

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. 77494-S42M BY ALLAN KREIMAN)

* * * * *

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 September 12, 1991, 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, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 77494-s42M is hereby granted to Allan Kreiman to appropriate 1,000 gallons per minute (gpm) up to 80 acre-feet per year for the irrigation of 40 acres located in the NE $\frac{1}{4}$ of Section 29, Township 19 North, Range 52 East in Dawson County. There will be two points of diversion, one on an unnamed tributary of North Fork of Deer Creek, and the other on North Fork of Deer Creek. Both locations are in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 29.

A dam will be erected to create a reservoir with a capacity of 80

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acre-feet on the unnamed tributary of North Fork of Deer Creek to capture the flow of that stream. If the unnamed tributary of the North Fork of Deer Creek does not yield 80 acre-feet, the balance of the water up to 30 acre-feet will be pumped into the reservoir by means of a 1,000 gpm pump from North Fork of Deer Creek during periods of high runoff. The period of appropriation by both the reservoir and the pump shall be from January 1 through December 31, inclusive of each year. The period of use shall be from April 1 through October 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 earth filled dam shall be designed by and constructed under the supervision of a Professional Engineer registered in Montana and experienced in the design of dams or by an engineer employed by the Soil Conservation Service.

3. This Permit is subject to the permanent installation of an adequated drainage device to satisfy existing prior rights.

4. This Permit is subject to the preferred use of those certain Yellowstone River Basin reservations granted by the Board of Natural Resources and Conservation on December 15, 1978, and as amended by Board Order on November 21, 1980.

5. This Permit is restricted to the appropriation of excess water. At no time shall the Permittee divert the entire flow of

the North Fork of Deer Creek.

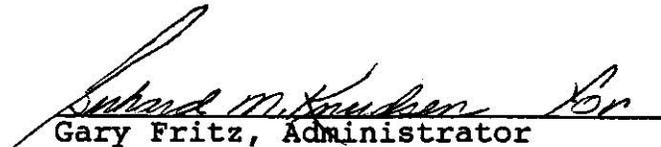
6. The permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted by the pump from the North Fork of Deer Creek to be recorded. The Permittee shall keep a written record of the flow rate and volume of waters diverted, including the period of time, and shall submit said records by November 30, of each year to the Water Resources Regional Office, P.O. Box 1269, Glasgow, MT 59230.

7. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

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 10th day of October, 1991.


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 10th day of October, 1991 as follows:

Allan Kreiman
Route 1, Box 35
Lindsay, MT 59339

Edwin W. Bryhn
HC 68 Box 8233
Glendive, MT 59330

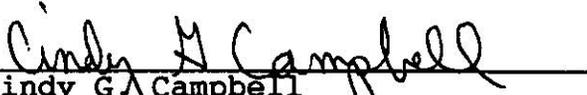
Rosalie Wyman
Mark Nelson
Representing S.D. Nelson
Estate
P.O. Box 1003
Glendive, MT 59330

Roy Jones, Manager
Glasgow Water Resources
Regional Office
P.O. Box 1269
Glasgow, MT 59230

Valber F. Bryhn
RR #1, Box 40
Lindsay, MT 59339

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

Gary Kreiman
Route 1, Box 26
Lindsay, MT 59339


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
NO. 77494-s42M BY ALLAN KREIMAN)

* * * * *

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 July 30, 1991, in Glendive, Montana, to determine whether the above Application should be granted to Allan Kreiman under the criteria in § 85-2-311(1), MCA.

Applicant Allan Kreiman appeared by and through his sons, Gary Kreiman and Dale Kreiman.

Objectors Rosalie Wyman and Mark Nelson appeared at the hearing by and through Rosalie Wyman.

Objector Valber F. Bryhn appeared at the hearing in person and by and through her daughter, Irene Bryhn Gross.

Jack Eaton, Owner of the Hot Bar Ranch, appeared at the hearing as a witness for Objector Wyman.

Ron Miller, Water Right Specialist with the Glasgow Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Roy Jones, Regional Manager of the Department's Glasgow Water Resources Regional Office, appeared at the hearing.

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PRELIMINARY MATTERS

There is an error on the Public Notice. The Date Filed entry is 2/25/1990. This Application was filed on February 25, 1991. This error is inconsequential, therefore the notice need not be republished; however, it did create ill will among the objectors who thought the Applicant had known about the proposed project for over a year and had not bothered to inform them.

EXHIBITS

Applicant's Exhibit 1 is a video tape labelled on its spine, "Kreiman Ranch: Proof of creek flow from springs below their point of diversion. (After high water - spring runoff) Date: 5/19/91." (20 minutes - 30 seconds running time) The purpose of the video tape is to show that under normal conditions, spring runoff and high water is the only suitable opportunity to pump from the North Fork of Deer Creek and to show that 90 percent of the creek flow is from springs that come in below Applicant's proposed point of diversion to freshen the livestock water downstream.

Objector Wyman objected to the video tape, after it had been shown and accepted into the record, on the basis that it is biased. Technically, there is no need to rule on this late objection; however, to assure this proceeding is fair, the Hearing Examiner will rule as follows: Yes, the video is biased. However, that is to be expected of any exhibit offered into the record. A party certainly would never offer an exhibit that would adversely affect his/her case. Since it is expected, the

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Hearing Examiner overrules the objection and affirms that the video tape is accepted into the record.

Applicant's Exhibit 2 consists of three pages. The first is written permission to enter property and is signed by Marvin L. Spencer of Spencer, Inc., Justus Hagen, Jim Squires of Squires, Inc., and John E. Kubesh of Diamond V Corp. The second page is an affidavit by Gary Kreiman that the photographs and video taken on the 19th of May, 1991, are true descriptions of the lands and water tributaries. At the bottom of this page the video camera operator is identified as Dennis Ketterling. The third page is an estimate of the watershed yield on the North Fork of Deer Creek below the Applicant's proposed diversion. Objector Wyman objected to the last page of this exhibit being accepted into the record because the person who prepared the document did not identify himself. When told the watershed yield was prepared by Mark Zuber of the Glendive Soil Conservation Service, Objector Wyman then objected because the data had not been supported. The Hearing Examiner reserved a ruling on this objection.

When there is a stream with a gauging station, one can find the number of acres in the watershed, then divide the acreage of the watershed into the amount of water measured to find the average runoff per acre which in this case is 0.4 acre-inch. When there is an area with the same characteristics as the area in question, the data for the gauged area can be applied to the area without a gauge. To find the number of acres in an area, one simply outlines the area on a topographical map, then uses a

planimeter which will show the total square miles of the area. The square miles are then multiplied by 640 (the number of acres in a square mile) to find the number of acres in the total watershed. One then multiplies the mean annual runoff figure and the number of acres to find the runoff in acre-inches which is then converted to acre-feet by dividing by 12.

It is clear from the document that the standard method was followed; therefore, the objection is overruled and the exhibit is entered into the record. The Hearing Examiner is aware that any watershed yield indicates the average annual runoff and does not represent the yield of any given year which could be either a higher or lower actual yield.

Applicant's Exhibit 3 is a photograph album with 12 pages. Two photographs are placed on each page, except the ninth page, along with a typewritten explanation of the subject. Most of the pictures have the date developed printed on the back. Those that do not are older pictures with the dates written in ink on the front of the photograph. This exhibit was accepted into the record without objection.

Applicant's Exhibit 4 consists of a copy of page 289 and a copy of page 290 of the water right listing by source name by land description compiled by the Department. The highlighted areas are records of water rights and owners located on the main stem of North Fork of Deer Creek below the proposed points of diversion. Applicant has calculated the total requirement of water for these users to be 163 acre-feet per year. Then

Applicant deducted the 57 acre-feet claimed by Squires Inc. because the reservoir used by Squires Inc. is washed out and no longer in use.¹ This exhibit was entered into the record without objection.

Objectors Wyman-Nelson's Exhibit 1 consists of a single letter sized paper with three photographs affixed to it. The date written on the face of each photograph is the date the photograph was taken. At the top of the page next to a photograph is a statement. It is not clear what the statement has to do with the photograph. Near the center of the page a photograph taken in 1986 is affixed. There is no written explanation for this photograph. A third photograph is affixed to the bottom of the paper. The explanation of this photograph is written to the left and under the bottom photograph and the middle photograph covers the explanation completely except the word "pasture." Applicant objected to this exhibit being entered into the record because the dates were not verified by the developer.

If one looks closely at the two larger photographs, a bit of green grass can be seen growing up into the brown grass. This indicates the photographs were taken in the spring. There is no way to determine the year. In the photograph at the middle of the page the creek is flowing and snow is on the ground

¹The Hearing Examiner calculated the total to be 164.82 acre-feet per year before the deduction of Squires' 57 acre-feet per year which after it is deducted leaves a total requirement of water for those users at 107.82 acre-feet per year.

indicating the spring season. These photographs indicate there are times when the creek does not flow on Objector Wyman's property as well as times when there is an excess of water. For this reason, Applicant's objection is overruled and the exhibit is entered into the record.

Objectors Wyman-Nelson's Exhibit 2 consists of three pages. The first and second pages are a copy of a Warranty Deed. The third page is a copy of a Notice of a Water Right filed on March 4, 1895. This exhibit was entered into the record without objection.

Objectors Wyman-Nelson's Exhibit 3 is a copy of page 69 of the Dawson County Soil Survey. This page discusses the climate and contains a chart of temperature and precipitation data. This exhibit was accepted into the record without objection.

Objector Bryhn's Exhibit 1 consists of two pages. The first page is weather data for the week ending April 13, 1991. The second page is from the Crop-Weather Report. This exhibit was accepted into the record without objection.

Objector Bryhn's Exhibit 2 consists of 14 pages which are copies of the Climatological Data of Montana for 1990. This exhibit was accepted into the record without objection.

The Department file was made available for review by all parties who had no objections to any part of it; therefore, it is entered into 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:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Allan Kreiman duly filed the above-entitled Application with the Department on February 25, 1991.

3. Pertinent portions of the Application were published in the Ranger-Review on April 4, 1991.

4. Applicant proposes to appropriate 1,000 gallons per minute (gpm) up to 80 acre-feet per year for the irrigation of 40 acres located in the NE $\frac{1}{4}$ of Section 29, Township 19 North, Range 52 East in Dawson County¹. Applicant proposes two points of diversion, one on an unnamed tributary of North Fork of Deer Creek, and the other on North Fork of Deer Creek. Both locations are in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 29. Applicant proposes to erect a dam to create a reservoir with a capacity of 80 acre-feet on the unnamed tributary of North Fork of Deer Creek to capture the flow of that stream. If the unnamed tributary of the North Fork of Deer Creek does not yield 80 acre-feet, the available

¹Unless otherwise specified all land descriptions in this proposal are located in Township 19 North, Range 52 East, in Dawson County.

water up to 30 acre-feet would be pumped into the reservoir by means of a 1,000 gpm pump from North Fork of Deer Creek during periods of high runoff. The proposed period of use is April 1 through October 31, inclusive of each year. (Department file and testimony of Gary Kreiman.)

5. On the Application, Applicant requests the period of appropriation to be from January 1 through December 31, inclusive of each year, but in item 4 of the "work copy" of the Application, the Applicant states the pump will be used only during spring runoff. When questioned about this conflicting statement, Gary Kreiman stated that he had failed to change that statement when he made the change for the period of appropriation for year round use. The change on the "work copy" of the Application for the period of appropriation indicates the period of diversion would be year round only for the dam on the unnamed tributary of North Fork of Deer Creek and that the period of diversion for the pump on the North Fork of Deer Creek would be from February 1 to September 15, inclusive of each year. During the hearing, Gary Kreiman stated his intent was to be able to appropriate water up to the permitted amount, 80 acre-feet, from both sources, not to exceed 30 acre-feet per year from the North Fork of Deer Creek, at any time when there were excess waters either from snowmelt or rainstorms. All of the Objectors indicated they thought Applicant's intent was to appropriate year round. The Public Notice stated the period of appropriation was from January 1 through December 31, inclusive of each year.

Regardless of the time of year, if a permit is granted for this Application, Applicant would be permitted to pump at a rate of 1,000 gpm from the North Fork of Deer Creek a total of seven days or 168 hours out of a year to obtain 30 acre-feet of water. (Department file, testimony of Gary Kreiman, and testimony of Dale Kreiman.)

6. Applicant proposes to place a steel pipe at a permanent pump site so that when water is available in the North Fork of Deer Creek, he would not have to struggle to set up a pump site, instead, he would merely have to connect the pump to the steel pipe and start it. Applicant proposes to excavate a depression to the side of the creek to serve as a pumping pit. The pump used to fill the reservoir would also be used to pump water to the sprinkler system. (Testimony of Gary Kreiman.)

7. The proposed dam and diversion works would be constructed under the supervision of a licensed engineer or an engineer with the Soil Conservation Service. (Testimony of Gary Kreiman.)

8. Applicant filed an application with the Department for a hazard determination of the proposed dam as required by the Dam Safety Act. The Department determined the proposed dam would be a low-hazard dam. (Testimony of Gary Kreiman and Ron Miller.)

9. Applicant owns the proposed place of use. (Testimony of Gary Kreiman and Department file.)

10. On May 19, 1991, there was a trickle of water at Applicant's proposed points of diversion. Farther down the

stream, approximately one-half mile below Applicant's proposed point of diversion, the creek was five inches deep and eight inches wide and the flow rate of the stream began to increase. Flow from springs on the hillside was entering the stream. On the same date at a point approximately three-quarters of a mile downstream from Objector Wyman's property, the North Fork of Deer Creek was seven inches deep, 14 inches wide, and the water was flowing rapidly. Objector Wyman's property is approximately seven miles downstream from Applicant's proposed point of diversion. Applicant did not have a flow meter to accurately measure the flow rate. (Applicant's Exhibits 1 and 2 and Department file.)

11. There was no flow at certain points on the Wyman-Nelson property on April 20, 1991. However, there was flow on the Wyman-Nelson property in May of 1991. (Applicant's Exhibit 3 and Objectors Wyman-Nelson Exhibit 1.)

12. The weather data for April 13, 1991, indicates that from January 1, 1991, there had been above average precipitation. Mrs. Gross had chosen to highlight the data for Glasgow which is located approximately 127 miles northwest (as the crow flies) of Glendive when data for Miles City would have better represented the Glendive area which is located 78 miles northeast of Miles City. Nevertheless, the precipitation had exceeded the normal at both locations. The three previous years had been extremely dry, especially 1988. (Objector Bryhn's Exhibit 1, testimony of Objector Wyman and Gary Kreiman.)

13. During a normal year about 80 percent of the annual precipitation falls during the growing season of April to September. Ordinarily June is the wettest month by far, but July is next in wetness and then May. (Objectors Wyman-Nelson's Exhibit 3.)

14. Objectors Nelson and Wyman have an exempt stock water right. At the present they have only 20 head of livestock; however, in the past they have had up to 115 head of livestock. (Testimony of Objector Wyman.)

15. Objector Bryhn has filed Statements of Claim No. W165729-s42M and W101455-s42M for water from the North Fork of Deer Creek. Claim No. W165729-s42M claims 40 gpm up to two acre-feet per year for stock water. Claim No. W101455-s42M claims 100 gpm up to two acre-feet per year for stock water. (Applicant's Exhibit 4.)

16. There were no objections to placing a dam on the unnamed tributary of North Fork of Deer Creek as proposed by the Applicant. Objectors were most concerned about the question of monitoring the Applicant's pumping from North Fork of Deer Creek. Objectors felt the period of pumping should be limited to a certain date such as from January 1 to April 15. (Objectors Wyman and Bryhn.)

Applicant is willing to install a measuring device if it were a condition on his permit. (Testimony of Gary Kreiman.)

17. On July 4, 1978, in May of 1991, and in July of 1991, there were excess waters in the North Fork of Deer Creek at the proposed point of diversion. (Applicant's Exhibit 3.)

18. There are some years in which water could be appropriated by the Applicant and also supply the downstream users. (Testimony of Irene Gross.)

19. Hot Bar Land and Cattle Company (Hot Bar), at one time owned by Jack Eaton, had a water right filed by John Bamber on March 5, 1895, to appropriate 1,000 miners inches (11,220 gpm) of the waters of Deer Creek. In 1981, Hot Bar filed Statement of Claim No. W34588-s42M claiming a right to use 9,000 to 30,000 gpm for irrigation of 400 acres in Section 7, Township 16 North, Range 56 East. This Statement of Claim was based on the John Bamber filing of March 5, 1895. The point of diversion is at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 16 North, Range 56 East, on the main stem of Deer Creek. This location is approximately 25 miles downstream from Applicant's proposed project. Hot Bar purchased the property in 1951. Soon after, Mr. Eaton began to notice a slight decrease in the flow until finally there was no flow. The property has now been transferred to John W. and Elma D. Eaton and Marjorie Baisch. Objector Wyman asked Mr. Eaton to testify to emphasize that often more water rights have been recorded than there is water. (Testimony of Jack Eaton, Objector Wyman, and Department records.)

20. The Montana Department of Fish, Wildlife, and Parks, the Department of Health and Environmental Sciences, and the

Richland County Conservation District, hold reservations for water from the Yellowstone River. However, these agencies did not object to the issuance of a permit for the proposed project. (Department records and Department file.)

21. There are no planned uses or developments for which a permit has been issued on the North Fork of Deer Creek.

(Applicant's Exhibit 4.)

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.

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, 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, irrigation, is a beneficial use. See § 85-2-102(a), MCA.

5. Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 9.

6. Applicant has proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed point of diversion in the amount requested and that during the proposed period of diversion the amount requested is reasonably available. See Finding of Fact 17. The test for availability of unappropriated water consists of proving the physical presence of water at the intended points of diversion. See § 85-2-311(1)(a); In re Application No. 72399-s41D by United States; In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-g42M by Crisafulli; Department of

Natural Resources and Conservation, Summary Report: Clark Fork Basin Water Use (1990).

7. It is clear that excess water is not available every year. See Finding of Fact 17, 18, and 19. However, the Applicant is not required to prove water is available every year to fulfill § 85-2-311(1)(a), MCA. All that need be shown is that there are sufficient waters in at least some years for the Applicant's appropriation, and that the Applicant's appropriation is administrable. See In re Application No. 43117-s41P by Morris Mancoronal, Final Order, June 14, 1984. The appropriative system by its very nature contemplates that at times the supply will be less than the rights therein. It is the foundation for the rule of which appropriator is to forego exercise of its rights in those times of shortage. "First in time, first in right" would never operate if no call were ever made. See In re Application No. 41255-g41B by Allred; MPC v. State ex rel. Carey, 41 St. Rep. 1233, 685 P.2d 386, (1984).

8. The Applicant has provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 6, and 7.

9. Applicant has complied with § 85-15-209, MCA, of the Dam Safety Act. See Finding of Fact 8.

10. Applicant has provided substantial credible evidence the water rights of prior appropriators will not be adversely affected by the proposed project. See Findings of Fact 5, 10,

17, and 18. Applicant stated repeatedly that his goal was to appropriate excess waters from both sources. Applicant has no intention of appropriating the Objectors' stock water. See Finding of Fact 4, 5, 14, and 15.

Applicant has shown by uncontradicted evidence that most of the water reaching the Objectors is water from springs along the North Fork of Deer Creek below his proposed points of diversion. See Finding of Fact 10. No doubt the flow was greater in 1991 than it had been in the last few years. See Finding of Fact 12. Nevertheless, the principle is the same. Applicant does not intend to appropriate the normal flow of the creek and would appropriate only when there are excess waters. See Finding of Fact 4.

11. There was some confusion as to the actual period of appropriation. Since all parties assumed Applicant's intent was to appropriate from January 1 through December 31, and the Public Notice so stated, one must conclude Applicant's true intent was to do so. See Finding of Fact 5.

The Objectors voiced their preference to have the period of diversion set to a particular date. See Finding of Fact 16. However evidence in the record indicates high runoff periods in the North Fork of Deer Creek can occur at any time of the year. See Findings of Fact 12, 13, and 17. It is senseless to set the period of appropriation from January 1 to April 15 as suggested by the Objectors when most of the precipitation occurs after that period. See Finding of Fact 13.

12. There are reservations for use of Yellowstone River water; however, since those reservation holders did not object to the instant Application, it is likely the proposed new water use would not adversely affect the reserved water rights. See Finding of Fact 20. Nor would the proposed project adversely affect any planned developments for which a permit has been issued. See Finding of Fact 21.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 77494-s42M is hereby granted to Allan Kreiman to appropriate 1,000 gallons per minute (gpm) up to 80 acre-feet per year for the irrigation of 40 acres located in the NE $\frac{1}{4}$ of Section 29, Township 19 North, Range 52 East in Dawson County. There will be two points of diversion, one on an unnamed tributary of North Fork of Deer Creek, and the other on North Fork of Deer Creek. Both locations are in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 29. A dam will be erected to create a reservoir with a capacity of 80 acre-feet on the unnamed tributary of North Fork of Deer Creek to capture the flow of that stream. If the unnamed tributary of the North Fork of Deer Creek does not yield 80 acre-feet, the balance of the water up to 30 acre-feet will be pumped into the reservoir by means of a 1,000 gpm pump from North Fork of Deer Creek during periods of high runoff. The period of appropriation by both the

reservoir and the pump shall be from January 1 through December 31, inclusive of each year. The period of use shall be from April 1 through October 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 earth filled dam shall be designed by and constructed under the supervision of a Professional Engineer registered in Montana and experienced in the design of dams or by an engineer employed by the Soil Conservation Service.

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

4. This Permit is subject to the preferred use of those certain Yellowstone River Basin reservations granted by the Board of Natural Resources and Conservation on December 15, 1978, and as amended by Board Order on November 21, 1980.

5. This Permit is restricted to the appropriation of excess water. At no time shall the Permittee divert the entire flow of the North Fork of Deer Creek.

6. The permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted by the pump from the North Fork of Deer Creek to be recorded. The Permittee shall keep a written record of the flow rate and volume of waters

diverted, including the period of time, and shall submit said records by November 30, of each year to the Water Resources Regional Office, P.O. Box 1269, Glasgow, MT 59230.

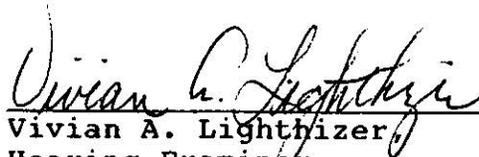
7. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

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 12th day of September, 1991.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 12th day of September, 1991 as follows:

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CASE # 77494