHRISTENSEN & HUBBLE
Attorneys at Law
P.O. Box 556
Stanford, MT 59479
Telephone: (406) 566-2500
Attorneys for Petitioner

MONTANA, TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 68173-S41S AND 68174-S41S BY FLOYD D. BLAIR	CAUSE NO. DV91-31

NOTICE OF PETITION FOR JUDICIAL REVIEW

TO Montana Department of Natural Resources and Conservation:

Notice is hereby given pursuant to 2-4-702(2) M.C.A. that a Petition for Judicial Review has been filed in the above Court in this matter.

Notice is given so that the Montana Department of Natural Resources and Conservation can comply with the provisions of 2-4-702(4) M.C.A. providing for a transmittal of the record to the District Court.

DATED THIS 5th day of April, 1991.

CHRISTENSEN & HUBBLE

BY: James A. Hubble
JAMES A. HUBBLE
Attorneys for Petitioner

CASE # 68173

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

FILMED
APR 11 1991

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 68173-s41S AND 68174-s41S BY FLOYD R. BLAIR	))))	NOTICE OF ERRATA AND REPLACEMENT PAGE

* * * * * * * *

Upon further review, an error was discovered in the "Final Order" in the above matter. The error was not material to the decision, but its correction may help in clarification of Department records.

In the caption of the "Final Order" two numbers were transposed in the second permit number. The correct number as indicated above is **68174-s41S** not **68714-s41S**.

Please replace the previous page 1 with the new enclosed page 1.

Dated this 19th day of March, 1991.

Cindy G. Campbell
Hearings Unit Secretary
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Errata and Replacement Page was duly served upon all parties of record at their address or addresses this 19th day of March, 1991 as follows:

CASE # 68174

Floyd D. Blair
Route 1, Box 45
Denton, MT 59430

Barber Ranch, Inc.
1106 Main
Denton, MT 59430

John R. Carter
P.O. Box 933
Denton, MT 59430

Merle Boyce
P.O. Box 74
Winifred, MT 59389

Hilltop Angus Ranch
Denton, MT 59430

Twin Butte Ranch
c/o John F. Barber
708 East Broadway
Lewistown, MT59457

Fred W. Robinson
Legal Unit
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Tim O'Hare
Attorney at Law
701 East Main, Suite A
Lewistown, MT 59457-2043

Richard W. Josephson
Attorney at Law
P.O. Box 1047
Big Timber, MT 59011-1047

Vincent Linse
Denton, MT 59430

John R. Christensen
Attorney at Law
82 Central Avenue
P.O. Box 556
Stanford, MT 59479

William A. Christians
P.O. Box 50
Denton, MT 59430

Wallace B. Ayers
Star Route
Denton, MT 59430

Sam Rodriquez, Regional Mgr.
Lewistown Water Resources
Regional Office
P.O. Box 438
Lewistown, MT 59457-2043

Cindy G. Campbell
Hearings Unit Secretary

CASE # 68174

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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 68173-s41S AND 68174-s41S BY FLOYD R. BLAIR	))))	FINAL ORDER

* * * * * * * *

The Proposal for Decision in this matter was entered on November 13, 1989. The Applicant filed a timely exception to the Proposal and Objectors John R. Carter, Merle Boyce, Vincent Linse, William A. Christians, and Twin Butte Ranch filed timely exceptions to the Proposal. An oral argument hearing was held on Wednesday, January 30, 1991, at the Fergus County Courthouse in Lewistown, Montana. Present at the oral argument hearing were the Applicant and his attorney, Richard Josephson; Objectors John Carter, Merle Boyce, Vincent Linse, William Christians, Wallace B. Ayers, Twin Butte Ranch, and their attorney, John R. Christensen; Hilltop Angus Ranch through Otto Poser; and Barber Ranch, Inc. through Robert T. Barber. Sam Rodriguez, Field Manager of the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing. Fred Robinson, Department legal counsel, was also present at the hearing.

The Proposal for Decision proposed to grant conditional Permits to Floyd R. Blair. The Proposal would grant, subject to certain conditions, Applicant's request in Application No. 68173-s41S to appropriate 560 acre-feet of water by means of an on-stream dam across Wolf Creek at a point in the NE¼NE¼NW¼ of

CASE # 68174

FILMED
MAR 13 1991

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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 68173-s41S AND 68174-s41S BY)
FLOYD R. BLAIR)

* * * * * * * *

The Proposal for Decision in this matter was entered on November 13, 1989. The Applicant filed a timely exception to the Proposal and Objectors John R. Carter, Merle Boyce, Vincent Linse, William A. Christians, and Twin Butte Ranch filed timely exceptions to the Proposal. An oral argument hearing was held on Wednesday, January 30, 1991, at the Fergus County Courthouse in Lewistown, Montana. Present at the oral argument hearing were the Applicant and his attorney, Richard Josephson; Objectors John Carter, Merle Boyce, Vincent Linse, William Christians, Wallace B. Ayers, Twin Butte Ranch, and their attorney, John R. Christensen; Hilltop Angus Ranch through Otto Poser; and Barber Ranch, Inc. through Robert T. Barber. Sam Rodriguez, Field Manager of the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing. Fred Robinson, Department legal counsel, was also present at the hearing.

The Proposal for Decision proposed to grant conditional Permits to Floyd R. Blair. The Proposal would grant, subject to certain conditions, Applicant's request in Application No. 68173-s41S to appropriate 560 acre-feet of water by means of an on-stream dam across Wolf Creek at a point in the NE¼NE¼NW¼ of

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Section 2, Township 18 North, Range 15 East, Fergus County, for irrigation of 376 acres and 10 acre-feet per year for stock watering purposes.

The Proposal would also grant, subject to certain conditions, Applicant's request in Application No. 68174-s41S to appropriate 1500 gallons per minute (gpm) up to 80 acre-feet of the waters of Wolf Creek by means of a pump at a point in the NE¼NE¼SE¼ of Section 10, Township 18 North, Range 15 East, Fergus County. The water would be pumped into an off-stream 45 acre-foot pit dam to be stored for irrigation of 181 acres.

The condition on the placement of the measuring device was the principle objection of the Applicant's Exception, otherwise Applicant agreed with the Proposal. The Objectors, on the other hand, take exception to Findings of Fact 4, 6, 8, 9, 10, and 11. Objectors also take exception to Conclusions of Law 3, 5, and 6, as well as paragraphs A, B, and C of the Order and the Order in general.

For this review, the Department must accept the Proposal's findings if the findings were based upon competent substantial evidence and the proceedings on which the findings were based complied with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1989) and ARM 36.12.229.

OBJECTORS' EXCEPTIONS

Objectors except to Finding of Fact 4 stating it is accurate, but does not go far enough and therefore misstates the Objectors' testimony that while acknowledging that recent years

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have been dry years, there are long-standing problems with the water supply in Wolf Creek which have intensified since Applicant made previous diversions on Wolf Creek.

As written, Finding of Fact 4 accurately reflects the record showing no water available from Wolf Creek in July and August, which according to the record is fairly representative of its normal condition in those months. Nothing would be gained by adding "there have been long-standing problems with the water supply in Wolf Creek which have intensified since Applicant made previous diversions on Wolf Creek." Moreover, any compliance problems with previously issued permits have no relevance in this decision.

Objectors exception to Finding of Fact 6 is a three-part exception. The first part of the exception is based on the premise there is reason to believe Applicant is not now bypassing 6 cfs as required by a previous permit. The basis for this doubt is a visit by the parties and the Hearing Examiner to the site on September 21, 1989, when that reservoir was approximately half full at the end of the irrigation season. The second part is that the Department is under-staffed and cannot verify compliance with a permit, thus should not be issuing permits under such conditions. Finally, Objectors except to the finding that it is necessary to bypass only 2 cfs instead of the full 6 cfs from November to March stating there is no evidence in the record to support this finding.

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The finding that bypassing 6 cfs would be adequate for stock water is supported by competent substantial evidence in the record and is consistent with previous Department decisions concerning Wolf Creek.

The amount of water in a previously permitted reservoir has no relevance in the instant case, however one of the Objectors testified that 1989 was an exceptionally wet year and he did not need to irrigate. That being the case, it is not surprising Applicant's reservoir was half full.

The second part of Objectors' exception to Finding of Fact 6 is not relevent to the finding.

The final part of Objectors' exception to Finding of Fact 6, there is no evidence in the record to support a finding that 2 cfs is adequate in the winter months, is well founded. There is no evidence to support that portion of the finding. The Hearing Examiner calculated the number of cattle using the stream at various times of the year and concluded that only one-third as many cattle used the stream in the winter as in the summer, therefore only one-third (2 cfs) of the 6 cfs required bypass would be required for the winter months. It is likely 2 cfs would be adequate for the number of cattle. However, that amount may not be sufficient to keep the water flowing to the winter users of the stream and the record contains no evidence that 2 cfs would keep the stream flowing to those users. Consequently, Finding of Fact 6 will be changed to reflect the record.

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Objectors take exception to Finding of Fact 8 because the Hearing Examiner failed to note the Objectors also testified there have been problems with inadequate water supply in Wolf Creek since Applicant began diverting under his prior permits.

According to the record, Objectors did testify to water supply problems in the last ten years; however, none of the Objectors stated the shortage was caused by Applicant's previously permitted projects.[1] One of the Objectors stated that the last ten years have been drier years. Since the water short periods of 1986 and 1988 are shown on Applicant's Exhibit 2, the omission of the testimony of water supply shortages is harmless.

Objectors' exception to Finding of Fact 9 is that while there is considerable water in Wolf Creek at times, all Objectors testified there is insufficient water in Wolf Creek to satisfy their rights and that allowing Applicant to further dam the stream would result in adverse effect to Objectors.

The record reflects that while there are indeed water short periods, there are also periods when Wolf Creek has water in excess of the Objectors' needs. Every Objector testified there are periods of high runoff when there is water in excess of the stock watering needs. Objectors seem to indicate that if there were no barriers on Wolf Creek, the flow would somehow even out and water would be available all year. The record does not reflect this at all. Each of the Objectors testified to a large

[1]Any problems the Objectors may be experiencing as the result of a previously permitted dam cannot be properly addressed in the instant case.

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spring runoff, diminished flow in early summer, low or no flow in July and August, and resumed flow in the fall as a regular pattern.[2] The construction or lack of construction on the creek will not change this pattern.

Objectors' exception to Finding of Fact 10 is that while the Objectors did not present data or reports to support their position, each Objector's testimony controverted Applicant's testimony regarding the soil in the vicinity of Wolf Creek. Further, the Objectors complain that the Hearing Examiner chose, in spite of the Objectors' cumulative experience of more than 200 years, to adopt the Applicant's testimony.

The Applicant not only testified to the soils in the area of the source, he produced information from an independent governmental agency to corroborate his testimony. He also made measurements of creek flows and kept a log of temperatures. The Objectors provided nothing to substantiate their testimonies. Consequently, the weight of the evidence favors to the Applicant.

Objectors also complain there is no evidence that bypassing 6 cfs would be sufficient to meet any recharging needs of the soil in the banks and stream bed of Wolf Creek. Here again the Applicant has produced evidence of the type of soils in the flood

[2]This pattern is consistent with Applicant's Exhibit 2, Figure 4. USGS flow measurements taken on Wolf Creek at a gaging station near Stanford show the unpredictability of flows in that part of the creek. During the 23 years of flow measurements taken between 1920 and 1971, the yearly mean discharge range from 1.55 cfs (1961) to 27.3 cfs (1970). However, this data also shows that in most years stream flow noticeably increases for a period of time early in the year, before tapering off.

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plain and bed of the creek which indicate the soil takes in water moderately and releases it slowly. Although no one knows the exact amount of water necessary to keep the bed and banks of the creek charged, the Hearing Examiner in Hilltop reasoned the mean flow of the creek was 6 cfs and conditioned the permit so that if, after a minimum of two years, a party requested a review of the bypass flow requirement and that review showed more or less bypass is required, the bypass requirement could be amended. To date no one has requested such a review, therefore one must conclude 6 cfs is adequate.

Objectors contend Finding of Fact 11 is contrary to the evidence, that there is a severe alkali problem in Wolf Creek at present and further damming and restriction of the flow of the creek can only make the problem worse.

The record contains evidence of an alkali problem, however, Objectors indicate the problem arises when there is no flow in the stream and water is standing in potholes. There is evidence in the record that 6 cfs should be sufficient to relieve the alkali problem. The stream does not naturally flow 6 cfs at all times. During July and August, the stream frequently does not flow at all, then the alkali problem comes to bear. Applicant is required to bypass the entire flow of the creek when the flow is 6 cfs or less, thus the Applicant cannot be held responsible for a worsened alkali problem.

Objectors except to Conclusion of Law 3 stating it is based on incorrect Findings of Facts. Objectors aver their testimonies

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established there is not sufficient water in Wolf Creek to satisfy their water rights and fill Applicant's reservoirs. Objectors contend the Applicant has failed to carry his burden to prove his proposed diversion will not adversely affect Objectors' water rights.

Findings of Fact 8 and 9 are not incorrect according to the record. Applicant has provided substantial credible evidence that there are unappropriated waters in Wolf Creek at times. Although water measurement data on the creek in conjunction with testimony on flow rates indicate that the full amount of the requested appropriation is not available throughout the year, all that need be shown is there is sufficient water part of the year in at least some years for the Applicant's appropriation. See In re Application 53498-s41S by Ridgeway.

Objectors argue Conclusion of Law 5 is incorrect, that virtually every downstream appropriator objected to the Application and testified he would be adversely affected by the granting of the permit. Objectors maintain the Applicant did not carry his burden of proof.

This conclusion is basically correct, however, the record does not support the finding that 2 cfs bypass would be adequate in the winter months. It is likely the Objectors would be adversely affected during this period. However, the Applicant did not propose the 2 cfs bypass, thus the Applicant has met his burden of proof. The conclusion will be modified to exclude the 2 cfs bypass provision and require no less than 6 cfs bypass at

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all times except July and August when the Applicant can appropriate no water.

Objectors except to Conclusion of Law 6, arguing the Applicant did not present substantial credible evidence his proposed means of diversion are adequate; that he presented only an outline of his proposed diversion. The exception also maintains some of the Objectors fear further damming of the stream will intensify an already hazardous situation and that this conclusion does not address these fears. Objectors argue there is no finding of fact to support a conclusion that further damming of Wolf Creek will not unnecessarily create a safety hazard. Objectors believe the Hearing Examiner has no way to conclude Applicant's proposed means of diversion are adequate because no evidence exists in the record to support such a conclusion.

Findings of Fact 12 and 13 support Conclusion of Law 6. It is true the Applicant presented a general sketch of the proposed dam. He described the general construction of the proposed dam in his testimony. Applicant stated the project will be designed by the Soil Conservation Service of the United States Department of Agriculture (SCS) and under a permit from the U.S. Corps of Engineers. It is common knowledge the SCS has stringent safety specifications and regulations concerning dams the size of the Applicant's proposal. Any project designed and constructed according to SCS specifications will be adequate and safe. Since the SCS will not proceed with a project design without the

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assurance that a cooperator has a right to appropriate the water to be used in the project, the Hearing Examiner properly proposed a condition requiring Applicant to submit said plans to all parties, the Department's Lewistown Water Resources Regional Office, and to the Hearing Examiner. In the event the plans are inadequate, all construction would cease and good cause would exist for modification or revocation. With these precautions, the diversion works would be adequate.

Objectors complain this condition effectively grants the Applicant's permits unless the Objectors are able to prove his proposed means of diversion are inadequate, thus improperly shifting the burden of proof to the Objectors.

This condition does not shift the burden of proof, it simply gives the Objectors the opportunity to review the proposed design plans and, if desired, to make comments. The plans will also be reviewed by the Lewistown Water Resources Regional Office personnel who will also have the opportunity to make comments. The plans were also to be reviewed by the Hearing Examiner; however, since Ms. Griffing is no longer employed by this Department, the plans shall be sent to this reviewer who will request a Department engineer to review them for adequacy as a diversion design. The burden is on the Applicant to procure a detailed design that will show his diversion will be adequate.

Objectors argue Condition B of the Order is inadequate because it does not order the Department or anyone else to verify Applicant is not appropriating water during the months of July

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and August. They further complain it is unfair to place the burden of policing the Applicant's water use on the Objectors and the Hearing Examiner should provide that the Department conduct frequent and random inspection of Applicant's diversion to verify compliance with Condition B.

The Department has neither the funds nor the personnel to randomly and frequently inspect each permitted project to verify compliance. Since Territorial days one water user has policed the other. When a situation became impossible, the matter was taken to district court where the rights were adjudicated, then a water commissioner policed the water use. Since Wolf Creek is not a decreed stream, it has no water commissioner. The water users must police each other as they have in Montana for over a century. Any Objector may contact the Department if Applicant is appropriating water when he should not.

Objectors except to Condition C of the Order, arguing the Hearing Examiner should specify the type and frequency of records to be maintained by the Applicant.

Although Condition C is adequate, the Department does have a standard condition which is considerably clearer. That condition will be substituted for proposed Condition C.

APPLICANT'S EXCEPTIONS

Applicant, in his exception, objected to the part of Condition B that requires a measuring device within one mile upstream of the on-stream reservoir on Wolf Creek. Applicant's reason for this objection is the stream channel is unstable and

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that a measuring device could be placed approximately one and one-third mile upstream of the on-stream reservoir in a more stable area. Since the proposed location of the measuring device is upstream of the confluence of Ox Creek and Wolf Creek, and Smith Creek and Wolf Creek, the Applicant must also measure the flow of Ox Creek and Smith Creek to determine the entire flow of Wolf Creek so the proper amount of the creek flow will be released. Objectors stated during the Oral Argument Hearing they had no objection to Applicant's proposed measuring device location. Therefore, Applicant and the Engineer with the Lewistown Water Resources Regional Office shall determine together the proper location of the measuring device and shall send this reviewer a map showing that location and the locations of the measuring devices on Ox Creek and Smith Creek.

Condition A in the Order required the Applicant to submit detailed plans as drawn by the SCS by November 30, 1990, or sooner. Since there were exceptions filed and oral argument requested, the Applicant did not receive a permit therefore he could not obtain a detailed plan from the SCS by that date. During the Oral Argument Hearing, Applicant asked for a one year extension to submit said plans. Applicant is overly optimistic concerning the time required for SCS to design a large dam. The minimum amount of time would be two years, however, since Applicant requested only one year, a one year extension is granted. If the Applicant is unable to secure a detailed plan

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from the SCS, he may obtain a plan from a qualified engineer and have the SCS approve it.

MODIFICATION OF FINDING OF FACT

For the reasons stated above, the Department determines that Finding of Fact 6, as contained in the Proposal for Decision in this matter, must be modified as follows:

6. Blair testified that bypassing six cubic feet per second (cfs) for the senior stock water rights would be acceptable to him. He thought that this amount was high, but said that he "could live with it". This finding is consistent with the findings and conclusions in previous Department decisions concerning Wolf Creek. See Conclusion of Law 9, In the Matter of the Application for Beneficial Water Use Permit No. 55943-s41S by Hilltop Angus Ranch; and Conclusion of Law 9, In the Matter of the Application for Beneficial Water Use Permit No. 56031-41S by Floyd Blair.

The period of appropriation in the permit for Hilltop Angus Ranch is April 1 through June 30 of each year. Blair's period of appropriation under Permit No. 56031 is March 15-31 and May 31 through June 30. The 6 cfs bypass requirement was held to apply only to these time periods.

There are eight different senior stock water rights downstream at the following times with the following number of cattle:

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	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Barber Ranch			100	100	100	100	100					
Christians					240	240	240	240	240	240		
Poser						400	400	400	400			
Ayers	200	200	200	200	200	200	200					
Boyce					300	300	300	300	300	300		
Linse				250	250	250	250	250	250	250		
Barber	200	200	200	200	100	100	100	100	100	200	200	200
Carter						125	125	125	125			
	400	400	500	750	1190	1715	1715	1415	1415	990	200	200

Based on the above table, there may be as many as 1715 pair (cow and calf) on Wolf Creek in June and July, and 1415 pair in August and September; 990 pair in October; 200-500 pair from November to March; and 750-1190 pair in April and May.

MODIFICATION OF CONCLUSION OF LAW

Conclusion of Law 5 is based on Finding of Fact 6 which has been modified above, therefore this conclusion must also be modified as follows:

5. The water rights of prior appropriators will not be adversely affected as long as Blair appropriates no water in July and August, bypasses 6 cfs from January 1 through June and September through December 31. An additional 1.67 cfs from April 1 through June 30 must also be bypassed whenever Hilltop Angus Ranch is diverting. Findings of Fact 6 and 7. Prior to using the additional 1.67 cfs, the Applicant must contact Hilltop Angus Ranch to see if it is diverting. If Hilltop is diverting, the Applicant must bypass the additional 1.67 cfs.

If Wolf Creek has a flow of less than the requisite bypass amount, Blair must bypass the entire flow of the stream. This bypass requirement applies to both of the above applications.

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MODIFICATION OF PERMIT CONDITIONS

Condition A is modified to extend the period of time for submission of the SCS detailed design plan:

A. Permittee shall build the on-stream dam (Permit No. 68173-s41S) in accordance with SCS rules and specifications, and with a drainage device at the bottom of the dam. Permittee shall provide the Hearing Examiner, the Department's Lewistown Water Resources Regional Office and all Objectors with detailed plans of the proposed dam as drawn or approved by the SCS when the plans are prepared and prior to any construction of the dam. Such plans must be prepared and submitted to the Hearing Examiner no more than one years after permit is issued. Failure to submit the plans in that time period, without a showing of good cause, may result in the modification or revocation of the permit.

The Objectors shall have 30 days after receipt of the proposed plans to review the plans and submit comments to the Hearing Examiner and the Permittee. The Permittee shall then have 15 days to file his response to the comments with the Hearing Examiner and the Objectors.

The Hearing Examiner shall review the proposed plans and comments. If the plans are inadequate, good cause shall then exist for modification or revocation of the permit. The Permittee shall not commence construction until the plans have been approved by the Lewistown Water Resources Regional Office and the Hearing Examiner.

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Condition B is based in part on Finding of Fact 6 and Conclusion of Law 5. Since both of these have been modified, the condition must be modified accordingly. Condition B must also be modified to allow the Applicant to place the required measuring device at a better location. Condition B is modified as follows:

B. Permittee shall not appropriate water in July or August. To satisfy senior stock water rights, Permittee shall bypass 6 cfs or the flow of the stream, whichever is less, from January 1 through June 30 and from September 1 through December 31 of each year. From April 1 through June 30, Permittee must bypass an additional 1.67 cfs to satisfy senior permitted rights whenever Hilltop Angus Ranch is diverting under Permit 55943-s41S.

Permittee must install and maintain the following measuring devices in order to meet the bypass requirement:

(1) at the point of diversion for the pit dam;

(2) at points selected by the Engineer in the Lewistown Water Resources Regional Office in consultation with the Permittee above the reservoir so that the stream flow into the reservoir may be accurately measured; and

(3) at the drainage device for the on-stream dam to assure that the same amount measured above is the requisite bypass amount being passed through the on-stream dam.

Department personnel and any of the Objectors shall have access to any of these measuring devices upon reasonable notice to Permittee.

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Condition C is modified to more clearly specify the type and frequency of records to be maintained by the Applicant as follows:

C. 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 by November 30 of each year to the Water Resources Regional Office, P.O. Box 438, Lewistown, MT 59457. Sucah records shall be available upon request to any of the Objectors or the Department.

Therefore, based upon the Findings of Fact and Conclusions of Law and upon any modifications specified herein, and upon all files and records in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Applications for Beneficial Water Use Permits Nos. 68173-s41S and 68174-s41S are hereby granted to Floyd R. Blair, except that no water may be appropriated for the months of July and August.

Application for Beneficial Water Use Permit No. 68173-s41S is granted to construct an on-stream dam and maintain a reservoir with a capacity of 560 acre-feet across Wolf Creek at a point in the NE¼NE¼NW¼ of Section 2, Township 18 North, Range 15 East, Fergus County. The period of appropriation shall be from January 1 through June 30 and from September 1 through December 31, inclusive of each year. Up to 550 acre-feet of water shall be

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used from March 15 through November 30 for new and supplemental irrigation on 376 acres and up to 10 acre-feet of water shall be used from January 1 through December 31 for stock water. The irrigation water shall be used in the following manner:

126 acres of new irrigation in NE¼ of Section 3, Township 18 North, Range 15 East;

17 acres of supplemental irrigation in NE¼ of Section 3, Township 18 North, Range 15 East (supplemental to Permit #33710-s41S);

17 acres of supplemental irrigation in the NW¼ of Section 2, Township 18 North, Range 15 East (supplemental to Permit #33710-41S);

24 acres of new irrigation in the W½NW¼ of Section 2, Township 18 North, Range 15 East;

129 acres of new irrigation in SE¼ of Section 34, Township 19 North, Range 15 East;

22 acres of new irrigation in the SW¼ of Section 35, Township 19 North, Range 15 East;

5 acres of supplemental irrigation in the W½SE¼ of Section 35, Township 19 North, Range 15 East (supplementing Permits 33738-s41S, 18495-s41S, and 56031-s41S);

30 acres of supplemental irrigation in the SW¼ of Section 35, Township 19 North, Range 15 East (25 acres supplemented by Permits 33738-s41S, 18495-s41S and 56031-s41S and 5 acres supplemented by Permit No. 33710-s41S); and

6 acres of supplemental irrigation in the SE¼SE¼ of Section 34, Township 19 North, Range 15 East.

Application for Beneficial Water Use Permit No. 68174-s41S is granted to construct an off-stream pit with a 45 acre-foot capacity next to Wolf Creek at a point in the NW¼SW¼ of Section 11, Township 18 North, Range 15 East, Fergus County, to divert

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1,500 gallons per minute (gpm) up to 80 acre-feet per year by pumping water out of Wolf Creek at a point in the NE¼NE¼SE¼ of Section 10 and into the off-stream pit dam from February 1 through June 30 and from September 1 through November 30; and to use the water from the off-stream pit dam from March 15 through November 30 for new and supplemental irrigation on 181 acres. Supplementing Water Right Claim Nos. 101592, 101593, 101594, 101595, and 101596, and Permit No. 29940, the water shall be used in the following places:

> 13.3 acres in E½SW¼; 63.5 acres in SE¼; 11.4 acres in S½NE¼ all in Section 10, Township 18 North, Range 15 East for supplemental irrigation.
>
> 2.0 acres in E½SW¼; 46.9 acres in SE¼; 2.6 acres in S½NE¼ all in Section 10, Township 18 North, Range 15 East for new irrigation.
>
> 12.1 acres in SW¼NW¼; 27.3 acres in W½SW¼; all in Section 11, Township 18 North, Range 15 East for supplemental irrigation.
>
> 1.9 acres in W½SW¼, Section 11, Township 18 North, Range 15 East for new irrigation.

These Permits are issued subject to the following terms, conditions, restrictions, and limitations:

A. Permittee shall build the on-stream dam (Permit 68173-s41S) in accordance with SCS rules and specifications, and with a drainage device at the bottom of the dam. Permittee shall provide the Hearing Examiner, the Department's Lewistown Water Resources Regional Office and all Objectors with detailed plans of the proposed dam as drawn or approved by the SCS when the plans are prepared and prior to any construction of the dam.

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Such plans must be prepared and submitted to the Hearing Examiner no more than one year after permit is issued. Failure to submit the plans in that time period, without a showing of good cause, may result in the modification or revocation of the permit.

The Objectors shall have 30 days after receipt of the proposed plans to review the plans and submit comments to the Hearing Examiner and the Permittee. Permittee shall then have 15 days to file his response to the comments with the Hearing Examiner and the Objectors.

The Hearing Examiner shall review the proposed plans and comments. If the plans are inadequate, good cause shall then exist for modification or revocation of the permit. The Permittee shall not commence construction until the plans have been approved by the Lewistown Water Resources Regional Office and the Hearing Examiner.

B. Permittee shall not appropriate water in July or August. To satisfy senior stock water rights, Permittee shall bypass 6 cfs or the flow of the stream, whichever is less, from January 1 through June 30 and from September 1 through December 31 of each year. From April 1 through June 30, Permittee must bypass an additional 1.67 cfs to satisfy senior permitted rights whenever Hilltop Angus Ranch is diverting under Permit No. 55943-s41S.

Permittee must install and maintain the following measuring devices in order to meet the bypass requirement:

(1) at the point of diversion for the pit dam;

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(2) at points selected by the Engineer in the Lewistown Water Resources Regional Office in consultation with Permittee above the reservoir so that the stream flow into the reservoir may be accurately measured; and

(3) at the drainage device for the on-stream dam to assure that the same amount measured above is the requisite bypass amount being passed through the on-stream dam.

Department personnel and any of the Objectors shall have access to any of these measuring devices upon reasonable notice to Permittee.

C. 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 by November 30 of each year to the Water Resources Regional Office, P.O. Box 438, Lewistown, MT 59457. Such records shall be available upon request to any of the Objectors or the Department.

D. These permits are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

E. Issuance of these permits shall not reduce the Permittee's liability for damages caused by exercise of these permits, nor does the Department, in issuing the permits, acknowledge any liability for damages caused by exercise of the permits, even if

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such damage is a necessary and unavoidable consequence of the same.

F. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required by the permitted uses.

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 4th day of March, 1991.

Vivian A. Lightizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

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 4th day of March, 1991 as follows:

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Cindy G. Campbell
Hearings Unit Secretary

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BB

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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 68173-s41S AND 68174-s41S BY FLOYD R. BLAIR	))))	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to §§ 85-2-121 and 85-2-311(1), MCA, a contested case hearing was held on September 12, 1989, in Lewistown, Montana, to determine whether the above applications should be granted. The Applicant, Floyd R. Blair, was represented at the hearing by attorney Richard Josephson. Objector, Barber Ranch Inc., was represented by attorney Tim O'Hare. Objectors John Carter, Merle Boyce, Vincent Linse, William Christians, Hilltop Angus Ranch, Twin Butte Ranch, and Wallace Ayers were represented by attorney John R. Christensen.

The files compiled by the Department of Natural Resources and Conservation (Department) for the above applications were circulated for review by all parties prior to the hearing and were admitted without objection. Applicant's Exhibits 1(a)-(m), 2 through 9, and 11 through 13 were admitted into evidence.

PROPOSED FINDINGS OF FACT

1. Floyd Blair ranches and farms along Wolf Creek, a tributary to the Judith River. On July 1, 1988, at 3:01 p.m., Blair filed Application for Beneficial Water Use Permit No. 68173-s41S seeking to build a dam (hereinafter referred to as the "stream

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dam") across Wolf Creek and maintain a reservoir with a capacity of 560 acre-feet. Blair proposes:

(a) to build the stream dam in the NE¼NE¼NW¼ of Section 2, Township 18 North, Range 15 East, Fergus County;

(b) to appropriate water from January 1 through December 31 of each year; and

(c) to use up to 550 acre feet from March 15 through November 30 for new and supplemental irrigation on 376 acres and use up to 10 acre feet from January 1 through December 31 for stock water. The water would be used in the following manner:

126 acres of new irrigation in NE¼ of Section 3, Township 18 North, Range 15 East;

17 acres of supplemental irrigation in NE¼ of Section 3, Township 18 North, Range 15 East (supplemental to Permit #33710-s41S);

17 acres of supplemental irrigation in the NW¼ of Section 2, Township 18 North, Range 15 East (supplemental to Permit #33710-41S);

24 acres of new irrigation in the W½NW¼ of Section 2, Township 18 North, Range 15 East;

129 acres of new irrigation in SE¼ of Section 34, Township 19 North, Range 15 East;

22 acres of new irrigation in the SW¼ of Section 35, Township 19 North, Range 15 East;

5 acres of supplemental irrigation in the W½SE¼ of Section 35, Township 19 North, Range 15 East (supplementing Permits 33738-s41S, 18495-s41S, and 56031-s41S);

30 acres of supplemental irrigation in the SW¼ of Section 35, Township 19 North, Range 15 East (25 acres supplemented by Permits 33738-s41S, 18495-s41S and 56031-s41S and 5 acres supplemented by Permit No. 33710-s41S); and

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6 acres of supplemental irrigation in the SE¼SE¼ of Section 34, Township 19 North, Range 15 East.

A series of pipelines would be used to convey the water from the reservoir to the irrigated fields.

2. On July 1, 1988, at 3:02 p.m., Blair filed Application for Beneficial Water Use Permit No. 68174-s41S seeking to build a pit (hereinafter referred to as the "pit dam") with a 45 acre-foot capacity next to Wolf Creek. In this application, Blair proposes:

(a) to build a pit dam in the NW¼SW¼ of Section 11, Township 18 North, Range 15 East, Fergus County;

(b) to divert 1,500 gallons per minute (gpm) up to 80 acre-feet per year by pumping water out of Wolf Creek at a point in the NE¼NE¼SE¼ of Section 10 and into the pit dam from February 1 through November 30; and

(c) to use the water from the pit dam from March 15 through November 30 for new and supplemental irrigation on 181 acres. Supplementing Water Right Claim Nos. 101592, 101593, 101594, 101595, and 101596, and Permit No. 29940, the water would be used in the following places:

13.3 acres in E½SW¼; 63.5 acres in SE¼; 11.4 acres in S½NE¼ all in Section 10, Township 18 North, Range 15 East for supplemental irrigation.

2.0 acres in E½SW¼; 46.9 acres in SE¼; 2.6 acres in S½NE¼ all in Section 10, Township 18 North, Range 15 East for new irrigation.

12.1 acres in SW¼NW¼; 27.3 acres in W½SW¼; all in Section 11, Township 18 North, Range 15 East for supplemental irrigation.

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1.9 acres in W½SW¼, Section 11, Township 18 North, Range 15 East for new irrigation.

A pipeline would be used to carry the water from the pit to the irrigated fields.

3. Pertinent portions of the above applications were published in the Lewistown News-Argus, a newspaper of general circulation in the area of the source, on March 8, 1989.

4. Wolf Creek is very low during July and August. Objectors all testified that in recent years the stream has been so low that the stream does not flow in July and August, but rather forms potholes. Objectors' cattle must drink from the potholes which eventually become alkaline without flowing water. In the summer of 1988, Wolf Creek went completely dry and did not rise again until late December. Applicant's Exhibit 2.

Blair himself testified that he believed the summer of 1988 was unusually dry, but generally there were no unappropriated waters in Wolf Creek during July and August.

5. By building the stream dam, Blair seeks to capture the runoff or high water that would occur in the spring and, possibly, in the fall, as well as the unappropriated water from December through March when most of the cattle are not on the creek and the irrigation season has not yet begun. He would impound the water and store it for use in the irrigation season from March 15 through November 30.

6. Blair testified that bypassing six cubic feet per second (cfs) for the senior stock water rights would be acceptable to

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him. He thought that this amount was high, but said that he "could live with it". This finding is consistent with the findings and conclusions in previous Department decisions concerning Wolf Creek. See Conclusion of Law 9, In the Matter of the Application for Beneficial Water Use Permit No. 55943-s41S by Hilltop Angus Ranch; and Conclusion of Law 9, In the Matter of the Application for Beneficial Water Use Permit No. 56031-41S by Floyd Blair.

The period of appropriation in the permit for Hilltop Angus Ranch is April 1 through June 30 of each year. Blair's period of appropriation under Permit No. 56031 is March 15-31 and May 31 through June 30. The 6 cfs bypass requirement was held to apply only to these time periods.

There are eight different senior stock water rights downstream at the following times with the following number of cattle:

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Barber Ranch			100	100	100	100	100					
Christians					240	240	240	240	240	240		
Poser						400	400	400	400			
Ayers	200	200	200	200	200	200	200					
Boyce					300	300	300	300	300	300		
Linse				250	250	250	250	250	250	250		
Barber	200	200	200	200	100	100	100	100	100	200	200	200
Carter						125	125	125	125			
	400	400	500	750	1190	1715	1715	1415	1415	1090	400	400

Based on the above table, there may be as many as 1715 pair (cow and calf) on Wolf Creek in June and July, and 1415 pair in August and September; 1090 pair in October; 400-500 pair from November to March; and 750-1190 pair in April and May. As such,

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the amount of stock water used in the winter is about one-third of that used in the spring, summer, and early fall.

Because one-third of the number of cattle are on the stream from November to March, it is necessary to bypass only 2 cfs, instead of the full 6 cfs, during this time.

7. Hilltop Angus Ranch, downstream of the proposed dams, has a water permit for 750 gallons per minute (gpm) or 1.67 cfs. See Permit #55943-s41S by Hilltop Angus Ranch. Otto Poser, owner and president of Hilltop Angus Ranch, testified that he has never had a chance to use this permit. The creek was dry in the summer of 1988. There was plenty of water to irrigate in the summer of 1989, but he did not have to irrigate because of the high rainfall.

8. Blair submitted some flow measurements for Wolf Creek for 1986, 1988, and 1989. See Applicant's Exhibit 2. These measurements show how much Wolf Creek fluctuates in a given year and from year to year. They also show that there are large spring runoffs on Wolf Creek. Objectors themselves testified to the past floods and very high runoff experienced by Wolf Creek.

9. Blair testified that, based on his measurements and observations, he would be able to fill his proposed reservoir seven out of ten years. Sterling Sundheim, a Civil Engineering Specialist with the Department's Field Office in Lewistown, testified that, except for the months of July and August, he believed there were unappropriated waters in Wolf Creek. For

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example, he had measured 14, 15, and 16 cfs in Wolf Creek during the month of June.

At times in September through June, Wolf Creek rises high enough to satisfy the existing rights and still have some excess waters for appropriation.

10. Objectors testified that the proposed dam would prevent "recharging" of the Creek's streambed during spring runoff and therefore limit the stream flow after runoff. They believed that such "recharging" was necessary in order to maintain as high of a flow as possible during the dry summer months.

Blair submitted evidence as to the soil composition of Wolf Creek's streambed and testified that the soils in the streambed below the proposed dams were mostly clay loam and silty loam. He stated that these soils have a moderate permeability but a high water capacity. As such, these soils would take in water moderately in periods of high water and give up water very slowly. Blair concluded that the ability of the Wolf Creek streambed to gain water in periods of high water and release it later would be negligible. Applicant's Exhibits 2 and 7.

Blair further submitted evidence to show that it is the temperature rather than the recharging from spring runoff that causes the creek to rise. Applicant's Exhibit 5.

Objectors presented no data or reports to support their position. The record therefore shows that high water is not very helpful in recharging the streambed. Moreover, the bypassing of 6 cfs in the spring, summer, and early fall should be sufficient

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to meet any recharging needs of the soils in banks and streambed of Wolf Creek.

11. Objectors also claimed that the building of a dam would increase the alkaline nature in the stream. Objectors contended that the spring runoff cleans out the alkali in the stream. According to Objectors, the dam would prevent this cleansing in the spring thereby increasing the alkaline nature of the creek and decreasing the potability of the water.

As long as flow of the stream is maintained, there is little alkali problem. As such, the bypassing of the 6 cfs during the spring, summer, and early fall should minimize the alkali problem.

12. Blair submitted a general sketch of the proposed dam. Applicant's Exhibit 4. He proposes to build a large earthen dam that would store approximately 560 acre-feet of water. He proposes to place a 30-inch gate in a riser that would pass water through the dam by a trickle tube to honor senior water rights. According to the side view drawing Blair proposes to place the riser approximately half way up the side of the dam.

Blair further proposes to construct a concrete spillway with a stilling basin to serve as an emergency spillway.

13. Blair could give no specific details as to the construction of the dam. He stated that a dam of this size must be designed according to specifications from the Soil Conservation Service and under a permit from the Corps. of Army Engineers.

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Blair stated that he has sought the help of the SCS in designing the dam, but that the SCS will not proceed without some assurance that Blair has a right to the water impounded and stored by the dam. Blair agreed at the hearing to build the dam in accordance with the SCS specifications, requirements from the Corps. of Army Engineers, and any other governmental requirements including dam safety and flood plain management.

14. Blair proposes to build the pit dam by digging a large hole and piling up the earth at one end to make a large earthen dam. Blair intends to use the pit dam for off-stream storage of only the water that he pumps from Wolf Creek into the dam. The bottom of the pit would be at least two feet above the flow of Wolf Creek.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter and parties in this matter. Section 85-2-309, MCA.

2. The Department must issue a permit for the beneficial use of water if the Applicant proves by substantial credible evidence that the criteria in § 85-2-311(1), MCA, have been met.

3. Blair showed by substantial credible evidence that there are unappropriated waters in Wolf Creek, at times, in the months of September through June. Findings of Fact 8 and 9. Given the history of very high spring runoff, there is sufficient water in Wolf Creek, at times, to satisfy the senior rights and to fill the stream and pit dams.

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4. There are no unappropriated waters in Wolf Creek during July and August. Finding of Fact 4. During these months, Blair may not appropriate any water and must bypass the entire flow of the stream.

5. The water rights of prior appropriators will not be adversely affected as long as Blair appropriates no water in July and August, bypasses 6 cfs from March 1 through June and September through October 31, and bypasses 2 cfs from November 1 through the last day in February of each year. An additional 1.67 cfs from April 1 through June 30 must also be bypassed whenever Hilltop Angus Ranch is diverting. Findings of Fact 6 and 7. Prior to using the additional 1.67 cfs, the Applicant must contact Hilltop Angus Ranch to see if it is diverting. If Hilltop is diverting, the Applicant must bypass the additional 1.67 cfs.

If Wolf Creek has a flow of less than the requisite bypass amount, Blair must bypass the entire flow of the stream. This bypass requirement applies to both of the above applications.

6. The proposed means of diversion, construction, and operation works are adequate as long as Blair complies with all governmental regulations and constructs the dam in accordance with SCS specifications.

Further, the proposed means of diversion are adequate only if the dam has a drainage device at the bottom of the dam to assure that the senior rights are honored. Blair proposed a gate approximately half way up the riser. Such a proposal would not

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adequately protect senior rights because stream flow coming into the reservoir could not be directly passed through.

7. The proposed uses of water for irrigation and stock water are by statutory definition beneficial uses. Section 85-2-102(2)(a), MCA.

8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued. The permit for Hilltop Angus Ranch is the only downstream permitted right. As long as Blair bypasses the amount necessary to satisfy this right as determined in Conclusion of Law 5, the planned use will not be affected.

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Applications for Beneficial Water Use Permits Nos. 68173-s41S and 68174-s41S are hereby granted to Floyd R. Blair, except that no water may be appropriated for the months of July and August.

These Permits are issued subject to the following terms, conditions, restrictions, and limitations:

A. Blair shall build the stream dam (Permit 68173-s41S) in accordance with SCS rules and specifications, and with a drainage device at the bottom of the dam. Blair shall provide the Hearing Examiner, the Department's Lewistown Field Office and all Objectors with detailed plans of the proposed dam as drawn by the SCS when the plans are prepared and prior to any construction of the dam. Such plans must be prepared and submitted to the

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Hearing Examiner by November 30, 1990, or sooner. Failure to submit the plans by that date, without a showing of good cause, may result in the modification or revocation of the permit.

The Objectors shall have 30 days after receipt of the proposed plans to review the plans and submit comments to the Hearing Examiner and the Applicant. The Applicant shall then have 15 days to file his response to the comments with the Hearing Examiner and the Objectors.

The Hearing Examiner shall review the proposed plans and comments. If the plans are inadequate, all construction on the dam must cease, and good cause shall then exist for modification or revocation of the permit.

B. Blair shall not appropriate water in July or August. To satisfy senior stock water rights, Blair shall bypass 6 cfs or the flow of the stream, whichever is less, from March 1 through June 30 and from September 1 through October 31 of each year. From November 1 through the last day in February, he must bypass 2 cfs. From April 1 through June 30, Blair must bypass an additional 1.67 cfs to satisfy senior permitted rights whenever Hilltop Angus Ranch is diverting under Permit 55943-s41S.

Blair must install and maintain the following measuring devices in order to meet the bypass requirement:

(1) at the point of diversion for the pit dam;

(2) at a point immediately above the reservoir so that the stream flow into the reservoir may be accurately measured (the

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measuring device for (1) may be used if it is within one mile from the top of the reservoir); and

(3) at the drainage device for the dam to assure that the same amount measured above is the requisite bypass amount being passed through the dam.

Department personnel and any of the Objectors shall have access to any of these measuring devices upon reasonable notice to Blair.

C. Blair shall maintain accurate and complete records of his water use under these permits. Such records shall be available upon request to any of the Objectors or the Department.

D. These permits are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

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

F. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required by the permitted uses.

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NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, briefs.

Dated this 13th day of November, 1989.

Elizabeth L. Griffing, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
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(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 13th day of November, 1989, as follows:

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