

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  
98469-76H BY PHILLIP R. AND )  
THELMA E. TAYLOR )

\* \* \* \* \*

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 12, 1997, 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 listed below, Beneficial Water Use Permit 98469-76H is granted to Phillip R. and Thelma E. Taylor to appropriate 1.5 cubic feet per second (673.2 gallons per minute) up to 71.94 acre-feet of the waters of an unnamed tributary of the Bitterroot River (Branch Creek) at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, Township 8 North, Range 20 West, Ravalli County, Montana. The uses are to be 1.5 cubic feet per second up to 71.46 acre-feet of water per year for irrigation of 39 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 and up to .48 acre-feet in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 for stock water. The period of use for irrigation and stock

**CASE # 98469**

water will be from April 1 through November 30, inclusive of each year. The means of diversion will be a headgate.

A. 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.

B. This permit is subject to the authority of a court appointed water commissioner, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters.

C. The appropriator shall install a flow measuring device approved by the regional manager at a point designated by the regional office to record monthly the flow rate and volume of all water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written record of the flow rate and volume of all waters diverted including the period of operation and shall submit the records by November 30 of each year. The regional manager may also request measurement records at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources regional office at the address listed below.

1610 South Third West, Suite 103  
P.O. Box 5004  
Missoula, MT 59806

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

D. The issuance of this right by the Department shall not reduce the appropriators' exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriators' exercise of this right.

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

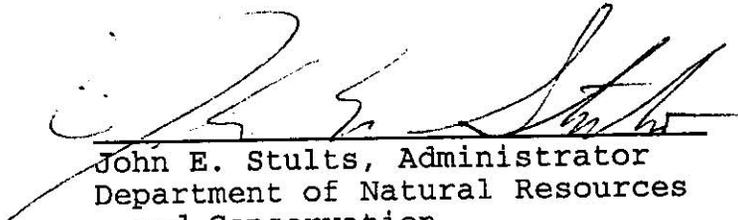
**NOTICE**

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 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 8<sup>th</sup> day of August, 1997.



John E. Stults, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(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, first class mail, at their address or addresses this 12<sup>th</sup> day of July, 1997, as follows:

Phillip R. & Thelma E. Taylor  
2343 Meridian Rd  
Victor, MT 59875

Charles McElfish  
P.O. Box 813  
Victor, MT 59875

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

Curt Martin, Manager  
Wes Mcalpin, WRS  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806-5004  
(via electronic mail)



Cindy G. Campbell  
Hearings Assistant

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

\* \* \* \* \*

IN THE MATTER OF THE	)	
APPLICATION FOR BENEFICIAL	)	PROPOSAL
WATER USE PERMIT 98469-76H	)	FOR
BY PHILLIP R. AND THELMA E.	)	DECISION
TAYLOR	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 1, 1997, in Hamilton, Montana, to determine whether a beneficial water use permit should be granted to Phillip R. and Thelma E. Taylor (Applicants) for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicants appeared at the hearing by and through Phillip R. Taylor.

Objector, Charles McElfish, appeared at the hearing in person.

Wes McAlpin, WRS, and Tracy Turek, WRS, with the Missoula Water Resources Regional Office of the Department of Natural

**CASE # 98469**

Resources and Conservation (Department) appeared at the hearing and were called to testify by both the Applicants and Objector.

#### EXHIBITS

Neither the Applicants nor the Objector offered exhibits for the record at the hearing. However, in response to the Hearing Examiner's Order of April 10, 1997, Applicants included a Minute Entry of Case No. 1337, Bear Creek, heard by Hon. Jeffery H. Langton on August 14, 1996. Objector Charles McElfish, in response to the Order, included a copy of his objection, a copy of his application for a beneficial water use permit, a copy of a letter written on October 7, 1996, to Mr. McElfish from Karl Uhlig, a copy of an Acknowledgment of Exempt Water Right 76H-E-99646, and a copy of a letter dated November 25, 1996, to Karl Uhlig from Charles McElfish concerning the instant application which included a copy of an Affidavit of Water Use by John McElfish.

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. An application for beneficial water use permit in the name of and signed by Phillip R. and Thelma E. Taylor was

received by the Department July 15, 1996, at 1:20 p.m. (Department file.)

2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on November 21, 1996. 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 proposed appropriation. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated January 30, 1997. (Department file.)

3. Applicants propose to appropriate 1.5 cubic feet per second (673.2 gallons per minute) up to 71.94 acre-feet of the waters of an unnamed tributary of the Bitterroot River (Branch Creek) at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, Township 8 North, Range 20 West, Ravalli County, Montana. The proposed uses are 1.5 cubic feet per second up to 71.46 acre-feet of water per year for irrigation of 39 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 and up to .48 acre-feet in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 for stock water. The proposed period of use for irrigation and stock water is from April 1 through November 30, inclusive of each

year. The proposed means of diversion is a headgate.

(Department file and testimony of Phillip Taylor.)

4. Applicants have proven by a preponderance of evidence the proposed use of water, irrigation and stock watering, are beneficial uses. The water would be used to irrigate 39 acres of crop land and pasture producing food for 30 cow/calf pairs and eight horses. (Department file.)

5. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate and that the amount requested is reasonably available during the period in which Applicants seek to appropriate. Applicants measured the flow rate of the source on May 21, 1996, at 3.37 cubic feet per second, on July 16, 1995, at 5.67 cubic feet per second, and on August 9, 1996, at 6.71 cubic feet per second. All measurements were taken at the diversion box. (Department file and testimony of Phillip Taylor.)

6. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. The means of diversion is a three-way diversion box with headgates which have handled all

the water of Branch Creek since installation approximately three years ago. When the water is diverted<sup>1</sup>, it flows into an existing ditch to a containment pond in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31 on Applicants' property where it is pumped out through a wheel line sprinkler system. (Testimony of Phillip Taylor.)

7. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. There are no water rights on Branch Creek downstream from Applicants' point of diversion. The water leaves Applicants' property and joins water from other irrigation then flows into the Bitterroot River. Objector has no water rights on Branch Creek except an exempt right for 0.68 acre-foot of stock water. (Department file and testimony of Phillip Taylor, Tracy Turek, and Wes McAlpin.)

8. Applicants have proven by a preponderance of evidence the proposed use would not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this

---

<sup>1</sup>Applicants have a water right out of No. 1 Ditch which is routed the same way the proposed diversion would be. By appropriating the water from Branch Creek, Applicants would be able to leave the No. 1 Ditch water for other users until late in the Fall when it gets drier than usual.

source for which permits have been issued or for which water has been reserved under state law. (Department file.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

10. Applicants have proven by a preponderance of evidence they have 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. Applicants own the property where the water would be put to beneficial use.

(Department file.)

Based upon the foregoing Findings of Fact and 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 substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1995).

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 listed below, Beneficial Water Use Permit 98469-76H is granted to Phillip R. and Thelma E. Taylor to appropriate 1.5 cubic feet per second (673.2 gallons per minute) up to 71.94 acre-feet of the waters of an unnamed tributary of the Bitterroot River (Branch Creek) at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, Township 8 North, Range 20 West, Ravalli County, Montana. The uses are to be 1.5 cubic feet per second up to 71.46 acre-feet of water per year for irrigation of 39 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 and up to .48 acre-feet in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 31 for stock water. The period of use for irrigation and stock water will be from April 1 through November 30, inclusive of each year. The means of diversion will be a headgate.

A. 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.

B. This permit is subject to the authority of a court appointed water commissioner, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters.

C. The appropriator shall install a flow measuring device approved by the regional manager at a point designated by the regional office to record monthly the flow rate and volume of all water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written record of the flow rate and volume of all waters diverted including the period of operation and shall submit the records by November 30 of each year. The regional manager may also request measurement records at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources regional office at the address listed below.

1610 South Third West, Suite 103  
P.O. Box 5004  
Missoula, MT 59806

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

D. The issuance of this right by the Department shall not reduce the appropriators' exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriators' exercise of this right.

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

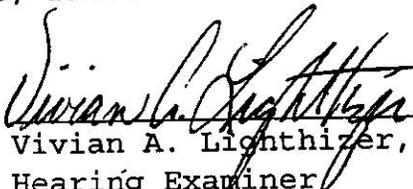
#### NOTICE

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 12<sup>th</sup> day of June, 1997.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, Montana 59620-1601

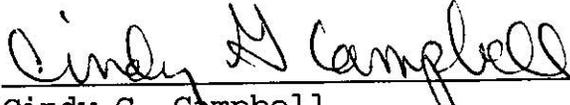
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 12<sup>th</sup> day of June, 1997, as follows:

Phillip R. & Thelma E. Taylor  
2343 Meridian Rd.  
Victor, MT 59875

Charles McElfish  
P.O. Box 813  
Victor, MT 59875

Curt Martin, Manager  
Wes McAlpin, WRS  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806-5004

  
Cindy G. Campbell  
Hearings Unit Legal Assistant