

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  
81391-s76H BY IRVING J. AND DEBRA )  
D. SCHIELDS )

\* \* \* \* \*

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 May 27, 1993, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application for Beneficial Water Use Permit 81391-76H by Irving J. and Debra D. Schields is denied.

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the

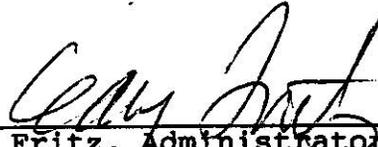
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**CASE # 81391**

party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 22 day of June, 1993.



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 23<sup>rd</sup> day of June, 1993 as follows:

Irving J. & Debra D. Schields  
P.O. Box 316  
Darby, MT 59829

Rodney I. & Karen A. Greenup  
P.O. Box 493  
Darby, MT 59829

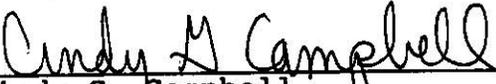
A. Glade & G. JoAnn Greenup  
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Darby, MT 59829

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Missoula Water Resources  
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(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
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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  
81391-s76H BY IRVING J. AND DEBRA )  
D. SCHIELDS )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on April 22, 1993, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991) for the above-entitled application.

APPEARANCES

Applicants Irving J. and Debra D. Schields appeared at the hearing by and through Irving J. Schields.

Objectors Rodney I. Greenup, Karen A. Greenup, Glade Greenup, and JoAnn Greenup appeared at the hearing in person and by and through counsel, Charles H. Recht.

Tom Gale, Water Commissioner, appeared at the hearing as a witness for Objectors Greenup.

Lee Yelin, Senior Water Rights Specialist with the consulting firm of Land and Water, Inc., appeared at the hearing as a witness for Objectors Greenup.

EXHIBITS

Applicants did not offer any exhibits for inclusion into the record.

**CASE # 81391**

Objectors offered twelve exhibits for inclusion into the record. All were accepted into the record without objection.

Objectors' Exhibit 1 is a large aerial photo with an overlay of clear plastic film on which the Chief Joseph/Greenups' pipeline, the location of the diversion, the metal drop box, the ditch which diverts water from Tin Cup Creek to the concrete diversion on Little Tin Cup Creek, and the location of Applicants' dam have been drawn in black ink. The location of the diversion on Tin Cup Creek and the Parshall flume on Little Tin Cup Creek are identified in red ink. A portion of Tin Cup Creek, Little Tin Cup Creek, and a spring have been drawn on the overlay in blue ink. The common corner of Sections 21, 22, 27, and 28, Township 3 North, Range 21 West, in Ravalli County; the common corner of Sections 20, 21, 28, and 29; and the common corner of Sections 16, 17, 20, and 21 have been drawn on the overlay in green. On the photo, the section corners and certain other reference points have been identified in blue pencil.

Objectors' Exhibit 2 consists of two cassette tapes made during the informational meeting conducted by Wes McAlpin on January 22, 1993.

Objectors' Exhibit 3 is a copy of an M.S. Thesis by Jonathan D. Hoffman on *Water Use, Groundwater Conditions, and Slope Failure on Benchlands in Western Montana*, subtitled *The Darby Slide Example*. Lee Yelin has highlighted several points in this

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'Unless otherwise stated all land descriptions in this Proposal are located in Township 3 North, Range 21 West, in Ravalli County, Montana.

thesis and compared them with Applicants' location which is inside the study area for the thesis.

Objectors' Exhibit 4 consists of 11 pages. The first page is simply a cover page identifying the contents and Lee Yelin as the person who took the photos on April 9, 1993. Pages 2 through 5 and 7 through 11 have two photographs affixed to each of them with the captions describing each photograph typed either beside or above each photograph. Page 6 has a single photograph affixed to it with the caption typed above the photograph.

Objectors' Exhibit 5 is a copy of Technical Release No. 60 210-VI entitled *Earth Dams and Reservoirs* which was compiled by the U.S. Department of Agriculture, Soil Conservation Service, Engineering Division.

Objectors' Exhibit 6 is a single page entitled Rectangular Channel Analysis & Design, Open Channel - Uniform flow. This exhibit shows the discharge of Little Tin Cup Creek was 3.18 cubic feet per second on April 9, 1993.

Objectors' Exhibit 7 consists of two pages. One is a Memorandum from Allan Kuser, Water Rights Specialist to Lee Yelin, Senior Water Rights Specialist, stating the size of the watershed as well as the approximate amount of runoff annually produced by the watershed. The other is an 11 inches by 14.5 inches copy of a portion of the USGS Trapper Peak Quadrangle map, and another quadrangle map which is not identified, depicting Little Tin Cup Creek drainage basin area.

Objectors' Exhibit 8 is a copy of a preliminary report by Howard Newman, Hydrogeologist, on Cook and Lynch ponds located on Bourne Gulch. Lee Yelin has highlighted certain portions of the report that he requested the Hearing Examiner to read and marked those locations with yellow Post-it notes.

Objectors' Exhibit 9 consists of eight pages. Two of the pages are 11 inches by 14.5 inches and the remaining six are regular sized pages. One of the large pages is a soils map of the area in which Applicants' dam is located and the drainage area immediately above it. The other large page identifies the soils indicated by the numbers and letters on the soils map. The regular sized pages explain in detail the soils properties. The titles of pertinent portions are highlighted in yellow.

Objectors' Exhibit 10 is an enlarged color copy of page 14 of the *Ravalli County Water Resources Survey*. Mr. Yelin drew in the location of Applicants' reservoir with a pencil during the hearing.

Objector did not offer Exhibit 11.

Objectors' Exhibit 12 is a portion of a bill for electricity used to power the irrigation pump used by Objectors. This bill reflects 22 days of pumping according to Karen Greenup.

Objectors' Exhibit 13 consists of two pages of graph paper. The first is a drawing by Lee Yelin of Applicants' diversion and the location of the screened pipe and wheelgate which opens the drain on the bottom of the reservoir in relation with the level of water in the pond. The second page shows the water elevation

in the pond and the locations of the screened pipe and wheelgate which opens the drain on the bottom of the reservoir as well as the sharp turn of the emergency spillway.

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

Immediately prior to the hearing the parties were given the opportunity to review a draft copy of *Private Montana Fish Ponds*, by Joseph Urbani and Associates, Inc. for The Montana Department of Fish, Wildlife, and Parks, draft dated January 1993. The Hearing Examiner stated her intent to take official notice of this material. No objection was expressed by any party. The Hearing Examiner also takes official notice of the Department's records, specifically Objectors' water rights and the Tin Cup Decree.

#### PRELIMINARY MATTERS

During the hearing, Irving Schields moved that Tom Gale's testimony be stricken because the map Mr. Gale was using showed Little Tin Cup Creek and Spoon Creek merging just before entering Tin Cup Creek. He stated that Mr. Gale, as Water Commissioner, should know Little Tin Cup Creek actually enters Tin Cup Creek about one-half mile upstream. Mr. Gale's map was comprised of several USGS topographic maps. A copy of one of those maps is in the Department file and it does indeed show Little Tin Cup Creek and Spoon Creek merging just before entering Tin Cup Creek. With all the man-made ditches in the area it is difficult to determine

the original route of these creeks. At any rate, Mr. Gale stated during his testimony that he does not regulate the waters of Little Tin Cup Creek, but deals only with Tin Cup Creek proper. Mr. Gale's testimony will stand.

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. Mont. Code Ann. § 85-2-302(1) (1991) 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. Irving J. and Debra D. Schields duly filed the above-entitled application with the Department on March 31, 1992, at 10:50 a.m. (Department file.)

3. Pertinent portions of the file were published in the *Ravalli Republic* on November 10, 1992. 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. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated December 7, 1992. (Department file.)

4. Applicants seek to appropriate 4.58 acre-feet of the waters of Little Tin Cup Creek at a point in Lot 13 of the Tin Cup Creek Subdivision, more specifically located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 21. Applicants seek up to 1.00 acre-foot of water per year for domestic use and up to 3.58 acre-feet per year for an on-stream fish pond. The proposed period of appropriation is from January 1 through December 31, inclusive of each year. The proposed place of use for both uses is Lot 13 of the Tin Cup Creek Subdivision, more specifically located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 21. The proposed means of diversion is a dam. The proposed capacity of the on-stream reservoir according to the public notice and the application is 2.45 acre-feet. However, during the hearing, it was discovered Applicants had calculated the capacity of the reservoir using the height of the dam instead of the bottom of the spillway which is 5.5 feet below the top of the dam. Considering that fact, the reservoir is somewhat smaller than indicated in the public notice and the application. If the maximum depth is 12.5 feet and the surface area of the pond is .34 acres, the pond would impound 1.7 acre-feet of water. (Department file, Objectors Exhibits 4 and 13, and testimony of Irving Schields and Lee Yelin.)

5. Applicants' primary motive for constructing the reservoir was to recharge their domestic well. The well is 180 feet deep<sup>1</sup>. The reservoir lies approximately 130 feet south of

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<sup>1</sup>The letter in the Department file from Applicants states the well is 80 feet deep; however, Mr. Schields testified at the hearing that the well is 180 feet deep.

the well. There is an estimated drop in elevation of 50 feet from the well to the reservoir. When the reservoir is full, it increases the production of the well from 55 gallons of water with a 24-hour recharge to approximately 200 gallons of water with a 24-hour recharge which allows nearly normal household use. The static water level in the well when the pond is full is 50 feet which corresponds with the 50 feet of drop in elevation from the well to the reservoir. (Department file and testimony of Irving Schields.)

6. Impounding 553,946.7 gallons of water (1.7 acre-feet per year) to produce 52,925 gallons of water (145 gallons per day x 365 days) in the well has an efficiency rate of .095 percent. (Well known technical fact.)

7. The dam was constructed in late 1985. It is 35 feet wide at the bottom and 8.00 feet wide at the crest. The height of the structure is from 16 to 18 feet. The dam site was cleared down to the bottom of the stream bed, then huge boulders taken from Applicants' basement excavation were placed in the stream and other materials, gravel and dirt, from around the dam site were used to form the dam. A felt-like material<sup>1</sup> has been placed upon the upstream side of the dam and Applicants had begun to cover that material with clay. A 12-inch pipe with a slidegate was placed in the bottom of the dam. A standpipe is also connected to the 12-inch pipe. However, the screened part

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<sup>1</sup>This material is not water proof, but according to Irving Schields, it will hold the dirt in place. That appears to be its only function.

of the standpipe is approximately 3.5 feet higher than the bottom of the spillway and will most likely never be used. Because of the materials used to construct the dam, it has always leaked profusely. Applying the felt-like material and clay was intended to stop the leakage; however, Applicants ceased work on the dam when the complaint was made by the Greenups. On April 9, 1993, Lee Yelin documented by photo that the same amount of water was leaking through the dam as was flowing through the outlet pipe. The spillway, located at the toe of a slope on the north side of the dam, is 10 feet wide at the bottom and 16 feet wide at the top. (Department file, Objectors' Exhibits 4 and 13, and testimony of Irving Schields and Lee Yelin.)

8. The slopes on the dam are too steep. The sides of the dam are sloughing off in places. Applicants have protected the end of the pipe through the dam with pieces of logs placed as cribbing to keep the falling rocks and other materials from crushing it. Ideally slopes on a dam of this size should be at least three feet to one foot' if the dam were on a strong foundation and contained impervious materials. Applicants' dam does not contain continuous impervious material throughout the dam width and the slopes are one foot to one foot in places, greater in some places, but never exceeding a slope of two feet to one foot. (Testimony of Lee Yelin, Objectors' Exhibit 5, and Objectors Exhibit 13.)

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'For each foot of height, there should be three feet horizontally.

9. The spillway has the potential to be dangerous. It is located at the toe of a slope, below Applicants' home. This slope is comprised of Lick stony loam and Woodside very stony sandy loam. Lick soils are light-colored, moderately thick to thick surface soils; strong-brown, compact, gritty clay loam subsoils; and strongly weathered gritty loam substrata containing many rotten cobblestones and boulders. The surface soils are extremely erosive and may be lost rather quickly if improperly irrigated. Woodside soils have moderately thick to thick, light yellowish-brown loose surface soils. The moderately thick, yellowish-brown sandy loam contain subangular blocks of brown light loam. These soils are very similar to the soils in the "Darby Slide" slope failure. The causes of slope failure are those changes to a slope that either decrease the shear resistance, or increase the shear stress. Water is the main catalyst for slope failure. With porous slope materials such as those contained in the subject slope, raising the water table will increase the internal pore pressure, and thus decrease the shear resistance. Increased groundwater will also add to the total weight of the material, increasing the shear stress. Although Applicants' well was considered a dry well, there are springs in the area and ponding of water behind the dam will add water to the area. The spillway, which has a very sharp bend in it, is unvegetated and shows some undercutting. (Testimony of Lee Yelin and Objectors Exhibits 3, 4, and 9.)

10. The initial filling of the reservoir occurred during spring runoff in 1986. Applicants claim the reservoir is not capturing the flow of Little Tin Cup Creek, that the water is flowing through the pond. However, Applicants' well is recharged by seepage from the reservoir. Approximately 145 gallons per 24-hour period is not flowing through the pond but is percolating through the soil to the well. Not all of the water percolating through the soil goes into the well. Some is lost to groundwater or other drainages or may surface further downstream. When the Greenups begin to irrigate from Little Tin Cup Creek, there is very little water left in the stream and Applicants' pond level begins to decline. Water must then be captured to refill the pond. The pond is not a nonconsumptive pond. An unspecified amount is lost through the bottom of the pond that is no longer available for the prior appropriators. (Objectors' Exhibit 8 and testimony of Irving Schields and Lee Yelin.)

11. Little Tin Cup Creek, also known as South Tin Cup Creek, is a perennial stream which flows into Tin Cup Creek at a point located approximately one half-mile downstream of Applicants' dam. (Department file and Objectors' Exhibits 1 and 10.)

12. The Montana Department of Fish, Wildlife, and Parks will not license a fish pond located on a perennial stream. Nor will it allow the owner to stock fish in such a pond. Mr. Schields stated he did not intend to stock fish in the pond, but intended to provide a pool of water during periods of low flow

for the naturally occurring fish in Little Tin Cup Creek.

(Testimony of Irving Schields and *Private Montana Fish Ponds* at p. 2.)

13. There is no way for fish in the pond to access the downstream area except through the 12-inch pipe in the bottom of the reservoir. In order to allow the free movement of fish, the pipe must remain open at all times. (Testimony of Irving Schields and Glade Greenup.)

14. Applicants measured the flow of Little Tin Cup Creek on August 3, 1992, at a rate of 5.72 cubic feet per second. Lee Yelin measured the flow rate of Little Tin Cup Creek to be 3.18 cubic feet per second on April 9, 1993. (Department file, Objectors' Exhibit 6, and testimony of Irving Schields and Lee Yelin.)

15. The Tin Cup Creek drainage has been decreed and generally has a water commissioner to allocate the water. Before the end of the irrigation season there is no water available for the third and fourth rights. Toward the end of the irrigation season there may be as little as 188 miner's inches for the first right in Tin Cup Creek. There is not at that time enough water, 642 miner's inches, to fill the Mill Ditch which is second right. (Testimony of Tom Gale.)

16. Objectors' claimed water rights on Little Tin Cup Creek is a decreed right with a priority date of May 1, 1886. This priority date establishes a third right. The headgate is located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29. The water is transported by the

Frazier-Spoon Creek Ditch to the places of use in Section 26.

The period of use claimed is from April 1 to October 1.

(Objectors' Exhibit 1, Department records, and testimony of Objectors Greenup.)

17. Objectors also have a claimed water right on Tin Cup Creek. They have claimed a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 16; however, Objectors' Exhibits 1 and 10 clearly show the point of diversion on Tin Cup Creek to be in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 21. The water is transported from the headgate by the Ford-Hollister Highline Ditch to Little Tin Cup Creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 21 approximately 1100 feet downstream from Applicants' dam. Part of the Ford-Hollister Ditch has been replaced by a pipeline. After the Tin Cup Creek water has been placed in Little Tin Cup Creek, it flows into the pipeline to supply the Chief Joseph Ranch, Rodney and Karen Greenup, and Glade and JoAnn Greenup with irrigation water. (Objectors' Exhibits 1 and 10, Department records, and testimony of Lee Yelin and Objectors Greenup.)

18. The entire Tin Cup Creek drainage is under constant call after about mid-July. The first, second, and third right users are located downstream from the confluence of Little Tin Cup Creek and Tin Cup Creek. They call for water, shutting off all tributary and any main stem diversions that are not first, second, or third. At that time the Greenups' water is shut off out of main Tin Cup Creek. The Water Commissioner does not need to physically shut off the headgate for the pipeline on Little

Tin Cup Creek because when the main Tin Cup Creek water is not available, there is insufficient water and the gate for the pipeline is not open. (Testimony of Lee Yelin.)

19. Objectors have been experiencing sediment problems in their sprinkler system for the last four or five years. It is not clear whether this problem is caused by the dam or by the repair of a ditch upstream. The sediment problem has not, however, caused Objectors to cease irrigating. At the time the Greenups discovered the dam, they were at the pipeline diversion on Little Tin Cup Creek when Mr. Schields released the water from the reservoir causing a large amount of sediment-laden water to flow down Little Tin Cup Creek into the pipeline headgate.

(Testimony of the Greenups and Irving Schields.)

20. Leaving the pipe in the bottom of the dam open causes the sediment picked up by the stream to flow through the pipe and on downstream which would cause some sediment problems.

(Testimony of Lee Yelin.)

21. There are no planned uses or developments for which a permit has been issued or for which water has been reserved in the source of supply. (Department records.)

22. Applicants own the proposed place of use. (Testimony of Irving Schields.)

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 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 3.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4), 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 preponderance of evidence standard in this section, the applicant, in

addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

4. The proposed uses, domestic and a fish pond, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2)(a). The proposed domestic use of water will benefit Applicants. See Findings of Fact 4 and 5. However, the efficiency of the diversion is extremely low, approximately 10 percent. See Finding of Fact 6. In *Allen v. Petrick*, 69 Mont. 373, 222 P. 451 (1924), the Court held that although emphasis should be placed upon economy of use, economy should not be insisted upon to such an extent as to imperil success. The diversion works must be reasonably efficient, but there is no requirement of absolute efficiency. *State ex rel. Crowley v. District Court*, 108 Mont. 89, 88 P.2d 23 (1939); *see also Worden v. Alexander* 108 Mont. 208, 90 P.2d 160 (1939). The question is then, is the diversion means reasonable and is water not wasted. An undetermined amount of water is lost to seepage that does not reach the well. See Finding of Fact 10. Waste, defined as the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use, is forbidden by Mont. Code Ann § 85-2-114 (1991). Since Applicants have not shown the loss of water is negligible, it cannot be concluded that water is not wasted.

Since Applicants are not interested in stocking a fish pond and will not be able to procure a fish pond license, the question of *bona fide* intent arises. Applicants would derive no benefit from fish in the reservoir; therefore the fish pond use is not beneficial to them. See Findings of Fact 11, 12, and 13.

5. Applicants have not shown 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 in the amount Applicants seek to appropriate or that during the period in which the Applicants seek to appropriate the amount requested is reasonably available. See Findings of Fact 14 through 18. It was established at the hearing there is not sufficient water to satisfy the decreed water rights in the Tin Cup Basin. See Findings of Fact 15 and 18. There may be water available in periods other than the irrigation season; however, Applicants did not provide evidence thereof. The only evidence provided was a measurement taken by Applicants during the irrigation season. The measurement provided by Objectors was taken at the beginning of spring runoff. See Finding of Fact 14.

6. Applicants have not provided substantial credible evidence the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 10 and 15 through 18. If there are no unappropriated waters in the source of supply during the irrigation season, a new use cannot be granted without causing an adverse effect to prior water rights.

7. Applicants have not provided substantial credible evidence the means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 7 through 10.

8. 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 21.

9. Applicants have possessory interest, or the written consent of the person with the possessory interest, in the property where the water would be put to beneficial use. See Finding of Fact 22.

10. Objectors have been experiencing some sediment problems. See Findings of Fact 19 and 20. The criteria for issuance of a permit do not include keeping the source sediment-free. If the sediment problem were to be so great as to prevent Objectors from reasonably exercising their water rights, the sediment problem would be causing an adverse effect to the water right and would fall under the criteria for issuance of a permit. However, that is not the case here and while the sediment may be a nuisance, it is not sufficient to deny a permit. Moreover, it is not clear that Applicants have caused all of the sediment in the source. See Finding of Fact 19.

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

PROPOSED ORDER

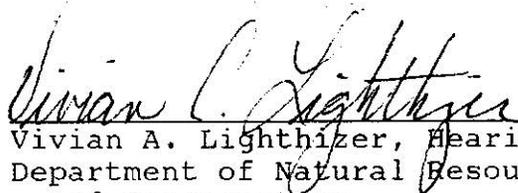
Application for Beneficial Water Use Permit 81391-76H by Irving J. and Debra D. Schields is denied.

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. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. 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 27<sup>th</sup> day of May, 1993.

  
Vivian A. Lighthizer, 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 27<sup>th</sup> day of May,  
1993 as follows:

Irving J. & Debra D. Schields  
P.O. Box 316  
Darby, MT 59829

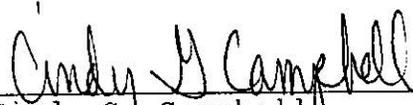
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