

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. 68427-76H BY DONALD AND)
PATSY WIEDIGER)

* * * * *

The Hearing Examiner's Proposal For Decision in this matter was entered on January 31, 1990. The Proposal recommended that Application for Beneficial Water Use Permit No. 68427-76H be granted in a modified form. The Hearing Examiner found that the Applicants had not shown that the proposed means of diversion, construction, and operation of the appropriation works were adequate for a fishery, therefore the flow rate and volume requested for fish ponds in the Application should be denied. The Hearing Examiner also found that Applicants had shown by substantial credible evidence that the statutory criteria for their application for stockwater purposes had been met and a permit for that purpose should be issued.

Objector Foss Ranch, through counsel, filed a timely exception to Findings of Fact No. 11A and 11B of the Proposal but did not request an opportunity for oral argument. The Objector argues that the weight of the evidence shows that the Applicant's digging of fish ponds caused induction of water from the FMB-Zig ditch, capturing water already appropriated by the Objector and that the Hearing Examiner had erroneously relied on the tes-

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timony of the Applicants whose testimony was not credible because it was "self-serving."

The record indicates that despite Dr. Engel's impressive credentials, much of his testimony concerning the effect of the Applicants' ponds on the ditch was derived from information supplied by Objector's representative, Ms. Huggans, who did not testify. This testimony was refuted by other witnesses. The Applicants were the only witnesses who had "first-hand" knowledge of the composition of the soils which were removed to form the reservoirs. They were also the only witnesses that knew how much water was flowing out of the springs to form the marshy area and how much water flowed from the marshy area before the ponds were dug; only they know the amount of water that drained from the marshy area into the ponds and the amount of water that now flows out of the ponds. The testimony of an expert need not be accorded greater weight than that of a person with long-standing familiarity of the area in question. See In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, at pg. 22.

The Hearing Examiner chose to accept the facts as posed by the Applicants. A review of the record shows that Findings of Fact 11A and 11B are based on substantial credible evidence and are not clearly erroneous. See Billings v. Billings Firefighters Local No. 521, 200 Mont. 421 (1982). A finding is clearly erroneous if a review of the record leaves the court with the definite and firm conviction that a mistake has been made. Wage

Appeal v. Bd of Personnel Appeals, ____ Mont. ____, 676 P.2d 194, 198 (1984). In this case the judgements made by the Hearing Examiner are well reasoned and supported by the record. Findings of Fact 11A and 11B are not clearly erroneous, and will not be modified or rejected. § 2-4-612(3), MCA.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 68427-76H by Donald and Patsy Wiediger is hereby granted to appropriate five gallons per minute up to .34 acre-feet per year for stockwater use. The source is springs located generally in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 5 North, Range 21 West, Ravalli County. The water is to be conveyed by a collection ditch to the place of use which is three ponds located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 34. The combined capacity of the three ponds shall not exceed 1.23 acre-feet.

The priority date is June 29, 1988 at 4:28 p.m.

The period of appropriation and use is from January 1 to December 31, exclusive of each year.

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

1. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject

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to any final determination of existing water rights, as provided by Montana law.

2. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit.

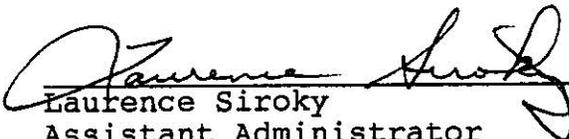
3. The Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in modification or revocation of this Permit.

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

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 11 day of September, 1990.



Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620

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

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at their address or addresses this 12th day of September, 1990,
as follows:

Donald and Patsy Wiediger
620 Gold Creek Loop
Hamilton, MT 59840

Terry Wallace
119 Mountain Ave.
Missoula, MT 59801

Foss Ranch
2949 Highway 93 South
Hamilton, MT 59840

Richard Reep
Graham & Reep
P.O. Box 7996
Missoula, MT 59807-7996

John or Connie Foss
1014 E. 19th Street
Fremont, NE 68025

Mike McLane, Field Manager
Missoula Water Resources
Field Office
Box 5004
Missoula, MT 59806


Cindy G. Campbell
Hearing Unit Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. P068427-76H BY DONALD AND)
PATSY WIEDIGER)

* * * * *

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 April 11, 1989 in Missoula.

The Applicants appeared in person and were represented by and through counsel Richard Reep.

Objector Foss Ranch was represented by Millicent Foss Huggans and by and through counsel Terry Wallace. Ms. Huggans did not testify.

Dr. Albert Engel of Scripts Institute of Oceanography and the University of Montana appeared as a witness for Objector Foss Ranch.

Objectors John and Connie Foss did not appear and were not represented.

Michael P. McLane, Manager of the Missoula Water Rights Bureau Field Office, Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") appeared as staff expert witness.

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STATEMENT OF THE CASE

The Applicants seek to appropriate water from springs arising on their property via a collection ditch into three small ponds for fish and supplemental stockwater. The primary purpose of the ponds, according to Don Wiediger testimony, is to drain a boggy area. Since the actual installation of a drainage system does not constitute a beneficial use of the water, no water use permit is required to drain the land. However, the water transported from the springs to the ponds for fish and stockwater uses, although secondary to the drainage purpose, do require a permit. The three ponds, which had been at least partially constructed as of the hearing date, lie parallel to and within 30 feet to 60 feet from what is locally known as either the Foss-McCrossin-Brown Ditch or Zig Creek* (hereafter FMB-Zig Ditch). The Applicants share the use of this ditch with Objectors Foss Ranch and four other parties. (Testimony by Tom Gayle.) Objector Foss Ranch claims first water right out of the ditch. The Applicants take their claimed irrigation water out of the FMB-Zig Ditch upstream from the three ponds, whereas the Foss Ranch's uses are all downstream of the Applicants' property.

* For purposes of this hearing, it is not necessary, nor is it the intent of the hearing to establish a standardized name for this channel. The channel will be called the FMB-Zig Ditch henceforth in this proposal.

Objector Foss Ranch maintains the following:

1. The springs the Applicant has requested water from are really seepage out of the FMB-Zig Ditch.
2. Construction of the Applicants' three ponds has caused induced leakage out of FMB-Zig Ditch and resulted in drastically lower flows being delivered to the Foss Ranch, especially in late summer. Thus, the ponds adversely affect the Foss Ranch's water rights.
3. All water in the FMB-Zig Ditch has been appropriated by Foss Ranch and others.

PRELIMINARY MATTERS

At the hearing, counsel for the Applicants moved to reduce the surface flow rate into the ponds, for fish use only, from 50 gallons per minute (gpm) to one gpm. He also requested that the volume be reduced accordingly from 80.7 acre-feet per year to whatever volume one gpm flowing continuously would produce; (1.6 acre-feet per year.) The stockwater requested would remain at five gpm up to 0.34 acre-feet per year. In an amendment signed by Applicants' counsel on July 21, 1988, the Applicants explained that "construction of these fish ponds is based upon the assumption that underground water flow may adequately oxygenate and cool the ponds." That same amendment further explained that the original request for 50 gpm up to 82 acre-feet per year was only an estimate based on information obtained from fishery biologists from the Department of Fish, Wildlife, and Parks. This estimate was an upper limit that may later be modified. The

request at the hearing to reduce the flow rate and volume was apparently based on the Applicants' observation that the minimum inflow of one gpm of surface water into the ponds would keep the water oxygenated and cool enough to sustain fish life.

The parties present at the hearing did not register objections to the motion. Therefore, as due process does not require republication based on a reduction of requested amounts, the Hearing Examiner hereby grants Applicants' motion to reduce the flow rate and volumes. Henceforth the application will be addressed as amended.

The Hearing Examiner reserved ruling on an objection to the admittance into evidence of two documents presented by the Applicants, (1) a letter, and (2) a report, both written by Mr. David O'Dell, a biologist.

Wallace objected that O'Dell was a professional witness who was not present to be cross-examined. He further pointed out that the fact that the Applicants had requested O'Dell to be present, proved that even the Applicants' attorney believed O'Dell should be present for questioning. Wallace classified the documents as hearsay evidence and not the type of evidence a reasonably prudent person would rely on in the conduct of his daily affairs without being able to question the author.

Mr. Reep, on the other hand, argued that although O'Dell was not present, in an administrative hearing, written testimony can be received so long as it supplements testimony already presented. He further pointed out that in response to discovery

requests by the Objectors, Reep had explained that O'Dell may be testifying by letter. The Objectors could have subpoenaed O'Dell themselves if they were concerned about questioning his written testimony.

Copies of the two documents in question were never sent to the Objectors prior to their presentation at the hearing.

Mr. Wallace's objection is hereby sustained. Although hearsay evidence may be received if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs, the right to cross-examine a witness is a paramount right which cannot be ignored. Mr. Reep's argument that the Objectors' attorney could have subpoenaed Mr. O'Dell based on Mr. Reep's discovery response, would have carried substantial weight had copies of the two documents been sent to the Objectors prior to the hearing, but such was not the case. Without reviewing the documents, the Objectors had little information on which to decide whether or not to subpoena the witness. In fact, if Mr. O'Dell's testimony were important to the Applicants' case, the Applicants could have more properly subpoenaed O'Dell themselves. In this case, the Hearing Examiner believes that the right to question the author precludes receipt of the hearsay evidence into the record. The Applicants' attorney had a responsibility to either, (1) produce a live author to respond to questions or at the very least to, (2) present copies of the written documents to the Objectors during discovery. He did neither. (ARM, 36.12.221)

The Hearing Examiner also reserved ruling on entering an exhibit introduced by the Objectors. Applicants, through counsel, objected to introduction into evidence for demonstrative purposes only a paper written by Dr. Engel about an aquifer within the Bitterroot Valley. Mr. Reep argued that the paper was not written specifically about Camas/FMB-Zig Ditch area and as such was immaterial to the hearing. Dr. Engel explained that the paper showed how springs were supplied by water from upgradient ditches and how ponds can be filled and aquifers recharged from these ditches on the west side of the Bitterroot Valley.

Mr. Reep's objection is hereby overruled. Dr. Engel's paper, although not specifically written about the source herein applied for, purportedly does explain the hydrologic concepts behind the Objectors' case and does apply to the aquifers in the west side of the Bitterroot Valley. The source of water for this application is within an area substantially similar in hydrologic characteristics to the area in Dr. Engel's paper. The paper is hereby entered into evidence for demonstrative purposes only, i.e., to help explain the hydrological concepts Dr. Engel is basing his conclusions on. Whether or not these concepts actually apply to this application is a decision to be made by the Hearings Examiner based on all evidence presented.

Unfortunately, Dr. Engel's paper inadvertently did not end up in the Examiner's custody following the hearing. Repeated efforts by the Hearings Examiner to obtain a copy of this document have been unsuccessful. However, there is little

likelihood that evidence contained in that document would have altered the final result of this decision.

Dr. Engel had explained that the purpose of introducing this paper was to supplement testimony he presented during the hearing regarding the characteristics of typical aquifers on the west side of the Bitterroot Valley. More specifically, he explained that the study illustrates the principles and shows the following:

1. How springs are formed,
2. How ponds can be filled, and
3. How aquifers can be recharged in the Bitterroot Valley.

Since all three of these topics were explained in great detail by Dr. Engel during the hearing, the presence of that document would not have substantially changed the weight of the evidence otherwise presented.

EXHIBITS

The Applicants submitted 15 exhibits in support of their application. Two of those exhibits (Applicants' Exhibits No. 12 and No. 13) received objections and their admittance as evidence has been denied.*

Applicants' Exhibit A is a 32" x 40" map drawn by a graphic artist of portions of Sections 26, 27, 34, and 35 of Township 5 North, Range 21 West, Ravalli County. The map shows generally

* See "Preliminary Matters" herein for details.

the area of the proposed project and all ditches involved. Mr. Wallace voiced concern that there is a discrepancy over whether the portion of the water conveyance channel labeled "Zig Creek" on Applicants' Exhibit A is really "Zig Creek" or a portion of the FMB Ditch. Wallace did not want this proceeding to establish the existence of a "Zig Creek" by admitting this map onto the record. For purposes of this administrative proceeding it is not necessary to determine whether the conveyance channel labeled "Zig Creek" is a natural stream or simply a portion of the man-made ditch labeled Foss-McCrossin-Brown Ditch. Therefore, the map was admitted for illustrative purposes only and will not be considered an accurate scaled map. Likewise, it shall not be used in this proceeding to establish the existence or nonexistence of any of the creeks or ditches depicted on the exhibit.

Applicants' Exhibits 1 - 11 are a series of colored photographs of the pond area before, during, and after construction of the ponds. All pictures were taken by the Wiedigers.

Exhibit 1 was taken facing northwest in the fall of 1985 showing cattails growing in the background. The cattails shown were located in part of the area where the ponds now sit.

Exhibit 2 shows the upper pond area in October or November of 1986 during construction.

Exhibit 3 was taken from the upper pond site looking downstream at the middle pond site in October or November of 1986.

Exhibit 4 shows the upper pond area in 1988.

Exhibit 5 depicts the middle pond area during construction in 1986.

Exhibit 6 shows the middle pond area in the fall of 1985. In the foreground is a test hole dug in 1985 in which cutthroat trout were planted.

Exhibit 7 is a picture of a portion of the middle pond in 1988.

Exhibit 8 is looking at the lower pond area in October or November of 1985.

Exhibit 9 also shows the lower pond area in the fall of 1985.

Exhibit 10 is a picture of the lower pond in 1988.

Exhibit 11 shows the relative locations of the lower pond and the FMB-Zig Ditch at the pond's closest point to the ditch.

Applicants' Exhibit 14 is a copy of a State of Montana Natural Streambed and Land Preservation Act Notice of Proposed Project signed by Don Wiediger and dated October 8, 1985.

Objector Foss Ranch introduced ten exhibits; all pictures taken April 6, 1989 by Dr. Albert Engel.

Objectors Exhibits

Exhibit 1 taken facing the ditch from the east side of the middle pond showing tracks left by heavy equipment to within ten feet of the ditch itself. Also shows standing water within ten feet of the ditch.

Exhibit 2 shows the three ponds with the FMB-Zig Ditch in the foreground.

Exhibit 3 is another more close-up picture of soil disturbance between the middle pond and the FMB-Zig Ditch.

Exhibit 4 was never described, but appears to be a picture of the FMB-Zig Ditch as it flows under a fence line.

Exhibit 5 shows water flowing into the upper pond.

Exhibit 6 also was not described, but appears to be a picture of either the middle or lower pond.

Exhibit 7 shows the upper end of the upper pond with the FMB-Zig Ditch in the foreground and the Wiediger house in the background.

Exhibit 8 again shows the upper pond, the FMB-Zig Ditch and the Wiediger house in the background. Two cattle are also shown lying next to the yard fence.

Exhibits 9 and 10 are also pictures of the upper pond and FMB-Zig Ditch in the foreground.

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

PROPOSED FINDINGS OF FACT

1. Montana statute Section 85-2-302, MCA, requires that a permit be obtained for the project herein proposed.

2. Application for Beneficial Water Use Permit No. P068427-76H was duly filed with the Department of Natural Resources and Conservation on June 29, 1988 at 4:28 p.m.

3. The pertinent portions of the application were published in Ravalli Republic, a newspaper of general circulation in the area of the source, on September 7, 1988.

4. The Applicants seek to appropriate waste and seepage water from irrigation ditches via a series of unnamed springs. Three ponds have been constructed parallel to and 30 to 60 feet from the FMB-Zig Ditch. (Testimony of Don Wiediger.) These ponds have a combined capacity of 1.23 acre-feet and are built in a swampy area in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 5 North, Range 21 West, Ravalli County. A series of unnamed springs located generally in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 5 North, Range 21 West, Ravalli County, supply water through a collection ditch into the upper of the three ponds. Overflows continue into the lower two ponds. (Testimony of Dr. Engel and Don Wiediger; and Department file.)

5. The Applicants are requesting a total flow rate of one gpm for fish and five gpm for stockwater from the springs located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 34, Township 5 North, Range 21 West. This water is diverted to the upper of three ponds via a collection ditch and can, if necessary, be measured and

controlled. (Testimony of Don Wiediger.) A reasonable volume for 20 animal units per year is 0.34 acre-feet. (Based on DNRC Standards of 15 gallons per day per animal unit.)

6. No factual data was entered into the record indicating that a flow rate of one gpm is either necessary or sufficient for the ponds to function as a fishery. The Applicants' attorney stated that they had found by actual use of the ponds that one gpm would supply the fishery needs. Yet no documentation of that assertion was presented. The Applicants did testify that ten six inch long cutthroat trout were planted in a small test pond (four feet by six feet by five feet deep) in 1985. At least some of those fish were still alive and had grown to approximately nine inches long two and one-half years later. (Testimony by Patsy Wiediger.) Yet no reference was made to necessary inflows or outflows from the test pond to sustain that fish life.

7. According to the Applicants, there has been no change in outflow patterns from the swampy area since construction of the ponds. There is and has been a small stream flow into and out of the pond area except in mid to late summer and during very cold periods in the winter when the streams freeze solid. (Testimony by Don and Patsy Wiediger.) Water flowing downstream from the ponds enters another swampy area on Alice McCrossin's property. These overflows occurred prior to construction of the ponds as well as since they were built. The only difference now is that before construction of the ponds, the water moved in a diffused pattern over a wide flat area and now the water flows directly

out of the ponds in a more confined stream. (Testimony by Don Wiediger.)

No base flow measurements out of the marsh area in which the three ponds are built have been taken. (Mike McLane Complaint Investigation Field Report and Don Wiediger Testimony.) Any measurements taken henceforth would include all base flows as well as any additional inflows into the area that might possibly result from construction of the ponds and the diversion ditch. Without such base flow data, measuring devices on the inlet of the upper pond and on the outflow channel below the lowest pond would serve no useful function.

8. The source is waste and seepage from upgradient irrigation ditches. Webster's Ninth New Collegiate Dictionary defines a spring as "a source of water issuing from the ground." By that definition, the source that the Wiedigers' diversion ditch taps is indeed a series of springs. (Don Wiediger's description.) Yet in the case at hand, the water bubbling out of the ground as springs comes directly from seepage from upgradient surface water ditches, including the south-to-north portion of the FMB-Zig Ditch. (Testimony of Dr. Engel.) Likewise, water enters the Wiediger ponds via direct seepage from the FMB-Zig Ditch. (Testimony of Dr. Engel.)

9. Water flows in the FMB-Zig Ditch year around. Consequently, water continually seeps out of the ditch onto the Wiediger property. (Don Wiediger testimony.) Likewise, water has historically seeped out of the FMB-Zig Ditch into the swampy

area in which the Wiediger ponds were built. (Testimony of Don Wiediger and Dr. Engel's reference to 1955 aerial photos.)

10. The original and primary intent of constructing the ponds was to dry up approximately three acres that was previously a saturated, swampy area by concentrating the water into three small ponds. Livestock trying to walk in the area sunk to their knees. The ponds did dry out the area and stock can now drink from the ponds and walk without sinking. (Testimony by Don and Patsy Wiediger and photographs by both the Applicants and the Objectors.)

11. There is water available in the source of supply in the amount the Applicant seeks throughout the period requested. The ponds were built in the fall of 1986 and since then have remained full enough to sustain fish life throughout the entire year and provide the stockwater needed with the requested flow rates. (Don Wiediger Testimony.) Surface flows into and out of the three acre marshland in which the ponds were constructed are essentially the same now as before the ponds were dug. (Testimony by Don Wiediger.) Thus, the water is physically available.

The Objectors, however, argued that the water supplying the ponds is appropriated. They used two approaches to show that construction of the ponds adjacent to the FMB-Zig Ditch has induced additional flows out of the ditch and further contend that water in the ditch is their water and is already appropriated. The following is a description of the two approaches used:

A. Dr. Engel testified that replacing soil in the swamp with ponds would, (i) increase evapotranspiration losses, and (ii) increase hydraulic head on the swamp aquifer, thereby inducing accelerated seepage out of the FMB-Zig Ditch. When questioned by the Hearing Examiner, however, Dr. Engel agreed that there would be very little change in evapotranspiration losses, but contended that the increased hydraulic head would at least double ditch losses. However, the hydraulic head will be increased only if saturated flow conditions exist between the ditch and the water in the ponds. Under hydraulic flow conditions Dr. Engel's explanation would be analogous to drawdown in a well and the resulting development effects on the surrounding aquifer flow patterns. But such is not the case. Still another witness for the Objectors, Tom Gayle, testified that at no place was the elevation of the bottom of the FMB-Zig Ditch the same as the water level in the Ponds - the ditch was higher. (See also Objector's Exhibits 8 and 10 and Applicants' Exhibit 4.) Dr. Engel testified that the FMB-Zig Ditch near the ponds is situated in soil consisting of decomposing granite. Such soils are made up of very porous sands and gravels interdispersed with very fine ground granite material known as "glacial flour" or "glacial milk". Since the ditch is at a higher elevation than the water in the ponds, saturated flow will only occur if an "aquifer mounding" effect is created under the ditch. In order for a mounding effect to occur the hydraulic conductivity of the soils in which the ditch is constructed must

be very low causing slow movement of the water through the soils. Porous soils as Dr. Engel has described have relatively high hydraulic conductivities allowing water to pass readily through them. With these porous soils and the base of the ditch at a higher elevation than the water in the swamp aquifer, it is highly doubtful that saturated flow conditions will exist. Without saturated flow, seepage from the ditch cannot be affected by stimuli to the aquifer* and Dr. Engel's explanation does not apply to this situation. The weight of the evidence indicates that there will be no induction of water created by the ponds. Consequently, there will be no resulting adverse affect to the flow in the FMB-Zig Ditch.

B. Dr. Engel also testified that Ms. Huggans had told him there was an enormous loss of water, especially in late summer, in the FMB-Zig Ditch downstream of the new ponds. This loss, according to her, correlated directly with construction of the ponds. No measured flow rates were presented and Ms. Huggans did not testify herself. This was countered by first hand testimony from Mr. Wiediger that there has been no change in inflows and outflows from the area.

Likewise, the installation of Wiedigers' conveyance ditch from the springs to their ponds will cause no appreciable change

*See In the Matter of the Application for Beneficial Water Use Permit No. 31711-g410 by Miller Colony, Inc., Proposal for Decision, September 8, 1983, p. 15, Subsection 14.

to flows in the FMB-Zig Ditch. Dr. Engel testified that if a ditch is installed as far as one-quarter mile away and downgradient from an existing supply ditch, there would be no significant increase in seepage from the supply ditch. The springs being tapped by Wiedigers' conveyance ditch are approximately one-quarter mile downgradient from the south-to-north reach of the FMB Ditch. Since the west-to-east portion of the FMB-Zig Ditch lies downgradient from the Wiediger springs (testimony by Don Wiediger), water diverted from the springs cannot reduce flows in that portion of the Objectors' supply ditch either. Thus, diverting flows from the Wiediger springs into the three ponds will not significantly affect flows in the FMB-Zig Ditch.

12. The historical seepage and waste arising from the FMB-Zig Ditch, as the ditch crosses the Applicants' property, has not been appropriated as such by any party hereto or by others. (Department records.)

13. The Objectors cannot put FMB-Zig Ditch water to beneficial use once it has seeped from the ditch because, after seeping away from the immediate ditch, the water is on the Applicants' property and is beyond the Objectors' control.

14. Surface inflows into the ponds from the springs can be measured and regulated. (Testimony by Don Wiediger and Objectors' Exhibit No. 5.)

15. A flow rate of five gpm up to 0.34 acre-feet per year is reasonable for the stockwater use requested. (See Preliminary Matters.)

16. Seepage from a ditch constructed in decomposing granite soil is inevitable in the absence of an effective artificial seal, such as plastic or concrete. The FMB-Zig Ditch has no such seal and the installation of one would be expensive. (Testimony of Dr. Engel.)

17. Applicant does not intend to increase ditch loss with his three ponds, but rather intends to concentrate water already seeping onto his property and creating swamp-like conditions in three small ponds. (Testimony of Don Wiediger.)

18. A three-quarter mile long four-inch gravity flow pipeline taps water out of the south-to-north reach of the FMB-Zig Ditch and is used by the Wiedigers to sprinkle irrigate land in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 34, Township 5N, Range 21W, Ravalli County. (Testimony of Don Wiediger and Dr. Engel.) Although Dr. Engel testified that this system reduced available flows to the Objector Foss Ranch, the application herein being considered does not request water for irrigation purposes.

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law of rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. (See Findings of Fact 1, 2, and 3.)

2. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, Chapter 2, Part 3, MCA (1987).

3. The Department shall issue a Beneficial Water Use Permit if the Applicants prove by substantial credible evidence that the following criteria are met. (See Section 85-2-311(1), MCA.)

(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, stock, and fish, are both beneficial uses by Montana statute. (See Section 85-2-102(2), MCA.)

5. The Applicants failed to show by substantial credible evidence that for use as a fishery, the proposed means of diversion, construction, and operation of the appropriation works was adequate. The only information entered into the record lacked both documentation and explanation. Because the decision in this matter is made on the basis of a failure of proof, rather than because the parties developed a full record and the evidence

weighed against the Applicants, the decision will be made without prejudice so the Applicants may reapply for a permit to use the ponds for a fishery at such time as they are prepared to produce the necessary evidence.

6. The diversion ditch and ponds are adequate facilities to supply stockwater. (See Findings of Fact 4, 5, and 10.)

7. There are no permits or water reservations apparent from the face of the record which the application could conceivably affect. (See Finding of Fact 12.)

8. The record contains substantial credible evidence that the water the Applicants seek to appropriate herein, waste and seepage from the FMB-Zig Ditch and other upgradient ditches, is unappropriated water. (See Finding of Fact 11.)

9. The Applicants proved by substantial credible evidence that unappropriated waters exist in the source of supply at times when the water can be put to the uses proposed. (See Findings of Fact 10, 11, and 12.)

The Objectors maintain that the seepage water from the FMB-Zig Ditch is their water because initially they appropriated it. Likewise, they believe that no one else can utilize that water. The fact remains, however, that it is "their" water, i.e., they have the right to use it, only so long as the water remains in their control. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 268, 17 P.2d 1074 (1933).

In the present case, the Objectors have lost possession and control of the water carried by the FMB-Zig Ditch, upon its seeping therefrom. (Findings of Fact 9 and 11.) After the water gets beyond the control of the owner of the right to use water, "it then becomes waste and is subject to appropriation by another." Rock Creek Ditch and Flume Co. v. Miller, *supra*, at 268. Thus, the Objectors may not prevent beneficial use by the Applicants when the appropriated water has left their control so that they themselves cannot make beneficial use of it.

However, the acquisition of a right to the seepage and waste water derived from the FMB-Zig Ditch is only good as against junior appropriators; the senior appropriators here, the Objectors, cannot be compelled to continue to waste so that the Applicants will continue to have a source. Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927).

Thus, in granting this Permit, the Department authorizes the appropriation of waste and seepage by the means specified herein, only to the extent that such waste and seepage occurs. Nothing herein prevents Objectors from improving the efficiency of the FMB-Zig Ditch; nothing herein compels them to continue to furnish this source for the Applicants.

10. The record contains substantial credible evidence that the water rights of prior appropriators will not be adversely affected by granting a Beneficial Water Use Permit.

The weight of the evidence presented tips the scale in favor of the Applicants. Dr. Engel's testimony, although valid within a groundwater aquifer, failed to show, in this case that additional seepage would be induced out of the FMB-Zig Ditch. (See Finding of Fact 11(A).) Likewise, although hearsay evidence is allowable in this administrative hearing, (ARM 36.12.221, June 30, 1984), it must be weighed accordingly against direct testimony. The Objectors' testimony that enormous losses resulted from construction of the ponds was countered by first hand testimony. (See Finding of Fact 11(B).)

Water being removed from the FMB-Zig Ditch to serve the gravity flow sprinkler system on the Wiedigers' property may or may not affect flows to Objector Foss Ranch. (See Finding of Fact 18.) However, Application P068427-76H does not request water for this project, therefore, the Hearing Examiner has neither the duty nor the authority to render any decisions regarding that sprinkler system. Concerns about the effects of this sprinkler system must be settled in a separate arena.

Therefore, based upon the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Use of the three ponds as a fishery under Application for Beneficial Water Use Permit No. P068427-76H by Donald and Patsy Wiediger is hereby denied without prejudice.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. P068427-76H is hereby granted to Donald and Patsy Wiediger to appropriate five gpm up to 0.34 acre-feet per year for stockwater from springs located generally in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 5 North, Range 21 West, Ravalli County. This water is conveyed by a collection ditch to three ponds located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of the same section. The combined capacity of the three ponds shall not exceed 1.23 acre-feet.

The place of use is the three ponds in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 5 North, Range 21 West, Ravalli County.

The priority date is June 29, 1988, 4:28 p.m..

The period of appropriation and use will be from January 1 to December 31 each year.

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

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. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

3. Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in modification or revocation of this Permit.

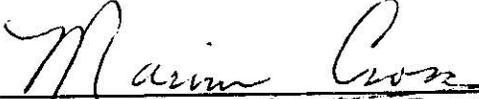
4. This Permit is granted subject to the right of the Department to modify or revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

NOTICE

This proposal 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, and briefs.

Dated this 31st day of January, 1990.



Marvin Cross, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 1828
Havre, MT 59501
(406) 265-5516

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 1st day of February, 1990, as follows:

Donald and Patsy Wiediger
620 Gold Creek Loop
Hamilton, MT 59840

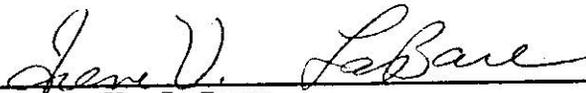
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Irene V. LaBare
Legal Secretary