

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. 70511-s76LJ BY WINTER SPORTS,)
INC.)

* * * * *

The Hearing Examiner's Proposal for Decision in this matter was entered on August 9, 1990. The Proposal recommended that Application for Beneficial Water Use Permit No. 70511-76LJ be granted. Objectors Joseph F. and Glinda T. Fagan (hereafter Objectors Fagan or the Fagans) filed timely exceptions to Applicant's Exhibit 13 and Findings of Fact 11, 15, and 16.

In their exception to Applicant's Exhibit 13, the Fagans state that the hydrological studies in this evaluation were not done on Haskill Creek, although that was how they were presented at the hearing.

Applicants' Exhibit 13 was offered for inclusion into the record during the hearing. All parties were given opportunity to object to any part of this exhibit at that time. There were no objections by any party at that time, therefore it was accepted into the record. If Objectors Fagan had any objections, they should have so stated at that time. Nothing in the record supports their position that the hydrological evaluation was not done on Haskill Creek.

The Fagans take exception to Finding of Fact 11 because the Hearing Examiner allowed measurements taken by Norman Kurtz and

CASE # 70511

Chester Powell, but did not use the measurement taken by Bill Voermans in this Finding of Fact.

Proposed Finding of Fact 11 refers to measurements taken by Norman Kurtz and Chester Powell at locations above the proposed point of diversion. Mr. Voermans took a measurement approximately eight miles below the proposed point of diversion in the fall, late October or early November, of 1988. The measurement at that time was .24 cubic feet per second or 107 gallons per minute.

The Hearing Examiner did not include Mr. Voermans' measurement in this Finding of Fact because the Hearing Examiner was stating facts concerning the flow rate above the proposed point of diversion to establish whether the Applicant had met the burden of proof required by § 85-2-311(1)(a), MCA. See Conclusion of Law 8 in the Proposal for Decision.

In their exception to Finding of Fact 15, Objectors Fagan point out that since their water right is junior to all the other water users on Haskill Creek, Winter Sports, Inc. will be their only junior to call for water.

Proposed Finding of Fact 15 discusses the availability of water in Haskill Creek. All Objectors who attended the hearing testified they have regularly experienced a shortage of water. Despite this fact, only one senior water right owner has called a junior water right owner for water.

It is not clear why Objectors Fagan take exception to this Finding of Fact. It is true the only junior right would be the

Applicant's, however if the Fagans experience a water shortage while the Applicant is appropriating, they may call the Applicant for water. The Hearing Examiner proposed certain conditions to be placed on the permit to protect prior rights. The first Condition E states,

"During the period of August through March, the permittee shall, in advance, notify the Kalispell Field Office of the Department of Natural Resources and Conservation that they intend to divert water from the source into the reservoir at a rate that exceeds the discharge from the reservoir back into the source, and the expected duration of the diversion. The Kalispell Field Office shall then inform the permittee of any recent shortages of water reported to the Field Office by owners of senior water rights, or any calls for water by owners of senior water rights on Haskill Creek or its tributaries."

It appears that the Fagans have merely affirmed this Finding of Fact in their exception. Proposed Finding of Fact 15 is not clearly erroneous and is adopted as proposed.

Objectors Fagan take exception to Finding of Fact 16 stating that there are no records of how much water the City of Whitefish actually does use and quotes the phrase used by the Hearing Examiner that "the actual pattern of use by the City of Whitefish is not part of the record."

Proposed Finding of Fact 16 discusses the flow rates in Haskill Creek and its tributaries. It also discusses the recorded water rights to the waters of Haskill Creek and the periods of appropriation of the various rights.

The City of Whitefish, with a right to divert water at a rate up to 12 cubic feet per second, is the only appropriator

with a right to use water throughout the year. The Examiner stated that the actual pattern of use by the City of Whitefish was not part of the record. The Hearing Examiner concludes in Proposed Conclusion of Law 9 that a weighing of the evidence in this case indicates that the water rights of prior appropriators will not be adversely affected. He further proposed certain conditions to be a part of the permit that are designed to administer this permitted use and protect existing rights. In their exception to Proposed Finding of Fact 16, the Fagans appear to have affirmed the Examiner's finding. Proposed Finding of Fact 16 is not clearly erroneous and is adopted as proposed.

A review of the record shows that Findings of Fact 11, 15, and 16 were 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 11, 15, and 16 are not clearly erroneous, and will not be modified or rejected. § 2-4-612(3), MCA.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law as proposed by the Hearing Examiner are hereby adopted.

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. 70511-s76LJ by Winter Sports, Inc. is hereby granted to appropriate 40 gallons per minute up to 24.54 acre-feet of water per year from an unnamed tributary of Haskill Creek for commercial use. The water shall be used for making snow.

The water shall be diverted from the source by a headgate and pipeline to a 12.2 acre-foot off-stream storage reservoir both being in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 31 North, Range 22 West, Flathead County, Montana. The period of appropriation from the source shall be January 1 through December 31 of each year. The period of use of the water from storage for making snow shall be November 1 through April 15 of each year. The place of use for making snow shall be in the NW $\frac{1}{4}$ of Section 1 and the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 2, Township 31 North, Range 22 West, Flathead County, Montana. The priority date shall be December 27, 1988 at 11:30 a.m.

This permit is subject to the following conditions:

A) The Permittee shall construct a system by which flow-through water is returned from the storage reservoir to the source at a point in immediate proximity to the point of diversion and at the same flow rate as it was diverted.

B) The Permittee shall install in the storage reservoir a water impermeable liner of sufficient strength to prevent seepage and which strength is not less than a 36 mil reinforced hypalon.

C) The Permittee shall construct the diversion works such that the flow rate diverted from the source is restricted to no more than 40 gpm.

D) The Permittee shall install flow metering devices at the intake from and outlet into the source adequate to allow the flow rates and volumes of all waters being diverted and released to be recorded. The permittee shall keep a written record of the flow rates and volumes of all waters diverted and released, including the period of time, and shall submit said records to the Kalispell Field Office of the Department of Natural Resources and Conservation by November 30 of each year.

E) During the period of August through March, the Permittee shall, in advance, notify the Kalispell Field Office of the Department of Natural Resources and Conservation that they intend to divert water from the source into the reservoir at a rate that exceeds the discharge from the reservoir back into the source, and the expected duration of the diversion. The Kalispell Field Office shall then inform the Permittee of any recent shortages of water reported to the Field Office by owners of senior water rights, or any calls for water by owners of senior water rights on Haskill Creek or its tributaries.

F) This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided

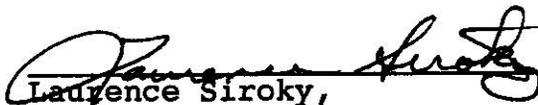
by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

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

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 12 day of October, 1990.


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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their addresses this 12th day of October, 1990, as follows:

Winter Sports, Inc.
P.O. Box 1400
Whitefish, MT 59937

James A. and Miriam Murdock
P.O. Box 122
Whitefish, MT 59937

Joseph F. and Glinda Fagan
570 Haskill Basin Road
Whitefish, MT 59937

Brice and Becky Bundrock
175 Haskill Drive
Whitefish, MT 59937

Percy C. King
Box 655 Armory Road
Whitefish, MT 59937

Andrew W. and Marsha Voermans
1875 Voermans Road
Whitefish, MT 59937

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59903-0860


Cindy G. Campbell
Hearings Unit Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
70511-s76LJ BY WINTER SPORTS, INC.)

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on April 18, 1990, at 9:30 a.m. in Kalispell, Montana, to determine whether the above Application should be granted to Winter Sports, Inc. under the criteria in § 85-2-311(1), MCA.

Applicant was represented by Donald R. Murray, attorney. Chester Powell, Ski Patrol Supervisor, Winter Sports, Inc., appeared as a witness for Applicant. Dennis Carver, P.E., Carver Engineering, Kalispell, Montana, appeared as a witness for Applicant. Jerry Osborn, Recreation Technician, Talley Lake Ranger District, United States Forest Service, appeared as a witness for Applicant. Norman Kurtz, Executive Vice President, Winter Sports, Inc., appeared as a witness for Applicant. Marc Spratt, Certified Hydrologist, Spratt & Associates, Kalispell, Montana, appeared as a witness for Applicant. David Schmidt, Water Resources Specialist, Kalispell Water Resources Field Office of the Department of Natural Resources and Conservation (Department), appeared as a witness for Applicant.

Objectors James A. and Miriam L. Murdock appeared at the hearing pro se.

CASE # 70511

Objectors Joseph F. and Glinda T. Fagan appeared at the hearing pro se.

Objector Percy C. King appeared at the hearing pro se.

Objector Andrew W. Voermans appeared at the hearing pro se.

Objector Marsha Voermans appeared at the hearing through Objector Andrew W. Voermans.

Objectors Brice and Becky Bundrock failed to appear at the hearing. Objectors Bundrock also did not appear at the prehearing conference on February 26, 1990. Pursuant to ARM 36.12.208, Objectors Bundrock are in default. The objections filed by the Bundrocks are

HEREBY STRICKEN and will not be considered in reaching a decision in this matter. Furthermore, the defaulting objectors no longer retain the status of parties in this proceeding.

EXHIBITS

Applicant's Exhibit 1. A 2' by 4' blue-line copy of the Big Mountain Ski Area Master Plan with Applicant's property boundary, proposed retaining pond, places of use for making snow, and contributing sources indicated by hand-drawn lines.

Applicant's Exhibit 2. A 2' by 4' watershed map of the Haskill Creek drainage basin drawn by Spratt & Associates, Kalispell, Montana. Indicated on the map are locations of existing water rights on Haskill Creek, locations of four measuring sites, and the location of each objector.

Applicant's Exhibits 3, 4, and 5. Three aerial photographs of Applicant's proposed place of use, purportedly taken April 7, 1990.

Applicant's Exhibit 6. A 42 square inch sample of 36 mil, industrial grade, Watersaver Reinforced Hypalon.

Applicant's Exhibit 7. A copy of a drawing made by Carver Engineering, for illustrative purposes, depicting the general dimensions and design of the proposed storage facility.

Applicant's Exhibits 8 through 12. Copies of Statements of Claims to Existing Water Rights listing Winter Sports, Inc. as owner. Department records show these claims as having been filed and assigned the identification numbers of 76LJ-W-143901-00 through 76LJ-W-143905-00 in the statewide water rights adjudication.

Applicant's Exhibit 13. A bound, ten page report: "Hydrological Evaluation; Beneficial Water Use Application; Winter Sports, Inc." prepared for Winter Sports, Inc., Whitefish, Montana, by Spratt & Associates, Consulting Hydrologists, Kalispell, Montana, dated April 18, 1990.

Applicants exhibits were all accepted into the record without objection.

Objectors Joseph and Glinda Fagan offered the following four exhibits:

Fagans' Exhibit 1. Copies of Department of Fish, Wildlife and Parks communications regarding the application in this matter: a March 2, 1989, letter to the Department of Natural

Resources and Conservation from Patrick J. Graham, Administrator, Fisheries Division; a February 16, 1989, memorandum from Jim Vashro to Fred Nelson; and a February 15, 1989, note from Fred Nelson to Jim Vashro, hand-written on the Public Notice of this matter.

Fagans' Exhibit 2. A copy of an April 9, 1990, letter to the Hearing Examiner from Don Alley, President, NW Montana Trout Unlimited, Kalispell, Montana.

Fagans' Exhibit 3. An April 11, 1990, letter addressed to the Hearing Examiner from Michael D. Enk, Bigfork, Montana, and an envelope postmarked April 13, 1990, from Michael Enk to Glinda Fagan.

Fagans' Exhibit 4. An undated letter with the salutation, "To Whom It May Concern", from Ken Kettinger, President, Flathead Fishing Association, Inc., Kalispell, Montana.

Applicant objected to all four exhibits offered by the Fagans on grounds that the exhibits were offered in support of allegations that the proposed project will have adverse impacts on interests other than Objectors Fagan's water rights. Applicant contends that precedent established by the Department in In the Matter of Application for Beneficial Water Use Permit No. 57448-s40R by Sheridan County/City of Plentywood restricts justiciable objections to those based on water rights. The Hearing Examiner took Applicant's objection under advisement, deferring a ruling until the issuance of the proposed order.

The objection is HEREBY OVERRULED. The exhibits have relevance, even though some may be of a secondary nature, to Objectors Fagan's allegations that there are no unappropriated waters in Haskill Creek, the source on which they own rights to appropriate water. Incidentally, the exhibits are also relevant to Applicant's request to amend their application. Fagans' Exhibits 1 through 4 are accepted into the record.

Official notice is taken of the Department's administrative file on this application. All parties had opportunity to review the file prior to the hearing, and to object to entering any part of the file into the record. No objections having been expressed, the Department's administrative file is made part of the record in its entirety.

On April 11, 1990, the Hearing Examiner took official notice of two technical reports:

- a) Eisal, Leo M., Kimberley M. Bradley, and Charles F. Leaf. 1988. Estimated Consumptive Loss from Man-made Snow. *Water Resources Bulletin*. 24:4, 815-820.
- b) Eisal, Leo M., Kimberley M. Bradley, and Charles F. Leaf. 1989. Estimated Runoff from Man-made Snow. Colorado Ski Country USA.

All parties were notified of this action and sent copies of these reports (hereinafter Eisal Reports) prior to the hearing. All parties had opportunity to object to entering the reports into the record. No objections having been expressed, said reports are made part of the record.

FINDINGS OF FACT

1. Applicant filed an Application for Beneficial Water Use Permit, Form 600, on December 27, 1988, at 11:30 a.m. (Department file)

2. Said application proposed to appropriate surface water at 40 gallons per minute up to 24.54 acre-feet per year from an unnamed tributary of Haskill Creek by means of a dam and on-stream reservoir in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 1, Township 31 North, Range 22 West, Flathead County, Montana. The capacity of the reservoir would be 12.27 acre-feet. The period of appropriation from the source into the reservoir would be January 1 through December 31 of each year. The place of use applied for was NW $\frac{1}{4}$ Section 1, Township 31 North; N $\frac{1}{2}$ N $\frac{1}{2}$ Section 2, Township 31 North; S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ Section 36, Township 32 North; and SE $\frac{1}{4}$ Section 35, Township 32 North, all in Range 22 West, Flathead County, Montana. The purpose of the proposed appropriation would be commercial snowmaking on the Big Mountain Ski Area, which is a commercial recreation facility owned and operated by Applicant. (Department file, Applicant's Exhibit 1, and testimony of Chester Powell)

3. Pertinent portions of the application were published in the Whitefish Pilot, a newspaper of general circulation in the area, on February 15, 1989. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department file)

4. The Department received timely objections to the application from the above-mentioned objectors. The bases stated for said objections are as follows:

a. Objectors Andrew and Marsha Voermans contend water is not available for additional appropriations from Haskill Creek and its tributaries (especially in winter months), and that possible failure of the proposed storage structure poses a threat of adverse effects to the quality of the watershed.

b. Objector Percy King contends water is not available for additional appropriations from Haskill Creek and its tributaries (especially in late summer).

c. Objectors James and Miriam Murdock contend water is not available for additional appropriations from Haskill Creek and its tributaries (especially in winter and late summer).

d. Objectors Joseph and Glinda Fagan contend water is not available for additional appropriations from Haskill Creek and its tributaries, and that the proposed appropriation will cause adverse effects to their property in the form of increased erosion from additional spring runoff.

e. Objectors Brice and Becky Bundrock contend the proposed appropriation will cause adverse effects to their property in the form of increased flooding and erosion from additional spring runoff.

The Bundrocks' objections were subsequently stricken (see above). (Department file)

5. At the hearing, Applicant requested the application be amended as follows: a) the proposed reservoir be changed from on-stream to off-stream, but with the same capacity and in the same ten acre parcel; b) the means of diversion be changed from dam to headgate with pipeline; c) the period of use for commercial snowmaking be changed from November 1 through March 31 of each year to November 1 through April 15 of each year; d) the places of use in Sections 35 and 36 be deleted, thereby limiting the proposed place of use to lands owned by Applicant; and e) the flow rate be raised to an unspecified amount to allow for diversion of high or flood waters for filling and refilling the reservoir.

Applicant stated that the amendments to the means of diversion and location of the storage reservoir were being made to address concerns expressed by the objectors and others about the original proposal's potential environmental harms such as to fisheries and from flooding were the dam to fail. Applicant also stated that the diversion pipeline, as designed, would have a capacity exceeding the applied for 40 gpm flow rate. (Applicant's Opening Statement, Testimony of Chester Powell, and Fagans' Exhibits 1 through 4)

6. Applicant stated the diversion and storage works will be constructed so that a constant flow of water can be maintained through the storage reservoir to maintain water quality by avoiding stagnation. This will be accomplished by a pump and pipeline system from the storage reservoir to the source that will dis-

charge the flow-through waters into the source at the point the water had been initially diverted from the source, thereby avoiding the dewatering of any reach of the stream. Applicant further stated that at no time would they divert the entire flow of the source, even if the entire flow of the source were equal to or less than their permitted appropriation. (Applicant's Opening Statement, Testimony of Chester Powell, and Applicant's Exhibit 7)

7. The proposed storage reservoir would be lined with a 36 mil reinforced hypalon liner. Measuring devices would be placed on the intake and outflow pipelines of the diversion and flow-through structures. (Testimony of Dennis Carver and Chester Powell, and Applicant's Exhibit 6)

8. Applicant has retained and will employ Carver Engineering, Kalispell, Montana, in designing and supervising construction of the diversion and storage works. Carver Engineering is a professional engineering firm experienced in designing and constructing water systems. It was stated by Dennis Carver that he is very comfortable with the adequacy of the design of diversion and storage works. (Applicant's Opening Statement, Testimony of Dennis Carver, and Applicant's Exhibit 7)

9. Applicant has experience with the installation and operation of snow-making systems. A snow-making system exists as part of the Big Mountain Ski Area and has been operated successfully. Applicant intends to purchase the snow-making equipment for the proposed project from Snow Machines, Inc., Midland,

Michigan, which will provide technical assistance on the installation and design of the snow-making system. (Testimony of Chester Powell and Jerry Osborn)

10. Appropriating water from Haskill Creek for making snow will allow Applicant to expand the season, more predictably open and close the season, and expand the usable ski runs in the early and late season at Big Mountain Ski Area. Winter Sports, Inc. is a stalwart of the economy of the Flathead Valley and one of the largest businesses in Whitefish. (Applicant's opening statement, Testimony of Chester Powell, and Applicant's Exhibits 3, 4, and 5)

11. Measurements were taken throughout the summer season of 1972 and 1973 of the flows in three unnamed tributaries of Haskill Creek that feed into the proposed source above the proposed point of diversion. The measurements were made under the direction and oversight of the corporation's engineer by Norman Kurtz, then water and wastewater operator for Winter Sports, Inc., and an assistant. A stopwatch was used to time the filling of a five gallon bucket. The measurements indicated a total combined flow never less than 100 gallons per minute (gpm).

During two recent summer seasons (from early summer through August), Chester Powell took measurements of stream flows in the drainage area above the proposed point of diversion. The measurements indicated an average flow of 40 gpm. Mr. Powell stated that these measurements did not include flows from springs that contribute additional water to the proposed source below the

location of the measurements. (Testimonies of Chester Powell and Norman Kurtz)

12. Calculations performed by Marc Spratt to estimate mean flow rates at the proposed point of diversion show means ranging from 812 gpm to 6570 gpm. These calculations were performed using the Parrett and Cartier "Methods for Estimating Monthly Streamflow Characteristics at Ungaged Sites in Western Montana" (1989) which is the professionally recognized standard for estimating stream flow characteristics in drainages similar to the Haskill Creek basin.

Mr. Spratt measured 4360 gpm of flow in the proposed source at the proposed point of diversion on April 14, 1990. (Testimony of Marc Spratt and Applicant's Exhibits 2 and 13)

13. Hydrologic analysis of the Haskill Creek basin indicates 39% of the average annual volume of surface water discharged by Haskill Creek is presently appropriated. The calculations performed by Marc Spratt indicate that the average annual discharge of Haskill Creek is 32851 acre-feet whereas the total appropriated volume as indicated in the Department's water rights records is 17249.91 acre-feet, 52% of the total discharge. Mr. Spratt's appropriated volume figure, however, includes the double counting of some rights (i.e., separate listings for a water right and an application to change that same right), multiple use of a single appropriation (i.e., municipal and power generation), and the present application. After subtracting these false additions, the total recorded appropriated volume for Haskill

Creek is 12737.97 acre-feet, or 39% of the 32851 acre-feet discharged annually. (Applicant's Exhibit 13 and Department records)

14. The proposed appropriation is unlikely to result in increased downstream erosion damage from increases in spring runoff. Hydrologic analysis of the portion of the Haskill Creek basin above the proposed point of diversion indicates the proposed appropriation would consist of one percent of the average annual volume of surface water that drains past the proposed point of diversion. Mr. Spratt has concluded that affecting stream discharge at the proposed point of diversion by one percent is not likely to cause changes in downstream erosion patterns.

As the proposed appropriation would be used for making snow, 87% at most, and possibly as little as 50%, of the water diverted would return to the source, and Applicant has stated that periods of high flow are their highest priority periods for diversion. In addition, runoff from man-made snow would occur in the earlier part of the runoff season and would generally be complete when the peak flow from the entire area is occurring. These facts in combination further reduce the likelihood of increased erosion. (Applicants' Exhibit 13, Eisal Reports, Department's file, and Testimony of Chester Powell)

15. Each of the objectors testified that they have regularly experienced the inability to exercise their rights to Haskill Creek water due to water availability problems. These problems

were typically in the late summer, fall, and winter. Objectors Fagan testified that they had insufficient water to satisfy their domestic needs off and on through five months in some years over the last few years, maybe as many as ten years. Objector James Murdock stated that he has not had adequate water when he needed it for irrigation for the past seven years.

According to the record in this matter, only one of the objectors had called for water from a junior, and then only once out of concern for others besides himself and for the fishery in Haskill Creek. Objector Voermans called for water by contacting the City of Whitefish in the late 1970's during a very dry year. They did not comply with his request. (Objectors' testimony, Fagans' Exhibits 1 through 4, and Department file)

16. The total combined flow rate for all recorded rights to surface water in Haskill Creek and its tributaries is 46.3 cubic feet per second (cfs). All but 1.8 cfs have periods of use that allow diversions in the late summer, fall, or winter. The mean average flows in Haskill Creek at a point near its confluence with the Whitefish River were calculated by Mr. Spratt. In April through July these calculated mean flows range from 68.32 cfs to 127.41 cfs; considerably more than the 44.5 cfs total of the recorded rights. In August through March these calculated mean flows range from 26.96 cfs to 17.25 cfs; considerably less than the 44.5 cfs total of the recorded water rights.

The City of Whitefish, alone, has rights to divert up to 12 cubic feet per second from Haskill Creek and its tributaries any

time during the year, yet the actual pattern of use by the City of Whitefish is not a part of the record. Since this appropriation diversion conveys the water out of the drainage, it is 100% consumptive, that is, none of it returns to the source. In addition, Applicant has rights to one cfs of water from each of two unnamed tributaries to Haskill Creek, locally known as "Tributary No. 1" and "Hindeman Creek", they have not been used since 1974 and 1968, respectively.

Such factors, plus the lack of information about efficiencies and return flows of the many irrigation rights in the drainage mean the exact amount of flow being diverted at any one point in time, or conversely, available at the proposed point of diversion or any of the objectors' points of diversion, cannot be determined from the evidence on the record and other materials available to the hearing examiner. Furthermore, neither the estimated mean flows nor the total of the recorded rights provides any indication of whether the flow of Haskill Creek or its tributaries at a water users point of diversion on a given day will be above or below demand. (Applicant's Exhibits 2 and 13, Testimony of Norman Kurtz, and Applicant's Exhibits 8 through 12)

17. There are approximately six linear miles of stream between the proposed point of diversion and the nearest objector, and well over ten linear miles to the furthest objector. The effect of withdrawing 40 gpm from the source for the proposed appropriation would be imperceptible to the objectors.

(Testimony of Marc Spratt)

18. Objectors Fagan and Voermans raised concerns at the hearing about possible adverse impacts the proposed appropriation may have on fisheries in Haskill Creek. Applicant expressed concern about the injection of this issue into the hearing, citing Plentywood, supra.

19. Objectors Fagan requested that the Hearing Examiner consider granting the permit on a temporary basis so that it could be determined whether there is water available for the proposed appropriation in low water periods of the year.

20. There are no permits issued to appropriate waters from Haskill Creek for which the project is still pending or planned. A Notice of Completion (Form 617) indicating that the planned development has been completed is on file with the Department for each permit that has been issued to appropriate water from Haskill Creek. (Department records)

21. There have been no reservations of water granted for any source in the Kalispell Field Office area which includes Haskill Creek and its tributaries. (Department records and Testimony of Dave Schmidt)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Title 85, Chapter 2, MCA.

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Finding of Fact 3.

3. An Application for Beneficial Water Use Permit may only be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application No. 50272-g42M by Joseph F. Crisafulli.

Applicant proposed five amendments to their application. See Finding of Fact 5. Four of the five amendments are granted for the following reasons:

a. The amendment of the place of use reduces the extent of the proposed water right and does not alter the parameters of the diversion from the source, i.e., flow rate, volume, source, point of diversion, and period of diversion.

b. The amendment of the period of use of the stored water for making snow does not alter the parameters of the diversion from the source.

c. The amendment of the reservoir location from on-stream to off-stream reduces the potentially negative impacts to the source and downstream drainage area, and with the diversion works as designed does not alter the parameters of the diversion from the source.

d. The amendment of the means of diversion reduces the potentially negative impacts to the source, and with the diversion works as designed does not alter the parameters of the diversion from the source.

The fifth proposed amendment, raising the flow rate to an unspecified amount to allow for diversion of high or flood waters for filling and refilling the reservoir, is denied as it expands the parameters of the diversion from the source and therefore may prejudice those persons who received notice of, but who did not object to, the application as proposed.

4. The proposed use, making snow for the purpose of commercial recreation, is a beneficial use of water. See Section 85-2-102(2)(a), MCA. See also Findings of Fact 2 and 10.

5. Applicant has possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 2 and 5.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant has put

forth a design and operation of the proposed project that not only are adequate for purposes of diverting and distributing the applied-for appropriation, but have elements that also address adequacy with regard to the environmental concerns of the objectors and others with interests in the water resources of the Haskill Creek basin, including the concern for fisheries protection. As a result, the question of standing to object on grounds of potential adverse effects on fisheries and the Department's jurisdiction over such issues need not be reached. See Findings of Fact 2, 5, 6, 7, 8, 9, and 18.

7. The proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 20 and 21.

8. Applicant has shown that there are unappropriated waters in the source of supply at the proposed point of diversion in the amount Applicant seeks to appropriate. The test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion. See Section 85-2-311(1)(a), MCA.

Applicant produced substantial credible evidence that clearly establishes the physical presence of water at the proposed point of diversion throughout the year. See Section 85-2-311(4), MCA. See also Findings of Fact 11, 12, and 13.

9. The proposed appropriation will not adversely affect the water rights of prior appropriators.

Applicant produced substantial credible evidence that clearly establishes water at the intended point of diversion throughout the spring and most of the summer of every year that was not en route to downstream water right users. See Section 85-2-311(4), MCA. This same evidence also establishes a credible contention on the part of the Applicant that such water would be available in other seasons with a frequency sufficient to their purposes. See Findings of Fact 12, 13, 16, and 17.

Upon Applicant's discharge of the burden to produce substantial credible evidence on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce: Objector must show they have water rights, describe with particularity the operation of their rights, state how they anticipate the proposed use will change the conditions of water occurrence in the source or how it will otherwise affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed conditions. See In re Application No. 60117-g76L by William C. Houston.

Objectors testified that they have experienced shortages of water in the drainage in the late summer, fall, and winter; they were inconclusive, however, as to the frequency and dates of the shortages. The evidence in the record is not adequate to determine the amount of volume or flow available to or being diverted by Objectors at any one point of time or point of diversion. Furthermore, the lack of evidence of effort on the part of Objec-

tors to exercise their seniority to obtain water to which they have valid rights raises additional questions about when, how often, and to what extent the alleged shortages have occurred. See Finding of Fact 15.

Applicant has provided substantial independent and credible evidence on the question of possible adverse effects, including potential effects to interests other than water rights (see Finding of Fact 14). Objectors failed to meet their burden of producing evidence that, contrary to Applicant's evidence, shortages had occurred with a high degree of frequency, and that Objectors were were required to exercise their water rights by calling for water. Weighing Applicant's evidence against the lack of evidence on the part of the objectors, the preponderance of the evidence in the record is that the water rights of prior appropriators will not be adversely affected.

Because it would be impossible to perceive the change in stream flow at an objector's point of diversion attributable to starting and stopping Applicant's diversion, operating the proposed system under an interim permit would not provide the test of availability and possible adverse effect Objectors Fagan wanted an interim permit issued for. See Finding of Fact 19.

10. The Department has the authority to place conditions on permits. See Section 85-2-312(1), MCA. In this matter, Applicant has indicated that the design capacity of the means of diversion will exceed 40 gpm, the applied-for flow rate. Applicant has also indicated that the diversion and storage system

design allow for a continuous flow of water. See Finding of Fact 6. In order to know whether the system is being operated so as to not adversely affect existing water rights and to take only the amount permitted, a condition must be placed on the permit requiring a control mechanism, such as a butterfly valve, on the diversion pipeline, and measuring devices on the intake and outflow of the system.

Applicant, on its own initiative, has represented to the Department and objectors that the project would be designed and operated according to a specific plan they have developed and imposed upon themselves. Therefore, the elements of this design and operation plan must be included in the conditions of the permit. See Findings of Fact 5, 6, and 7.

To avoid appropriation by Applicant during times when water is unavailable due to limitations placed on the source by senior water right holders, i.e., that the exercise of the permit is within the criteria of § 85-2-311, MCA, a condition must be placed on the permit requiring prior notification by Applicant during the period of each year that shortages frequently, if not predictably, occur. See Conclusion of Law 9.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70511-s76LJ is hereby granted to Winter Sports, Inc. to appropriate 40 gallons per minute up to 24.54 acre-feet of

water per year from an unnamed tributary of Haskill Creek for commercial use. The water shall be used for making snow.

The water shall be diverted from the source by a headgate and pipeline to a 12.2 acre-foot off-stream storage reservoir both being in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 31 North, Range 22 West, Flathead County, Montana. The period of appropriation from the source shall be January 1 through December 31 of each year. The period of use of the water from storage for making snow shall be November 1 through April 15 of each year. The place of use for making snow shall be in the NW $\frac{1}{4}$ Section 1 and the N $\frac{1}{2}$ N $\frac{1}{2}$ Section 2, Township 31 North, Range 22 West, Flathead County, Montana. The priority date shall be December 27, 1988 at 11:30 a.m.

This permit is subject to the following conditions:

A) The permittee shall construct a system by which flow-through water is returned from the storage reservoir to the source at a point in immediate proximity to the point of diversion and at the same flow rate as it was diverted.

B) The permittee shall install in the storage reservoir a water impermeable liner of sufficient strength to prevent seepage and which strength is not less than a 36 mil reinforced hypalon.

C) The permittee shall construct the diversion works such that the flow rate diverted from the source is restricted to no more than 40 gpm.

D) The permittee shall install flow metering devices at the intake from and outlet into the source adequate to allow the flow

rates and volumes of all waters being diverted and released to be recorded. The permittee shall keep a written record of the flow rates and volumes of all waters diverted and released, including the period of time, and shall submit said records to the Kalispell Field Office of the Department of Natural Resources and Conservation by November 30 of each year.

E) During the period of August through March, the permittee shall, in advance, notify the Kalispell Field Office of the Department of Natural Resources and Conservation that they intend to divert water from the source into the reservoir at a rate that exceeds the discharge from the reservoir back into the source, and the expected duration of the diversion. The Kalispell Field Office shall then inform the permittee of any recent shortages of water reported to the Field Office by owners of senior water rights, or any calls for water by owners of senior water rights on Haskill Creek or its tributaries.

E) This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

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

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 on 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 9th day of August, 1990.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 9th day of August, 1990, as follows:

Winter Sports, Inc.
P.O. Box 1400
Whitefish, MT 59937

James A. and Miriam Murdock
P.O. Box 122
Whitefish, MT 59937

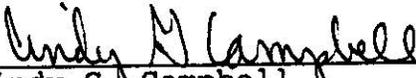
Joseph F. and Glinda Fagan
570 Haskill Basin Road
Whitefish, MT 59937

Brice and Becky Bundrock
175 Haskill Drive
Whitefish, MT 59937

Percy C. King
Box 655 Armory Road
Whitefish, MT 59937

Andrew W. and Marsha Voermans
1875 Voermans Road
Whitefish, MT 59937

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59903-0860



Cindy G. Campbell
Hearings Unit Secretary