

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
70919-s41H BY LAWRENCE J. AND)
BERNA SUE VAN DYKE)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 10, 1992, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restriction, and limitations specified below, a Beneficial Water Use Permit is hereby granted for Application 70919-s41H by Lawrence J. and Berna Sue Van Dyke to appropriate 175.03 gallons per minute (gpm) up to 282.32 acre-feet of the waters of an unnamed tributary of South Dry Creek, locally known as Spring Creek, at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4 by means of an on-stream dam for a flow through fish and wildlife pond. The reservoir shall have a capacity of 3.3 acre-feet. The period of diversion and use shall be from January 1 through December 31, inclusive of each year.

CASE # 70919

FILMED
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1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This permit is subject to the condition that the Permittee shall install adequate flow measuring devices in order to allow the flow rate of all waters diverted to be recorded. One flume shall be installed in the Tudor Lane Ditch directly below the Boylan South Dry Creek diversion; another shall be installed in Spring Creek just before Spring Creek flows into the pond; and a third flume shall be installed where the water exits the pond into Tudor Lane Ditch. The Permittee shall keep a written record of the flow rate 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, 111 N. Tracy, Bozeman, MT 59715 PH: (406) 586-3136.

3. This permit is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

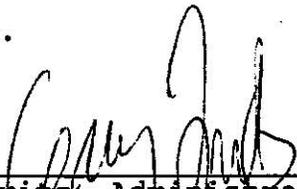
4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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 1 day of July, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

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 9th day of July, 1992 as follows:

Lawrence J. Van Dyke
Berna Sue Van Dyke
5651 Love Lane
Bozeman, MT 59715

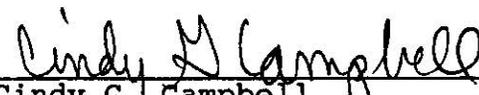
Robert Baldwin
Goetz, Madden & Dunn, P.C.
35 North Grand
Bozeman, MT 59715

H.A. Bolinger
P.O. Box 1047
Bozeman, MT 59715

W. Boyd Boylan
9491 Gant Road
Bozeman, MT 59715

Scott Compton, Manager
Bozeman Water Resources
Regional Office
111 North Tracy
Bozeman, MT 59715
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal 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) PROPOSAL FOR DECISION
70919-s41H BY LAWRENCE J. AND)
BERNA SUE VAN DYKE)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 21, 1992, in Bozeman, Montana, to determine whether a Beneficial Water Use Permit should be granted to Lawrence J. and Berna Sue Van Dyke for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1989).

APPEARANCES

Applicants Lawrence J. and Berna Sue Van Dyke appeared at the hearing in person and by and through counsel Robert Baldwin.

Objector W. Boyd Boylan (Boyd Boylan) appeared at the hearing in person and by and through his son Douglas Boylan.

Jan Mack, Water Rights Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Cindy Campbell, Hearings Unit Legal Secretary, attended the hearing.

Lou Antonick, Program Assistant with the Department's Helena Central Office, attended the hearing as an observer.

Objector Marguerite Newey withdrew her objection to this Application on April 23, 1992.

CASE # 70919

Objectors Mrs. Richard (Betty J.) Adams, Ben TeSelle, Edw. D. Blackwood, and Edw. Lee Blackwood did not appear at the hearing nor had they made prior explanation to the Hearing Examiner; therefore in accordance with Mont. Admin. R. 36.12.208 (1991), they are in default, their objections are dismissed, and they no longer have status as parties to these proceedings.

EXHIBITS

Applicants offered six exhibits for inclusion into the record. All were accepted into the record without objection.

Applicants' Exhibit 1 consists of 31 pages and is the District Court Decision in Boylan v. Van Dyke, et al., Cause No. DV-88-362, an action taken to determine whether Applicants' pond interfered with Objector Boylan's ditch rights to transport irrigation water down the ditch which crosses Applicants' property.

Applicants' Exhibit 2 consists of five pages and is the Montana Supreme Court Decision in Boylan v. Van Dyke, et al., 247 Mont. 259, 806 P.2d 1024 (1991).

Applicants' Exhibit 3 consists of three USGS Quadrangle maps taped together. Labels identifying the Applicants' point of diversion and each of the Objectors' points of diversion have been affixed to the maps.

Applicants' Exhibit 4 is a diagram showing the pond, maximum pond level, headgates, flumes, drains, culverts, the original Tudor Lane Ditch route, the existing Tudor Lane Ditch, Spring Creek, Dry Creek, and the roadway.

Applicants' Exhibit 5 is a copy of the Warranty Deed which conveys ownership of a tract of land located within the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 4, Township 3 South, Range 5 East, in Gallatin County,¹ Tract A of Certificate of Survey 1399, to Applicants.

Applicants' Exhibit 6 is Volume III of the transcript of Boylan v. Van Dyke, et al., Cause No. DV-88-362.

The Department file was made available for review by all parties at the hearing who had no objection to any part of the file; therefore the file was accepted into the record in its entirety.

PRELIMINARY MATTERS

Applicant moved, both verbally and by written motion, that the Hearing Examiner take judicial notice of the decision and written Findings of Fact and Conclusions of Law, dated October 19, 1989, of the Montana Eighteenth Judicial District Court in Boylan v. Van Dyke, et al., Cause No. DV-88-362; the transcript of the proceedings of the trial of that action; and the decision and opinion of the Montana Supreme Court in the appeal of that action, Boylan v. Van Dyke, et al., 247 Mont. 259, 806 P.2d 1024 (1991). There was no objection expressed by Objector Boylan to this motion and the Hearing Examiner agreed to do so. However, during the hearing these documents were entered into the record as exhibits without objection. Further, these documents were in

¹Unless otherwise specified, all land descriptions in this proposal are located in Township 3 South, Range 5 East, in Gallatin County.

the Department file which was accepted into the record in its entirety obviating the need for official (judicial) notice.

The Hearing Examiner did take official notice of a booklet entitled "Irrigation Water Measurement Irrigation Ditches and Pipelines" published by the Agricultural Extension Service of the University of Wyoming as Bulletin 583R, pages 40 and 42, for the purpose of calculating the flow from the reading of the Parshall flumes she and Mr. Mack took during the site visit.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the Department. Mont. Code Ann. § 85-2-302 (1991).

2. Lawrence J. and Berna Sue Van Dyke duly filed Application for Beneficial Water Use Permit 70919-s41H with the Department on May 5, 1989. (Department file.)

3. Pertinent portions of the Application were published in the Bozeman Daily Chronicle on June 28, 1989.

Five timely objections and one untimely objection to the Application were received by the Department. Applicants were notified of the objections by a letter dated July 18, 1989.

(Department file.)

4. Applicants propose to appropriate 180.00 gallons per minute (gpm) up to 290.34 acre-feet of the waters of an unnamed tributary of South Dry Creek, locally known as Spring Creek, at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4 by means of an on-stream dam. The proposed reservoir would have a capacity of 3.3 acre-feet. The proposed use, a flow-through fish and wildlife pond, is nonconsumptive. The proposed period of diversion is from January 1 through December 31, inclusive of each year. (Department file and testimony of Lawrence Van Dyke.)

5. Applicants are joint owners of Tract A of Certificate of Survey 1399, which consists of approximately of 20 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 4. (Testimony of Lawrence Van Dyke and Applicants' Exhibits 1 and 5.)

6. South Dry Creek is a spring fed stream that extends north through Section 9 and into Section 4. A ditch known as the Tudor Lane Ditch diverts water from South Dry Creek in Section 4. Tudor Lane Ditch crosses Applicants' land in a northerly direction to about the center of Tract A where it formerly looped east then back to the west, then finally runs north onto Mr. Boylan's property. Another small spring fed creek, locally known as Spring Creek extends across the W $\frac{1}{2}$ of Section 4 and intersected with the Tudor Lane Ditch on Tract A at approximately the easterly most point in the above described course of the former loop of the Tudor Lane Ditch. Both streams are perennial. (Testimony of Lawrence Van Dyke and Applicants' Exhibit 1.)

7. A pond was excavated and a ten-foot high dam was erected across Tudor Lane Ditch between May 18, 1988, and May 22, 1988, prior to the irrigation season of 1988 by Van Dyke Irrigation Service, Inc. under the supervision of Lawrence J. Van Dyke. (Mr. Van Dyke has been involved in the irrigation business since 1975 and has considerable experience in the construction and installation of all kinds of diversion works, ditches, embankments, ponds, and related structures.) The pond is located where Tudor Lane Ditch formerly looped as stated above. By virtue of the installation of the headgate out of the pond, the water in Tudor Lane Ditch is allowed to flow through the pond then back into Tudor Lane Ditch. After construction of the pond, the part of the ditch which had made the loop to the east and back to the west became incorporated in the pond which is located essentially in the loop made by the ditch. Tudor Lane Ditch water now flows through an 18 inch smooth coated steel inlet pipe into the pond and back out into Tudor Lane Ditch through another 18 inch smooth coated steel pipe or it flows back into South Dry Creek if not needed for irrigation by Objector Boylan. The 18 inch smooth coated steel pipes each have a capacity of conveying approximately 320 miner's inches of water. Spring Creek also flows into the pond and out into Tudor Lane Ditch or into South Dry Creek as stated above. When Tudor Lane Ditch is not active, water from Spring Creek flows into the pond and out of the pond into South Dry Creek. (Testimony of Lawrence J. Van Dyke, Applicants' Exhibits 1, 4 and 6, and Department file.)

8. The construction of the pond and dam was done in the usual manner and compacted so as to safeguard and impound the waters. The foundation was adequately and properly prepared by stripping the topsoil, scrubbing the brush, trees and other organic material within a 30 foot wide area at the base of the dam, and the dam was built with a mixture of clay, gravel, and sand which were properly compacted.

There was discussion concerning a stump being incorporated into the dam. According to Applicants' expert witness during the trial, the stump and its root system were added after the main part of the dam was completed to change the slopes and widen the road, and therefore would have no effects on the integrity of the dam itself. (Testimony of Lawrence Van Dyke and Applicants' Exhibits 1 and 6.)

9. District Court Judge, Honorable Joseph B. Gary visited the site in May of 1989 and saw a small amount of seepage from the dam, but on a subsequent visit in August of 1989, observed no seepage from the dam. (Applicants' Exhibits 1 and 2.)

10. In the summer of 1988, Applicants installed three Parshall flumes, with nine-inch throats, to enable Objector Boylan or any other observer to measure the amount of water flowing into the pond from Tudor Lane Ditch, into the pond from Spring Creek and out of the pond into Tudor Lane Ditch. One flume was installed in the Tudor Lane Ditch directly below the Boylan South Dry Creek diversion; another was installed in Spring Creek just before Spring Creek flows into the pond; and a third

flume was installed where the water exits the pond into Tudor Lane Ditch. In the late fall of 1988, after the irrigation season, Applicants installed a syphon in the pond as a means of draining the pond, if necessary. There is also a trickle tube in the dam that allows the natural flow not going into Tudor Lane Ditch to go down the pipe and into South Dry Creek. The trickle tube acts as a permanent spillway for the pond. (Applicants' Exhibits 1 and 6 and personal observation.)

11. Applicants installed a stop log headgate at Objector Boylan's point of diversion where Tudor Lane Ditch diverts water from South Dry Creek in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4. If Mr. Boylan wants to divert all of the water of South Dry Creek into Tudor Lane Ditch, he can block the flow of South Dry Creek by inserting logs or planks in the slots on the headgate. The water in the ditch then flows in a northerly direction, enters an 18 inch smooth coated steel pipe, then flows through the pond then back into Tudor Lane Ditch through another 18 inch smooth coated steel pipe with a headgate. The headgate on the outlet pipe is a screw type headgate that is easily operated requiring a simple turning of the wheel to allow the water to flow into Tudor Lane Ditch. Objector has full access to these structures to adjust them for his supply of irrigation waters from South Dry Creek in Tudor Lane Ditch. (Applicants' Exhibits 1 and 6 and personal observation.)

12. In August of 1988, Russ Schauer, an employee of the Applicants, measured the flow of water at the flume in Tudor Lane

Ditch to be 65.2 miner's inches and the flow of Spring Creek was measured at 12 miner's inches. The flow from the pond into Tudor Lane Ditch was measured at 90.8 miner's inches. On August 3, 1988, Douglas Boylan recorded a measurement on the flume at the Tudor Lane Ditch diversion from South Dry Creek to be 87 miner's inches and at the Tudor Lane Ditch outlet from the pond at 87 miner's inches. In late August, 1988, Lawrence Van Dyke measured the flow into Tudor Lane Ditch from South Dry Creek at 87.2 miner's inches and the flow into the pond from Spring Creek at 10 miner's inches. The measured flow from the pond into Tudor Lane Ditch was measured at 97.6 miner's inches. On April 19, 1989, Rhett Hurless, Applicants' expert witness during the trial, measured the flow from South Dry Creek into Tudor Lane Ditch at 142 miner's inches and the flow into the pond from Spring Creek at 15.6 miner's inches. The flow from the pond into Tudor Lane Ditch was 160 miner's inches. Further, in the spring of 1989, Lawrence Van Dyke, with the South Dry Creek headgate shut off, measured the flow of water into the pond from Spring Creek at 15.6 miner's inches and the flow from the pond into Tudor Lane Ditch at 15.6 miner's inches. Before the hearing on May 21, 1992, Douglas Boylan read the water level at .6 foot (56.4 miner's inches) in the flume in Tudor Lane Ditch where the water flows out of the pond. He did not read the flume located at the Boylan point of diversion nor the Spring Creek flume. When Jan Mack, Cindy Campbell, Lou Antonick, and the Hearing Examiner visited the site the day of the hearing in early afternoon, the

water reached the .85 foot mark on the flume located in Tudor Lane Ditch below Objector Boylan's point of diversion which is 2.39 cfs or 95.6 miner's inches. There was a lot of turbulence in the flume located in Tudor Lane Ditch where the water flows out of the pond and the water fluctuated between .83 and .85 foot. According to Applicants' Exhibit 6, page 418, the turbulence causes a reduced reading by a tenth of a foot, which would elevate the reading taken by Jan Mack and the Hearing Examiner to approximately .94 foot or 2.79 cfs or 111.6 miner's inches. The gate on the outlet from the pond to Tudor Lane Ditch was opened completely. Spring Creek was contributing to the flow; however, we did not view the flume in Spring Creek to take a reading. (Applicants' Exhibit 1 and 6 and personal observation.)

13. Objector Boylan uses Tudor Lane Ditch to convey water out of South Dry Creek to his property in Section 32, Township 2 South, Range 5 East, to irrigate approximately 72 acres. Prior to the construction of Applicants' pond, Objector Boylan diverted Spring Creek water at the point where Spring Creek intersected the ditch. At that point or somewhere near that point, a structure consisting of two 18 inch corrugated culverts and a metal headgate was in place to allow Objector Boylan to discharge the water in the ditch which was not needed on his land into South Dry Creek. (Applicants' Exhibits 1 and 6.)

14. Objector Boylan believes he has a historical right to South Dry Creek and Spring Creek water. However, the only timely

Statement of Claim for water to be transported by Mr. Boylan through the Tudor Lane Ditch is Statement of Claim W042370-41H filed by William Boyd Boylan claiming 100 miner's inches of Dry Creek. Untimely Statement of Claim W213948-41A was filed by W. (William) Boyd Boylan on May 15, 1989, for Spring Creek waters to be delivered by Tudor Lane Ditch. (Statement made by Applicants' counsel, testimony of Douglas Boylan and Jan Mack, Applicants' Exhibit 1, Department file, and Department records.)

15. Before construction of the pond, Objector Boylan diverted water from South Dry Creek into Tudor Lane Ditch by using canvas dams. The dams were placed into South Dry Creek to divert all of the waters of South Dry Creek into the Tudor Lane Ditch. Spring Creek water was also diverted into Tudor Lane Ditch at the point where it intersected the ditch. After construction of the pond, Objector Boylan diverts the water from South Dry Creek into Tudor Lane Ditch by the stop log headgate installed by Applicants, which is a great deal easier than installing a canvas dam. The District Court found that the operation of Mr. Boylan's diversion system is essentially the same as it was before except that the headgates in the ditch installed by Applicants improved Mr. Boylan's facilities. (Applicants' Exhibit 1 and testimony of Lawrence Van Dyke.)

16. Objector Boylan feels that permits should not be issued for water that has been claimed "forever, since they've kept records." Objector Boylan is having trouble getting enough water for irrigation and just does not want any more interference at

this time. Other persons are appropriating South Dry Creek water and causing a shortage for Mr. Boylan. (Testimony of Douglas Boylan.)

17. Mr. Boylan does not agree that flow-through ponds are nonconsumptive. He believes water is lost to the system through seepage and evaporation. (Testimony of Boyd Boylan.)

Applicants' expert witness during the trial stated that approximately 3.3 acre-feet per year would be lost to evaporation, but that 1.0 acre-foot would be gained through precipitation, so that reduces the amount of water lost to the system to 2.3 acre-feet per year. The phreatophytes that existed in the area of the pond used water at a rate of approximately 3.8 acre-feet per year, so the removal of those plants in the pond area offset any loss by evaporation. (Applicants' Exhibits 1 and 6.)

18. Objector Boylan is objecting to this application to discourage similar applications in the future. (Testimony of Douglas Boylan.)

19. There are no other planned uses for which a permit has been issued or for which water has been reserved that may be adversely affected by the proposed project. (Testimony of Applicant and Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

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

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1989), are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

.....
(4) To meet the substantial credible evidence standard in this section, the applicant

shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, fish and wildlife, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2) (1991). Applicants would beneficially use all the water diverted. There is no evidence in the record that Applicants would waste water. See Finding of Fact 4.

5. The Applicants have provided substantial credible evidence that the means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 7, 8, 9, 10, and 11.

6. The Applicants have provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 12, 13, 14, 15, and 17.

The criteria for nonconsumptive use is that there would be little or no diminution in supply and that water would be returned to the source of supply sufficiently quickly that little or no disruption would occur to stream conditions below the point of return. See In re Application 49573-s43B by Carter; In re Applications 29912-s41I and 29913-s41I by Diamond City Mining Co. Applicants' pond meets those requirements. The District Court found, and the Montana Supreme Court affirmed, that ". . . the waters of the Spring Creek were fully flowing into the pond

and would naturally flow out of the pond into the Tudor Lane Ditch together with the waters of the Dry Creek" and "[t]he flow of water through the Tudor Lane Ditch has not been interfered with. The water flows from Dry Creek into the ditch, through the pond and further down the ditch onto [Mr. Boylan's] land." The water is not taken from the pond by the Applicants; therefore there is no delay in returning the water to the source. It is true there will be some loss by evaporation and seepage; however, the loss by evaporation is offset by the removal of phreatophytes in the pond area. See Finding of Fact 17. The District Court found there is no seepage of any significance. See Finding of Fact 9.

Moreover, Objector Boylan does not have a water right to use water from Spring Creek. See Finding of Fact 14. A recent decision by the Montana Supreme Court upheld the Department's position that failure to file a timely statement of claim with the water court establishes a conclusive presumption of abandonment of that right as stated in Mont. Code Ann. § 85-2-226 (1991).

7. Applicants have provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion. At times when the water can be put to the use proposed by the Applicants, unappropriated water is reasonably available during the period in which the Applicants seek to appropriate. See Finding of Fact 4, 6, 12, and 14.

However, Applicants did not provide substantial credible

evidence water is available in the amount they seek to appropriate. See Finding of Fact 7. The maximum flow rate measured in Spring Creek was 15.6 miner's inches which is 175.03 gallons per minute. Nevertheless, Applicants can beneficially use any amount of water that flows from Spring Creek into the pond; therefore the maximum amount of water that can be permitted is 175.03 gpm up to 282.32 acre-feet per year.

Mr. Boylan expressed a belief that a permit should not be issued for water that has been claimed by others. See Findings of Fact 15. Issuing permits for water that has been claimed by other users is consistent with Montana's water policy to encourage the wise use of the State's water resources by making them available for appropriation and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people. Mont. Code Ann. § 85-2-101(3) (1991). As long as the new use does not adversely affect the water rights of a prior appropriator and meets the other criteria for issuance of a permit, it matters not that the water has been claimed by another downstream user. The waters of any stream in Montana are used many times. Some of the appropriated waters, after use, flow back into the stream as return flows and are picked up, used again and returned to the stream and so on, getting the maximum use for the benefit of the people of Montana. In the instant case, the use is nonconsumptive and there is no adverse effect; therefore it is

proper to issue a permit for water that has been claimed by other users.

8. It is true Applicants diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. See Finding of Fact 7. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application 52031-s76H by Frost. Moreover, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.

9. In part, the objection to this application was based on a fear of similar applications in the future. See Finding of Fact 18. Mont. Code Ann. § 85-2-311(b) (1991) provides that the Department shall issue a permit if the applicant proves by substantial credible evidence that the water rights of prior appropriators will not be adversely affected. This mandatory directive cannot be ignored on the supposition that future appropriations might cause an adverse effect. The Department must proceed on a case-by-case basis and each individual application must be examined on its own merits. Any application that threatens injury to other water users must be denied or

modified. In re Application 25534-c76H by Griff; In re Application 28224-s41I by Loomis/Edenfield.

10. Applicants have provided substantial credible evidence they have possessory interest in the proposed place of use. See Finding of Fact 5.

11. The Applicants have provided substantial credible evidence the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 19.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restriction, and limitations specified below, a Beneficial Water Use Permit is hereby granted for Application 70919-s41H by Lawrence J. and Berna Sue Van Dyke to appropriate 175.03 gallons per minute (gpm) up to 282.32 acre-feet of the waters of an unnamed tributary of South Dry Creek, locally known as Spring Creek, at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4 by means of an on-stream dam for a flow through fish and wildlife pond. The reservoir shall have a capacity of 3.3 acre-feet. The period of diversion and use shall be from January 1 through December 31, inclusive of each year.

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

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

2. This permit is subject to the condition that the Permittee shall install adequate flow measuring devices in order to allow the flow rate of all waters diverted to be recorded. One flume shall be installed in the Tudor Lane Ditch directly below the Boylan South Dry Creek diversion; another shall be installed in Spring Creek just before Spring Creek flows into the pond; and a third flume shall be installed where the water exits the pond into Tudor Lane Ditch. The Permittee shall keep a written record of the flow rate 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, 111 N. Tracy, Bozeman, MT 59715 PH: (406) 586-3136.

3. This permit is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

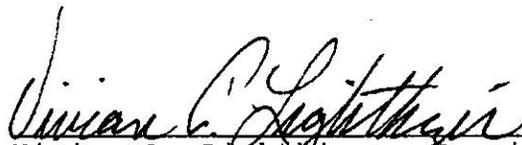
NOTICE

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 10th day of June, 1992.


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

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 10th day of June, 1992 as follows:

Lawrence J. Van Dyke
Berna Sue Van Dyke
5651 Love Lane
Bozeman, MT 59715

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