

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  
81855-s41H BY PATRICK C. MARTIN )  
AND SUSAN EWING )

\* \* \* \* \*

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 4, 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 81855-s41H by Patrick C. Martin and Susan Ewing 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 requesting

CASE # 81855

FILMED

AUG 23 1993

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 16 day of July, 1993.

  
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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 16<sup>th</sup> day of July, 1993 as follows:

Patrick C. Martin  
Susan Ewing  
2771 Deer Creek Dr.  
Bozeman, MT 59715

Wayne Edsall Trust  
Marcia J. Edsall Trust  
& Wayne Edsall, Trustee  
3181 McIlhattan Rd.  
Bozeman, MT 59715

Vera DeHaan  
Mildred McAfee  
1321 Bridger Dr.  
Bozeman, MT 59715

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

John E. Stults,  
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  
81855-s41H BY PATRICK C. MARTIN ) DECISION  
AND SUSAN EWING )

\* \* \* \* \*

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1991), a hearing was held in the above matter on April 21, 1993, in Bozeman, Montana, to determine whether a Permit to Appropriate Water based on the above application should be granted to Patrick C. Martin and Susan Ewing under the criteria in Mont. Code Ann. § 85-2-311(1) and (4) (1991).<sup>1</sup>

APPEARANCES

Applicant Patrick C. Martin appeared at the hearing on his own behalf and as spokesperson for Applicant Susan Ewing.

Objectors Wayne Edsall Trust and Marcia J. Edsall Trust appeared at the hearing through their spokesperson Wayne Edsall, trustee.

Objectors Vera DeHaan and Mildred McAfee appeared at the hearing on their own behalf. Kenneth McAfee, husband of Mildred

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<sup>1</sup> The 1993 Legislature amended Mont. Code Ann. § 85-2-311 to revise and clarify the burdens and standards of proof under which applications for beneficial water use permits are processed. The amendments apply retroactively to all applications pending on April 16, 1993, the effective date of the act. The act, Senate Bill 231, has been published as 1993 Montana Session Laws, Chapter 370. The above-entitled application was pending on April 16, 1993; therefore, the amendments apply to this application.

**CASE # 81855**

**FILMED**

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McAfee, appeared at the hearing as a witness in behalf of Objectors DeHaan and McAfee.

Jan Mack, Water Resources Specialist in the Bozeman Water Resources Division Regional Office of the Department of Natural Resources and Conservation (Department), appeared as spokesperson for the Department.

#### EXHIBITS

Applicants offered the following exhibits for inclusion in the record. Exhibits 1 through 7 were accepted into the record without objection. Exhibit 8 was accepted into the record as noted below.

Applicants' Exhibit 1 is a 24-inch by 36-inch photocopy of a site plan of Applicants' residence and surrounding area. The general location of the proposed reservoir was drawn on the plan by Pat Martin in blue ink.

Applicants' Exhibit 2 is a 24-inch by 36-inch photocopy of a map of the area of the source and proposed reservoir. The general location of the source and proposed reservoir were drawn on the map by Pat Martin in light blue ink. The locations of two other existing reservoirs on drainages neighboring Deer Creek were drawn on the map by Pat Martin in black ink.

Applicants' Exhibit 3 is a color photograph of the proposed dam site looking upstream on Deer Creek. Pat Martin is standing at the proposed dam site.

Applicants' Exhibit 4 is a color photograph of part of the area that would be the reservoir storage pond. The photograph is

taken on the western side of the proposed site looking generally easterly.

Applicants' Exhibit 5 is a color photograph of part of the area that would be the reservoir storage pond. The photograph is taken on the northern side of the proposed site looking generally southerly.

Applicants' Exhibit 6 is a color photograph of part of the area that would be the reservoir storage pond. The photograph is taken on the eastern side of the proposed site looking generally southwesterly and downstream.

Applicants' Exhibit 7 is a color photograph of part of the area that would be the reservoir storage pond. The photograph is taken on the southern side of the proposed site looking generally northerly. Pat Martin appears in the foreground. Applicants' home appears in the background.

Applicants offered Exhibits 4 through 7 primarily to show the water-consuming vegetation that would be removed if the permit were granted.

Applicants' Exhibit 8 is a color photograph of Deer Creek looking downstream from the proposed dam site. Objectors DeHaan and McAfee objected to this exhibit on grounds it misrepresented the flow of Deer Creek because it only shows the flow at one moment of high runoff. Applicant Martin stated the photograph was taken during high flow this spring, either March or April. All parties, including Applicants, agreed that this exhibit does not represent a typical or average flow in Deer Creek.

Applicants' Exhibit 8 was accepted into the record with the notation that if it is used to document flow in Deer Creek, it only represents high spring runoff.

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.<sup>2</sup>

During the hearing, the Hearing Examiner stated official notice would be taken of records maintained by the Department on water rights in the vicinity of the proposed appropriation. No objection was expressed by any party.

Facts in this Proposal for Decision which have been derived from the noticed materials or records are identified as such.

#### FINDINGS OF FACT

1. Patrick C. Martin and Susan Ewing filed Application for Beneficial Water Use Permit 81855-s41H with the Department on July 29, 1992, at 10:29 a.m. (Department's file)

2. On the Application form, Applicants proposed to appropriate 10 gallons per minute (gpm) up to 16.13 acre-feet (AF) per year of water from Deer Creek by means of a dam in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$

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<sup>2</sup> During the hearing a nearly illegible photocopy of "Annual Free Water Surface Evaporation, NOAA Technical Report NWS 33" (attached to a February 4, 1993, letter from Pat Martin) was replaced with a legible, but otherwise identical, photocopy. The illegible copy was discarded.

of Section 20, Township 1 South, Range 6 East, Gallatin County, Montana. The appropriation was proposed to be used for a flow-through fish pond, for fire protection, and for wildlife purposes in and from a proposed on-stream reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 20, Township 1 South, Range 6 East, Gallatin County, Montana. The capacity of the reservoir would be 0.4 acre-feet. The period of appropriation would be January 1 through December 31 of each year. The proposed use for fire protection was subsequently deleted from the application by the Department.  
(Department's file)

3. Pertinent portions of the application, as revised, were published in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the proposed source, on December 23, 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.  
(Department's file)

4. The Department received two timely objections filed against this application.

Vera DeHaan and Mildred McAfee objected contending the proposed appropriation would adversely affect the flow of a down-gradient spring and hence their water rights; the source is over appropriated; and, evaporation would further reduce the already insufficient stream flow.

Wayne Edsall Trust and Marcia J. Edsall Trust objected contending the proposed dam would adversely affect their water rights and there is not enough water in the source for an additional use. The contention was supported with a statement that the stream dries up in late summer. (Department's file)

5. Deer Creek is a small, natural-channel stream which flows out of the mountains above Applicants' property, through Applicants' property, and downstream through Objectors' properties. (Department's file and testimony of Pat Martin, Wayne Edsall, and Vera DeHaan)

6. All Objectors have filed statements in the statewide adjudication claiming water rights from Deer Creek. All of the statements claim priority dates prior to July 1, 1973. Some of the rights are for year round stock watering use. Others are for irrigation from as early as the beginning of March to as late as the beginning of November. There is no evidence in the record questioning the existence and extent of Objectors' water rights. (Department's file and Department's records)

7. At the hearing, Applicants amended the application to remove the use for a flow-through fish pond. Applicants' original intent was to stock the reservoir with fish. Upon consulting with the Montana Department of Fish, Wildlife and Parks, Applicants decided for several reasons they would not stock the pond. If fish happen to live in the pond, that would be acceptable to Applicants; however, they would not operate the pond to maintain a fish population. Therefore, Applicants do not need to secure

aspects of the original application which are solely for the maintenance of a viable flow-through fish pond, i.e., constant flow rate for oxygenation of the pond water. (Testimony of Pat Martin)

8. Applicants jointly own the parcel of land on which the place of use and point of diversion are located. The parcel is identified by Applicants as Tract 27, Certificate of Survey 1278. (Department's file and testimony of Pat Martin)

9. Applicants want to build the pond to increase the diversity of wildlife which occur on the property. (Testimony of Pat Martin)

10. There is no evidence in the record identifying species which do not presently visit the property which would do so if a pond of water existed there. There is no evidence wildlife in the area would benefit from the creation of a pond at the proposed location or that building the proposed pond will have any effect on the existing wildlife. Because there is no evidence in the record establishing that adding a pond to the property would increase the diversity of or otherwise positively affect the existing environmental conditions for wildlife, it cannot be determined whether, with respect to the proposed use for wildlife, adding the pond would benefit Applicants, other persons, or the public.

11. Applicants' primary reason for wanting to build and fill the pond is to provide a reservoir of water for fire protection, i.e., to have ready access to water in greater flow and

volume than can be obtained through their garden hose in case they need to suppress a fire. The application form has fire protection as a use for the pond (subsequently deleted by the Department). Applicant Martin's testimony about the use of the pond was extensive on the intent for fire protection purposes and minimal on the intent for wildlife purposes. (Department's file and testimony of Pat Martin)

12. The design of the proposed project includes a "Fire Pumping Station." The station has an intake from the bottom of the pond, a 4 ft. by 15 ft. sump, a 100 to 300 gpm pump with electric motor, a fire-hose rack and 175 feet of 2½-inch hose, and 6 ft. by 6 ft. by 6 ft. 8 in. pump house. (Department's file)

13. Applicants' property and home are remote from fire suppression responders and access to the property is sometimes impeded by such things as snow or mud. The naturally occurring flow of Deer Creek cannot be relied upon to provide water for fire suppression (see Findings of Fact 12 and 27). Furthermore, because their home is in the trees, the potential fire danger is greater to it than to other homes in the same rural residential housing development. (Applicants' Exhibits 2 through 8, and testimony of Pat Martin)

14. Because the Applicants' intent has always been to use the pond for fire protection purposes, the reservoir and dam design characteristics and potential impacts for fire protection are inherent in and identical to the design characteristics and

potential impacts of the proposed project as it was identified in the published public notice materials. (Department's file and testimony of Pat Martin)

15. There is no evidence in the record indicating the amount of water necessary to provide fire protection to Applicants' property. There is no indication of the amount of water reasonably needed to suppress the type of fire that may occur on such a property.

16. The Department has issued 105 water use permits for fire protection purposes. Forty-four of these permits have included reservoir storage. The four most recent permits issued for fire protection have priority dates in 1990 and 1992. (Department's records)

17. The pond, for any purpose, would "consume" the amount of water necessary to initially fill the pool, the amount lost through evaporation, the amount of any seepage which may leave the stream's surface and subsurface flow, and the amount necessary to refill the pool after any drawdown or releases. (Department's file, testimony of Pat Martin, and generally recognized technical fact<sup>3</sup>)

18. Evaporation off the surface of the pond would be approximately twenty to twenty-four inches per year. The trees and shrubs which would be removed from the area which would be inundated consume a minimum of two feet of water per year, and

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<sup>3</sup> See Mont. Admin. R. 36.12.221(4) (1991).

possibly close to four feet. The net result is the amount of water lost from the reservoir (or "consumed") due to evaporation is compensated by the water saved by not having it used by plants. Put another way, the consumptive effect of evaporation is eliminated because it is fully compensated. Therefore, in terms of the total volume of water discharged by the source, the proposed pond would be non-consumptive. (Department's file, Applicants' Exhibits 4 through 7, and testimony of Pat Martin)

19. Deer Creek streambed drops sixty feet of vertical measurement as it traverses Applicants' property which is approximately 700 feet of horizontal measurement. Applicants allege because of the slope, any water which seeps out of the pond will rise back to the surface within a few hundred feet and long before it reaches any downstream diversion works. They contend seepage would not be a consumptive aspect of their proposal or an impact on downstream water users, and that lining the reservoir to prevent seepage is not necessary. (Applicants' Exhibit 2 and testimony of Pat Martin)

20. Deer Creek is a losing stream. The amount of water flowing in the stream in the upper areas, such as at the proposed point of diversion, is greater than the amount of water flowing in it at the lower reaches, such as at Objector DeHaan's property. This is a natural condition that appears to be the result of seepage losses through the streambed. Objector Edsall Trusts expressed concern that construction of the reservoir would break the "armor" of the streambed resulting in greatly increased

seepage of water through the bottom of the reservoir into the ground compared to what has occurred historically through the natural streambed. (Testimony of Wayne Edsall, Vera DeHaan, and Kenneth McAfee)

21. The soils in the area of Applicants' newly-constructed home near the proposed reservoir are generally gravelly and sandy with some clay lenses. Generally, soils in the Deer Creek drainage are loose, rocky, gravelly loam that is susceptible to a high rate of permeability. (Testimony of Pat Martin and Wayne Edsall)

22. There is no evidence in the record identifying the soils in the area which would form the bottom of the pond. There is no evidence of the depth to bedrock or the location and configuration of clay lenses, hence it cannot be concluded that seepage from the pond would not be intercepted by clay or bedrock fissures and separated from the stream hydrology as appears to happen in the lower reach of the stream. It, therefore, cannot be determined whether the pond, without a liner to prevent seepage, would be non-consumptive as to seepage.

23. Applicants would line the pond with bentonite or with plastic to prevent seepage if required to do so by the Department, and tend to feel plastic would be the better material for the soil conditions to avoid bank deterioration and seepage. Objector Edsall Trusts attempted to seal their pond with bentonite, but the pond would not seal using only bentonite. Objector Edsall Trusts' pond is in less permeable soils than the proposed

pond would be. A plastic liner would make Applicants' proposed pond non-consumptive as to seepage. (Testimony of Pat Martin and Wayne Edsall)

24. The preliminary project design submitted to the Department during the processing of the application form was produced by a professional architect and indicates general design features which appear to provide for adequate operation of the reservoir for the proposed purpose and to release water to prior appropriators. No evidence in the record questions the adequacy of the preliminary design with respect to these functions. (Department's file and testimony Pat Martin)

25. Applicants will be employing professionals with experience in the design and construction of reservoirs for producing the detailed design and for constructing the proposed project. (Testimony of Pat Martin)

26. Applicants have not included and do not intend to include measuring devices in the design and construction of the pond and dam. They contend there is no need to measure the amount of water entering and leaving the pond because the slope of the property ensures that any water lost would soon return to the creek. (Department's file and testimony of Pat Martin)

27. There are significant questions as to whether flows in Deer Creek are sufficient to fill and maintain the pool in the proposed reservoir. The parties agreed in July, August, and September there probably wouldn't be any flow in Deer Creek. For the last six years, the flow of Deer Creek has not been

sufficient to fill and maintain the water level in a pond owned by Objector Edsall Trusts. Objector Edsall Trusts put in a well to supplement the flows of Deer Creek in order to maintain the water level in their pond. (Testimony of Vera DeHaan, Wayne Edsall, and Pat Martin)

28. Applicant Martin estimated the flow in Deer Creek to be 10 gpm in July 1992 which was the period of low flow for that year. The following method was used: Applicant Martin held a bottle in the creek to collect the flow. This method of measuring water has a large margin of error. (Department's file, testimony of Pat Martin, and generally recognized technical fact)

29. On December 3, 1993, Applicants stated the stream is one inch deep and one foot wide. This was calculated by the Department to equal 26.93 gpm. The record does not indicate how the dimensions were determined, whether they are accurate, or whether the margin of error is great or small. Neither does it indicate whether the dimensions stated are average stream size, stream size at the time of the July 1992 estimate, or stream size at the time the statement was made, i.e., January 1993. Because of these ambiguities and in light of statements by all parties about lack of stream flow, this estimate cannot be given much weight as evidence of reasonable physical availability of the requested amount of water during the proposed period of use. (Department's file and testimony of Vera DeHaan, Mildred McAfee, and Wayne Edsall)

30. Water flowed in Deer Creek at the proposed point of diversion all year last year (1992), a wetter year than there has been in the last six or eight years. Applicant Martin estimated the flow in Deer Creek during late summer last year to have been approximately one-quarter of a foot wide and one-half inch deep. The record does not indicate how these dimensions were determined, whether they are accurate, or whether the margin of error is great or small. Because of these ambiguities and in light of statements by all parties about lack of stream flow, this estimate cannot be given much weight as evidence of reasonable physical availability of the requested amount of water during the proposed period of use. (Testimony of Pat Martin, Vera DeHaan, Mildred McAfee, and Wayne Edsall)

31. Deer Creek does not typically have a period of peak high spring runoff; it typically has one day of high spring runoff. (Testimony of Wayne Edsall and Pat Martin)

32. Objectors DeHaan and McAfee were born and raised on Deer Creek and have fifty years of familiarity with it. They have not been able to exercise their Deer Creek water rights for irrigation for the past fifteen or so years because of the lack of water in the creek. There has not been enough water in Deer Creek during the past ten to fifteen years for their lessee to water seventy-five head of stock as had been done in the past. (Testimony of Vera DeHaan and Mildred McAfee)

33. There is no evidence in the record that owners of senior water rights have ever called the creek for water, i.e.,

required junior appropriators to cease diverting so that any flow there may be would be available to satisfy the water rights of senior appropriators.

CONCLUSIONS OF LAW

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

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled (see Findings of Fact 1, 2, 3, 4, 5, and 6); therefore, the matter is properly before the Hearing Examiner. See Mont. Code Ann. §§ 85-2-301, 302, 305, and 307 through 309 (1991).

3. In accordance with 1993 Mont. Laws 370, the Department must issue a beneficial water use permit if the applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) 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 Mont. Code Ann. § 85-2-311(1), 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. 1993 Mont. Laws 370.

5. Applicants have proven they have possessory interest in the place where the water would be put to beneficial use. See Finding of Fact 8. Therefore, the criterion in Mont Code Ann. § 85-2-311(1)(f) has been met.

6. An Application for Beneficial Water Use Permit may be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, that is, those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that

identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli. Furthermore, the Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1991).

Changing the proposed use of the reservoir by deleting the flow-through fish pond component does not imply an increase in the burden on the source beyond what was identified in the notices of this application. See Finding of Fact 7. Furthermore, changing the proposed use from wildlife purposes to fire protection purposes does not imply an increase in the burden on the source beyond what was identified in the notices of this application. See Finding of Fact 14. Therefore, the proposed purpose of the proposed appropriation may be, and therefore is, amended to delete the use for a flow-through fish pond, and to replace it with fire protection in accordance with the Applicants' expressed intention. See Finding of Fact 11.

7. In order to be a beneficial use of water under Montana law, the use must benefit the appropriator, other persons, or the

public. Mont. Code Ann. § 85-2-102(2)(a) (1991). Applicants failed to prove the proposed use of water for wildlife purposes would benefit themselves, other persons, or the public. See Findings of Fact 9 and 10. Therefore, as to the proposed use for wildlife purposes, the criterion in Mont. Code Ann. § 85-2-311(1)(d) has not been met.

8. Applicants have proven the proposed use of the water for fire protection purposes would benefit them. See Findings of Fact 11, 12, and 13. Fire protection is a beneficial use of water. See Mont. Code Ann. § 85-2-102(2)(a) (1991); In re Application 32798-s76G by Harpole Family Corporation; see also Mont. Admin. R. 36.2.101(6) (1991); In re Application 39887-s76D by West Kootenai Water Users Association; e.g. Finding of Fact 16.

9. There are, in the proof required to meet the test for beneficial use, two aspects which must be addressed. Applicants must, as has been done, prove the use can be beneficial to some person or the public. In addition, Applicants must prove the amount of water proposed to be appropriated is a beneficial amount, i.e., it is not wasteful. Waste of water is not beneficial. See Mont. Code Ann. §§ 85-2-102(15) and 312(1) (1991); see generally Mont. Code Ann. §§ 85-2-101(3) and 301(1) (1991). Applicants have provided no evidence in the record establishing the amount of water requested is needed for fire protection purposes and does not constitute waste. See Finding of Fact 15. Applicants have not proved the volume requested is a reasonable

amount for the proposed purpose. Therefore, as to the proposed use for fire protection purposes, the criterion in Mont. Code Ann. § 85-2-311(1)(d) has not been met.

10. Applicants proved by uncontradicted substantial credible evidence that the project, by recovering water historically lost to transpiration by plants, would make sufficient water available to offset the effects of evaporation from the pond. See Findings of Fact 17 and 18. Thus, unappropriated water is available for the portion of the consumptivity of the proposed use attributable to evaporation.

Applicants theory about return of seepage is feasible and cogent, but due to a lack of substantial credible evidence it cannot be concluded as a fact seepage from the pond would return to the source. See Findings of Fact 19, 20, 21, and 22. The proposed project, if unlined, must be considered consumptive. Applicants did not prove there is unappropriated water available in the source to compensate for seepage. Nevertheless, the liner Applicants agree to install would make the pond non-consumptive and eliminate the need to prove water is available to compensate seepage. See Finding of Fact 23.

11. Applicants failed to prove unappropriated water is available throughout the proposed period of use at the proposed point of diversion in the amount required, i.e., sufficient flow of water in Deer Creek to fill and maintain the water level in the pond or to provide the volume of impounded water necessary to provide fire protection. Applicants provided no evidence

identifying the flow of water for most of the proposed period of appropriation. Furthermore, the estimates of flow which were provided cannot be considered credible or substantial enough to be the basis of a finding of fact that the estimated flow equals the actual flow. See Findings of Fact 28, 29, and 30. Without substantial credible evidence upon which to make a finding on the availability of unappropriated water, a permit cannot be granted. See 1993 Mont. Laws 370; see also In re Application 68033-s76G by Robert Hollenback; In re Application 77304-s40C by Dave and Patricia A. Roberts; In re Application 80175-s76H by Steve Tintzman. Therefore, in light of the evidence of chronic water shortages in this source (see Findings of Fact 27, 31, and 32), and without substantial credible evidence showing with specificity that water is reasonably available in the amount required at the proposed point of diversion during the proposed period of use, it is concluded that the criterion in Mont. Code Ann. § 85-2-311(1)(a) is not met.

12. The Department has found in the past an applicant's commitment to abide by a condition on the permit requiring the proposed project be built to certain professional design and construction standards constitutes sufficient proof of the adequacy of the proposed diversion works. See In re Application 68173-s41S and 68174-s41S by Floyd R. Blair; In re Application 61333-s40A by Reuben C. Pitsch. Furthermore, the willingness to line the pond with plastic, the satisfactory design of the release structure, and the satisfactory design of the fire

suppression system all contribute to an indication of the adequacy of the proposed diversion works and conveyance facilities. See Findings of Fact 12, 23, 24, and 25. Nevertheless, Applicants indicate a lack of intent to include measuring devices. See Finding of Fact 26.

This design for the means of diversion together with Objectors' testimony is sufficient to raise issue of adverse effect to Objectors' downstream rights due to the inadministrable nature of the appropriation works. Where measuring devices are necessary in order for a permit to be administrable, and the applicant indicates an intent not to include measuring devices, the Department will not unilaterally impose them as a condition placed on the permit. See generally In re Application 58133-s410 by Lloyd DeBruycker.

Because measuring devices are not included to ensure the outlet structure in the dam, after the permitted volume has been impounded, releases the same amount of water that is entering the reservoir, the proposed means of diversion is not adequate. See In re Application 60567-s76G by Jack A. and Randall E. Perkins; In re Application 52793-s76D by Martin J. Hochstetler. Therefore, it is concluded the criterion in Mont. Code Ann. § 85-2-311(1)(c) has not been met.

13. Since Applicants are required to prove all the criteria necessary for the issuance of a permit have been met, and since Applicants have failed to prove the amount of water Applicants seek to appropriate is reasonably available in the source of

supply at the proposed point of diversion, that use of the proposed volume of water for the proposed purpose would be beneficial, and that the proposed means of diversion, construction, and operation of the appropriation works would be adequate, no finding is necessary as to whether the water rights of prior appropriators would be adversely affected or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See In re Application 53221-s400 by John E. and Betty J. Carney; In re Application 61333-s40A by Reuben C. Pitsch; In re Application 77335-s40A by Reuben C. Pitsch.

PROPOSED ORDER

Application for Beneficial Water Use Permit 81855-s41H by Patrick C. Martin and Susan Ewing 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 exceptions 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 4<sup>th</sup> day of June, 1993.



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

CERTIFICATE OF SERVICE

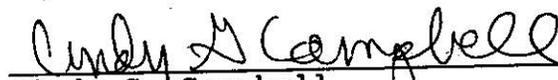
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 7<sup>th</sup> day of June, 1993, as follows:

Patrick C. Martin  
Susan Ewing  
2771 Deer Creek Dr.  
Bozeman, MT 59715

Vera DeHaan  
Mildred McAfee  
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Wayne Edsall Trust  
Marcia J. Edsall Trust  
& Wayne Edsall, Trustee  
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Bozeman, MT 59715

Scott Compton, Manager  
Bozeman Water Resources  
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111 N. Tracy  
Bozeman, MT 59715  
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Cindy G. Campbell  
Hearings Unit Legal Secretary