Siebel

FINAL ORDER

APPEALED

TO

DISTRICT COURT

&

MT Supreme Court

COPY

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBERS 76H-106450, 76H-106451, 76H-106452, 76H-106454, BY KENNETH F AND JUDITH A SIEBEL	)	FINAL ORDER

* * * * * * * * *

The Hearing Examiner issued a Proposal for Decision (Proposal) on March 6, 2002. The Hearing Examiner found and concluded that the Applicant had proven the criteria of the Montana Water Use Act with the following exceptions: (1) Applicant had not proven that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use, i.e., the Applicant failed to provide evidence to establish a direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife or water fowl population, or recreational activity; and, (2) Applicant had not proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right. Applicant excepted to the Proposal on March 25, 2002, and requested oral argument. Objector, Bitterroot River Protection Association (BPRA) responded to Applicant's exception. An oral argument was held on May 8, 2002.

Applicant objected to Proposed Finding of Fact No. 13 as irrelevant to the permit criteria. Finding of Fact No. 13 found that Applicant is a private party and that Applicant's proposal is not pursuant to any federal or state mandate or program to manage fish or wildlife. Applicant argues that the Montana Water Use Act simply provides that a proposed use is "beneficial" if it will benefit the appropriator and there is

no requirement that an appropriator exert control over fish and/or wildlife population to establish a beneficial use.

The Hearing Examiner did not hold that the Montana Water Use Act does not authorize private appropriations for fish and wildlife purposes. However, the Hearing Examiner did recognize that the Montana Water Use Act imposes two restrictions on such private appropriations: (1) there must be some kind of diversion, impoundment, or withdrawal of water; and, (2) the appropriation must be measured against amounts reasonably needed for that use. It is in the latter recognition that a use that cannot reasonably be quantified cannot be recognized as a water right. Consequently, Finding of Fact Number 13 has relevance in that it eliminates any argument that the private appropriator is relying upon any notion of federal or state "ownership" in either the fish or wildlife in which "management" or "control" of those natural resource populations is being fostered under color of state or federal law. Since the Applicant makes no assertion of legal control over the fish or wildlife, Applicant is left with the burden of establishing the actual need for the amount of water requested for Applicant's private use.

Ted J. Doney, a former Director and Chief Legal Counsel for the Montana Department of Natural Resources and Conservation, and a person who can be credited with being instrumental in helping to formulate the evolution of water law in Montana, in Montana Water Law Handbook § 2.4.1, at 27 in discussing beneficial use as the basis, measure, and limit of a water right, opines that the rules governing the quantification of a water right by beneficial use "are still firmly entrenched in our (Montana) water law system." Doney, in discussing the case law developed rules, in formulating an understandable general rule, notes "[t]o state the application of these rules more simply,

the quantity of water attached to a water right is limited in time and volume by the capacity of the appropriation facilities, actual use, actual need, or original intent, whichever is less." Accepting the above rule as the Hearing Examiner did, the Applicant in this case, whether claiming a beneficial use for recreation, fish, wildlife, or waterfowl, or generically for wetland use, must not only establish what the Applicant's intent is, how much water can actually be diverted and used, and that the appropriation facilities are of sufficient size, but most importantly, must establish how much water is needed to sustain the use for the enumerated uses, i.e., actual need. Arguably, without quantifying how much water is needed to recreate, or how many fish, wildlife, or waterfowl will utilize the facilities, the Applicant's evidence is speculation at best. Consequently, the Hearing Examiner found that the Applicant failed to meet its statutory burden. As explained later in this Final Order, I decline to follow the Hearing Examiner's reasoning.

The Applicant further objects to Proposed Finding of Fact No. 21 as being incomplete. Applicant asserts that the Hearing Examiner did not fully set forth the uncontradicted testimony of Applicant's expert witness. The Applicant argues that the strict burden of proof that the Hearing Examiner has required would prevent virtually any appropriator from obtaining a water permit. Applicant argues that the Hearing Examiner is attempting to "legislate" a separate standard of proof for fish and wildlife applications, despite the fact that the Montana Water Use Act makes no such distinction.

The Applicant is correct that the Montana Water Use Act makes no distinction as the burden of proof placed on an applicant because of the beneficial use that forms the basis of the application. The Hearing Examiner has not changed the burden of proof. The fact is that it may be a rather easy task in the case of an application for an irrigated

hay field of a specified size to calculate the crop requirement and carrying capacity of a ditch to quantify the need for a beneficial use to irrigate the field. In an application where the use (whether public or private) is for water for fish, wildlife and/or waterfowl and the Applicant faces a more difficult task. The expert testimony that was not included in the Proposal would aid the trier of fact in this matter in quantifying the water needed on a reasonableness basis. Again, as set out below, I find that the Applicant need only establish a reasonable amount of water to meet the burden of proof established in the Water Use Act and that a private appropriator does not need to control or manage the fish, wildlife, or water fowl.

Applicant asserts that the Hearing Examiner neglected to include a Finding of Fact concerning the testimony of Departmental witness Patrick Ryan to the effect that he felt the statutory criteria were satisfied with respect to the amount of water requested relative to the proposed beneficial use. The purpose of the contested case hearing is to discern facts that lead the hearing examiner to a conclusion of law on a matter that is at issue. What a department employee felt prior to a hearing on a contested issue is not probative of whether in fact the Applicant has satisfied the statutory criteria. There is no error in excluding such testimony.

Applicant further argues that the Department of Natural Resources and Conservation drafted legislation in August of 2000 relative to the issue of fish and wildlife applications but failed to get a sponsor to carry the legislation. Apparently, this action, if true, establishes legislative intent that the agency must issue permits for private fish and wildlife appropriations. What is true is that the agency drafted legislation calling for a legislative study to address the difficulty in quantifying minimum or maximum

amounts of water needed for fish and wildlife uses for consideration in the 2001 legislative session. The decision not to pursue the study bill was based on a perception on the part of the agency that the legislature as a whole was not interested in study bills. Consequently, the Department of Natural Resources and Conservation, in the absence of any legislation to the contrary, continues to process applications pursuant to the statutory criteria, which places the burden of proof of quantifying the beneficial use on the applicant. The Applicant's argument does not compel a reversal of the Proposal.

Next, Applicant argues that the Proposal is inconsistent with other recent proposed decisions where the Hearing Examiner perceives that the applicant's burden of proof has not been satisfied and issues an interlocutory order allowing more time for the applicant to provide evidence. An interlocutory order is not appropriate in this matter. Applicant is not arguing that there is any new additional evidence to be presented on the matter. Rather, Applicant is arguing that by definition private fish and wildlife ponds are beneficial uses and that the evidence in the record is sufficient to establish a reasonable amount of water.

At oral argument Applicant argued that the Department of Natural Resources and Conservation has granted on at least one occasion a similar application for similar uses in an uncontested matter. The argument being that the Regional Office followed the written policies of the Department of Natural Resoureces and Conservation and as a result of this contested case the Applicant is being held to a different standard. Likewise, Applicant argues that the proposal is in compliance with the written policies of the Department of Natural Resources and Conservation and that the Hearing Examiner is now relying on legal authorities developed by the agency's legal staff in reaching a conclusion that is in

apparent contradiction of the agency's written policies. The Hearing Examiner is correct that he is not bound by agency written policies in the absence of formal adoption under the Montana Administrative Procedure Act. State v. Vainio, 2001 MT 220, 306 Mont. 439, 35 P.3d 948 (2001). As concerns the legal analysis relied upon by the Hearing Examiner, the BRPA specifically raised legal argument consistent with the agency's legal analysis. The Hearing Examiner found the argument to be compelling. The standard of review for a conclusion of law from a proposal for decision is *de novo* to determine whether the conclusion of law is correct. Since at least January 22, 1986, the Department has been aware of the legal analysis upon which BRPA relies. The legal analysis is based on the premise that pre-July 1, 1973, water law (the prior appropriation doctrine) has been fully incorporated into the Montana Water Use Act, except where the Water Use Act and the prior appropriation doctrine are clearly at odds, in which case the Water Use Act is controlling. In Axtell v. M. S. Consulting, 288 Mont. 150, 158 (1998), the Montana Supreme Court noted that the prior appropriation doctrine was abolished. The Supreme Court went on in its opinion to state that the law developed under the prior appropriation doctrine is still applicable in determining the existence and validity of water rights acquired before 1973. But in the case at issue, there is no existing water right at issue. Here we deal with the creation of a new right under an exclusive mechanism for acquiring the water right – a permitted water right. Mont. Code Ann., §85-2-301 (1) (2001) ("After July 1, 1973, a person may not appropriate water except as provide in this chapter"). Although much of the pre-July 1, 1973, case law has been codified in the Montana Code Annotated, there is nothing in the definitions to suggest

that a private developer cannot acquire a water right in a fish, wildlife, or water fowl pond if the appropriator has no control over these natural resources.

While the legal analysis relied upon by the BRPA may be sound, it does not take into account the flexibility an agency has in interpreting and administering the laws assigned to it by the legislature, especially in the case of water law where the there was a comprehensive overhaul of the law in the enactment of the Montana Water Use Act. Since at least January 22, 1986, the Department of Natural Resources and Conservation, aware of this legal analysis, has on an application-by-application basis applied a "reasonable amount" quantification for beneficial uses associated with the development of ponds. Reasonable amount is the standard applied by the department with respect to a variety of uses. As mentioned earlier, for some uses of water these are well studied and understood amounts which are fairly uniformly applied, such as with stock watering, domestic, and crop irrigation uses of water. Applicants have been allowed to meet their burden of proof by defining the use and providing evidence as to a reasonable amount of water necessary to effectuate the defined use.

The agency finds itself in a contested case hearing in which the objector raises legal issues that if this were a matter of first impression might compel denial of the applications at issue. However, given the Department of Natural Resources and Conservation's long-term application-by-application treatment of the development of water rights associated with ponds, this cannot be said to be a matter of first impression. Adherence to precedent is a guiding principle of American jurisprudence. Here, where the agency is engaged in the area of statutory interpretation and the legislative power is implicated, the Montana legislature remains free to alter what the Department of Natural

Resources and Conservation has done in allowing beneficial use of water associated with ponds to be quantified on a reasonableness standard basis. There has been no sufficient intervening change in the Montana Water Use Act, or indication that the Department of Natural Resources and Conservation's interpretation has proved unworkable or has fostered confusion and inconsistency in the law that warrants a departure from established application-by-application precedent. Since the passage of the Water Use Act in 1973, the DNRC has issued 1,966 permits for various fish and wildlife uses. Only 420 of these received objections. Of the 420 that received objections, only 59 of the applications have been the subject in contested case hearings. None of the department's final orders were appealed on the basis of an improperly set flow rate or volume. A few examples of contested cases addressing the reasonable flow or volume for fish and wildlife uses are: Smith Farms, Inc., 3344-s40R (1976) (Flow and volume of objector's fish and wildlife use found reasonable); Hoyt, 33983-s41Q (1982) (Flow and volume to achieve viability is reasonable); Wilson/Holst, 34145-76LJ (1982) (Amount necessary for fish use varies with specific project; amount reduced.); Wood, 104667-41H (2000) (Fish and wildlife use beneficial if flow and volume are reasonable; amounts modified to professional guidelines); Baitis, 103849-76M (2000) (Fish use beneficial as amounts are reasonable. Failed to prove wildlife use beneficial due to absence of evidence on quantity). Furthermore, Findings of Fact 21 through 25 establish that the flow rates and volumes applied for are based on professional design and are the amounts reasonably necessary to ensure the project is viable, and that higher amounts would be more ideal. Finding of Fact 21 notes the final amounts were also the result of reductions through amendments that the record shows involved input from the department staff to avoid

amounts in excess of what was reasonable for viability of the project. Applicants have met their burden of proof by defining the use and providing evidence as to the reasonable amount of water necessary to effectuate the defined use.

Having given the exceptions and oral arguments due consideration and reviewing the record, for each application the Department hereby adopts the findings and conclusions in the March 6, 2002, Proposal, except as herein modified and supplemented:

CONCLUSIONS OF LAW

Strike Conclusion of Law # 7 and replace it with a new Conclusion of Law # 7. "The Applicant has proven by a preponderance of evidence that he quantity of water proposed to be used is the amount reasonably necessary for the proposed beneficial use."

Strike Conclusion of Law # 8 and replace it with a new Conclusion of Law # 8. "The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d).

The Memorandum attached to the Proposal is stricken. The following conditions apply:

CONDITIONS

DECREED STREAM – WATER COMMISSIONER:

This right is subject to the authority of court-appointed Water Commissioners, if appointed, to measure and distribute water. The appropriators shall contract with the Bitterroot River Water Commissioner, and pay for all related expenses necessary to administer this permit. The Bitterroot River Water Commissioner, with cooperation from appropriators, or their local agents, shall be given access to take measurements and adjust flows as required under this permit.

WATER MEASUREMENT RECORDS REQUIRED

The appropriators shall install a department-approved water use measurement device at point approved by the department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the department, the appropriators shall keep a written record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30 of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records shall be sent to the Missoula Water Resources Regional Office. The appropriators shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

OTHER CONDITIONS

Any diversion structure placed in the Mitchell system shall be constructed to be fish-friendly to allow for fish migration.

Any diversion shall be constructed to include a control structure that is sufficient to regulate the amount of water diverted under this permit in accordance with the varying flow rates allowed during different periods of the year.

PRIVATE AGREEMENT

The appropriators and certain objectors have entered into a separate agreement that contains provisions and conditions that limit this permit. The department does not necessarily recognize this agreement, but shall include it in the permit file.

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

ORDER

Application for Beneficial Water Use Permit Numbers 76H-106450, 76H-106451, 76H-106452, and 76H-106454, by Kenneth F. and Judith A. Siebel are GRANTED.

The specific parameters for the various purposes on each of the four individual permits, e.g., flow rates, volumes, periods of use, points of diviersion, means of

diversion, places of use, shall be as found in the Findings of Fact on each individual permit. The conditions stated above shall be placed on all four permits.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate district court within 30 days after service of this Final Order. The Department does not provide for a rehearing in this matter. Copies of a petition for judicial review must be promptly served upon the Department and all parties of record. 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 ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 29th day of July, 2002.

Jack Stults,
Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601
406 444-6605

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below by first class United States Mail on this 29th day of July, 2002.

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COPY

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

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBERS 76H-106450, 76H-106451, 76H-106452, 76H-106454, BY KENNETH F AND JUDITH A SIEBEL	)	PROPOSAL FOR DECISION

* * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on November 27, 2001, in Hamilton, Montana, to determine whether a beneficial water use permit should be issued to the Kenneth F. and Judith A. Siebel, hereinafter jointly referred to as "Applicant" for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, David Pengelly. Clint Brown, Water Consulting, Inc.; Brian Riggers, Water Mark Consulting, LLC.; and Karl Uhlig, Land and Water Consulting, Inc., testified for the Applicant.

Objector Bitterroot River Protection Association (BRPA) appeared by and through counsel Jack Tulholske and David Ryan.

Objectors Montana Department of Fish, Wildlife and Parks (MFWP), United States Fish and Wildlife Service (USFWS), and Jim Johnston did not appear at the hearing.

Patrick Ryan, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant and the Objector.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered one exhibit for the record. The Hearing Examiner accepted Applicant's Exhibit 1.

Applicant's Exhibit A1 is an 8½ by 11 inch topographic map of the area of the ponds associated with the four applications.

Objector offered five exhibits for the record. The Hearing Examiner accepted Objector's Exhibit 1, 2, 4, 5, and 7. Objector offered no other exhibits.

Objector's Exhibit O1 is a six page copy of Water Rights Bureau Policy No. 20, *Fish, Wildlife, and Recreation Ponds*. (introduced by Applicant). This exhibit is admitted as a guideline statement of the Department. It is not binding on this hearing examiner as a statement of law or policy since it was not adopted pursuant to the Montana Administrative Procedure Act. *See, Vanio v. State of Montana,* 2001 MT 220, 306 Mont. 439 (2001).

Objector's Exhibit O2 is a 9 page copy of a Legal Memorandum to Jack Stults from Tim Hall. The Parties stipulated to the authenticity of the memorandum. (introduced by Applicant). To the extent that the exhibit was introduced to establish the existence of any fact it is ruled not relevant. To the extent the exhibit was offered for the purpose of judicial notice of any laws, the hearing examiner will take notice of the laws contained therein, but rules that the legal conclusions contained in the exhibit are not binding as a matter of law on the hearing examiner. The exhibit does form the basis for the objection by BRPA that beneficial use has not been established by the Applicant. The hearing examiner will treat the exhibit as the legal argument of the objector.

Objector's Exhibit O4 is a photograph of the Southeast Pond bypass channel taken by Applicant's counsel. The Parties stipulated the photograph is limited to the purposes of this hearing.

Objector's Exhibit O5 is a photograph of the Triple Pond (Middle). The Parties stipulated the photograph is limited to the purposes of this hearing.

Objector's Exhibit O7 is a photograph of the North Complex (South area). The Parties stipulated the photograph is limited to the purposes of this hearing.

PRELIMINARY MATTERS

The Parties stipulated that the only criterion at issue is that of beneficial use.

The record was left open through December 5, 2001, for receipt of Applicant's response to the Objector BPRA's prehearing Motion to Certify to the Director their earlier Motion to Terminate Applications, the ruling on the Motion, and the Director's ruling if certified. By order of January 9, 2002, the Hearing Examiner denied the Motion to Certify.

One hearing was held and the combined proposal for decision will have findings of fact, conclusions of law, and an order for each application.

Prior to the hearings Applicant amended the applications and agreed to conditions which resulted in the withdrawal of the objections by the three non appearing Objectors. The amendments were reductions in flow rate and volume during all or portions of the period of diversion. The Hearing Examiner finds that existing water users and parties are not prejudiced by the reduction in rates and volumes, and re-notice is not required for the amendments.

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 APPLICATION 76H-106450

(Southeast Ponds)

General

1. Application for Beneficial Water Use Permit 76H-106450 in the name of Kenneth F. and Judith A. Siebel and signed by Kenneth F. Siebel was filed with the Department on March 19, 1999. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 250 gallons per minute (gpm) up to 331.20 acre-feet of water per year from a surface source known as Mitchell Slough, Mitchell Ditch, or the Mitchell. The water is to be diverted at a point in the NE¼NE¼NE¼ of Section 16, Township 8 North, Range 20 West, Ravalli County, Montana. The proposed means of diversion is a headgate. The proposed use includes multiple purposes of fishery, recreation, and wildlife/waterfowl in a single reservoir. The proposed period of appropriation and associated maximum flow rates are shown in the following table:

Purpose	Flow Rate, gpm	Volume, af	Period of Diversion
Fishery	250	250.08	Apr 1 to Nov 14
	176	23.33	Nov 15 to Dec 14
	103	33.68	Dec 15 to Feb 28
	176	24.11	Mar 1 to Mar 31
Recreation	(etc in fishery	(3.86)	Jan 1 to Dec 31
Wildlife/waterfowl	flow and volume)	(3.86)	Jan 1 to Dec 31
	Total Annual Volume, af	331.20	

The proposed place of use is an off stream reservoir located in the SE¼SE¼SE¼ of Section 9 and the NE¼NE¼NE¼ of Section 16 all in Township 8 North, Range 20 West, Ravalli County, Montana. (Department file)

Physical Availability

4. Applicant measured flows in the East Branch of the Mitchell at 11.84 cubic feet per second (cfs) during the low flow period to 55.8 cfs during the high flow period. High flows occur seasonally after upstream irrigation has begun and irrigation return flows contribute to the flows in the Mitchell. (Department file)

Legal Availability

5. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

6. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

Adverse Effect

7. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

8. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right.

9. The Mitchell joins the Bitterroot River about two miles downstream of the point of diversion. Applicant agreed to the time sensitive diversion rates, measure the flows diverted, and install fish friendly inlet control structure to mitigate possible project impacts on downstream objectors' rights.

10. Applicant agreed to be subject to the authority of court appointed Bitterroot River water commissioners, when appointed. (Department file)

Adequacy of Appropriation Works

11. Applicant has used experts knowledgeable in hydrology, channel construction, and channel restoration to design and construct the project. (Department file, testimony of Clint Brown, Karl Uhlig, Brian Riggers)

Beneficial Use

12. Applicant has provided evidence that the proposed use of water is for multiple use fishery, recreation, and wildlife/waterfowl habitat.

13. The Applicant is a private entity. The Applicant's proposal is not pursuant to any federal or state mandate or program to manage fish or wildlife.

14. The Applicant's intent is to create a natural appearing yet functional man-made ecological community comprised of ditches, ponds with deep and shallow water areas (fish habitat, and emergent and sub-aquatic vegetation habitat to attract wildlife), and riparian habitat which can be used by naturally occurring fish, wildlife, and waterfowl

in the area. Identified uses include spawning habitat for brown trout, rearing habitat for brown and rainbow trout; seasonal and nesting habitat for mallards, teal, coots, geese; use of the marshy area by blue herons, pheasants, and redwing blackbirds; high quality habitat for muskrats, painted turtles, frogs, and possibly beaver; and occasional use by whitetail deer, skunks, raccoons, and moose.

15. A portion of this use of water will indirectly benefit the public in that their fish and wildlife resources will have access to additional habitat designed for their use.

16. Objector MFWP stated in their objection their interpretation of beneficial use for fish, wildlife, and recreation. MFWP states their definition of beneficial use is "the proposed use of water provides a net benefit to public fish, wildlife, and recreation resources." Objector MFWP's casual observations of the Applicant's recent work on Mitchell Slough indicate the fishery in that reach has benefited. After working with the Applicant, Objector MFWP conditionally withdrew its objection.

17. Direct benefits to the Applicant (including invited personal and business guests) from the man-made habitat are recreation opportunities including bird watching, canoeing, hunting, and fishing.

18. The intent is not to raise a definite number of stocked fish in the ponds, other wildlife, or waterfowl. Instead it is to create an improved natural habitat that is attractive to naturally occurring area fish, wildlife, and waterfowl.

19. Because the habitat is intended to benefit the natural fishery, Applicant has agreed to use diversion structures which allow for fish migration. A portion of the flows are to assure and maintain a surface water connection at the return to the Mitchell to attract natural species.

20. MFWP pond stocking permits are not needed when artificial ponds will not be stocked.

21. The flows for the proposed uses were determined in part by totaling the volumes for increasing the water level in the pond above the local water table (mounding), seepage from the pond, pond evaporation, and a turnover rate sufficient to control temperature in

the summer and provide sufficient oxygen in the winter. This volume was then back calculated for the period of diversion to get a flow rate. Then Applicant's fisheries expert was asked to make a fisheries assessment of the North Complex (See Proposal For Decision 76H-106454 herein at page 27). This approach is not the more typical approach where the fisheries biologist is asked for the water requirements required to produce a viable habitat for a specific species and number of fish. Applicant's fisheries expert recommended[1] that the flows diverted to the ponds need to be balanced with those in the source. Applicant followed the recommendation and amended the requested flows to assure the biological needs of the Mitchell are not compromised by the Applicant's project. The reduced flows do not compromise the Applicant's purpose because the channel from the source to the ponds was redesigned to provide appropriate habitat at the lesser flows. Applicant recognizes that design adjustments to accommodate the flow reductions (as amended) and resulting lower water temperatures, reduced wetted perimeter of the ponds, reduced outflows, and increase in frozen pond surface area in winter may be needed to maintain the intended habitat. Under the reduced flows the habitat will still be viable; it just won't be ideal.

22. The Applicant has used a fisheries biologist, a wildlife biologist, and a hydrologist to design and create the intended habitat. The habitat created will be monitored to determine the most advantageous flow balance based on fish species utilization between the Mitchell and the created pond/wetland ecosystem. Upon completion of the habitat, a fishery assessment will be conducted to determine if the improved fishery habitat desired can be achieved at lower flows from the Mitchell. An opportunity to provide the required assessment is with the *Project Completion Notice*.

23. A portion of the water requested is to raise the water level above the local groundwater level to create the riparian habitat desired. The local groundwater levels are near the surface of the ground in the area. Experts deemed the use of pond liners not

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1 The recommendations made for the North Complex were then applied to the other three applications.

appropriate here to raise the water level because they will not create the desired riparian habitat, and may not be stable given the high rate of groundwater movement in the area.

24. After a period of use fine sediments are expected to decrease seepage from the inlet ditch and pond bottom. After this occurs, less water will be required to keep the water level above the groundwater level.

25. Applicant's fisheries biologist stated that the inflow is also needed to create the fishery habitat; where the water leaves the pond, by bottom seepage or a surface outflow, is not material to the pond habitat. (Department file, testimony of Clint Brown, Brian Riggers, and Karl Uhlig)

Possessory Interest

26. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

Water Quality Issues

27. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure

28. The priority date of this application is prior to the March 29, 1999 effective date of the Bitterroot River subbasin temporary closure. The application is not subject to the closure.

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

CONCLUSIONS OF LAW APPLICATION 76H-106450

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit may be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised by an objector, the water quality of a prior appropriator will not be adversely affect, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-311 (1), (2).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 4.

4. The Applicant has proven that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 5, 6.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 8, 9, 10.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 11.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. The Applicant has not provided evidence to establish a direct correlation between the amount

of water applied for and the need for that amount of water to sustain a defined fishery, wildlife or waterfowl population, or recreational activity. Mont. Code Ann. § 85-2-311(1)(d). See Memorandum.

8. The Applicant has not proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 13 and Memorandum.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 26.

10. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Finding of Fact No. 27.

11. The Bitterroot River subbasin temporary closure does not apply to the application. Mont. Code Ann. § 85-2-344. See Finding of Fact No. 28.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant has provided no term or condition that would satisfy the burden of establishing beneficial use. Mont. Code Ann. § 85-2-312.

13. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven a beneficial use to which Applicant can put the water to use by a preponderance of the evidence, a permit may not be granted.

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

PROPOSED ORDER APPLICATION 76H-106450

The Application is DENIED.

FINDINGS OF FACT APPLICATION 76H-106451

(Triple Ponds)

General

1. Application for Beneficial Water Use Permit 76H-106451 in the name of Kenneth F. and Judith A. Siebel and signed by Kenneth F. Siebel was filed with the Department on March 19, 1999. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 1.31 cubic feet per second (cfs) up to 812.70 acre-feet of water per year from a surface source known as Mitchell Slough, Mitchell Ditch, or the Mitchell. The water is to be diverted at a point in the SW¼SE¼SE¼ of Section 9, Township 8 North, Range 20 West, Ravalli County, Montana. The proposed means of diversion is a headgate. The proposed use is combined multiple purposes of fishery, recreation, and wildlife/waterfowl in a series of three (3) reservoirs connected by a ditch system. The proposed period of appropriation and associated maximum flow rates are shown in the following table:

Purpose	Flow Rate, cfs	Volume, af	Period of diversion
Fishery	1.31	613.67	Apr 1 to Nov 14
	1.00	57.21	Nov 15 to Dec 14
	0.65	82.65	Dec 15 to Feb 28
	1.00	59.17	Mar 1 to Mar 31
Recreation	(incl in fishery flow and volume)	(2.80)	Jan 1 to Dec 31
Wildlife/waterfowl		(2.80)	Jan 1 to Dec 31
Total Annual Volume, af		812.70	

The proposed place of use is three off stream reservoirs located in the SW¼NW¼SE¼, the N½SW¼SE¼, and the SW¼SE¼, all in Section 9, Township 8 North, Range 20 West, Ravalli County, Montana. (Department file)

Physical Availability

4. Applicant measured flows in the East Branch of the Mitchell at 11.84 cubic feet per second (cfs) during the low flow period to 55.8 cfs during the high flow period. High flows occur seasonally after

upstream irrigation has begun and irrigation return flows contribute to the flows in the Mitchell. The Hearing Examiner notes that 1.31 cfs flowing between April 1 and November 14 (228 days) will only produce 592.38[2] acre-feet instead of the 613.67 acre-feet requested. (Department file)

Legal Availability

5. Appropriations from the Mitchell other than Applicant's are upstream of the point of diversion. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system, before it leaves Applicant's property. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

6. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

Adverse Effect

7. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

8. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right.

9. The Mitchell joins the Bitterroot River about two miles downstream of the point of diversion. Applicant agreed to the time sensitive diversion rates, measure the flows diverted, and install fish friendly inlet control structure to mitigate possible project impacts on downstream objectors' rights.

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2 $((1.31 \text{ cfs} * 448.8\ ^{gpm}/_{cfs}) * (228 \text{ days} * 1440\ ^{min}/_{day}))/325851\ ^{gal}/_{af}) = 592.38$ af

10. Applicant agreed to be subject to the authority of court appointed Bitterroot River water commissioners, when appointed. (Department file)

Adequacy of Appropriation Works

11. Applicant has used expertise knowledgeable in hydrology, channel construction, and restoration to design and construct the project. (Department file, testimony of Clint Brown, Karl Uhlig, Brian Riggers)

Beneficial Use

12. Applicant has provided evidence that the proposed use of water is for multiple use fishery, recreation, and wildlife/waterfowl habitat.

13. The Applicant is a private entity. The Applicant's proposal is not pursuant to any federal or state mandate or program to manage fish or wildlife.

14. The Applicant's intent is to create a natural appearing yet functional man-made ecological community comprised of ditches, ponds with deep and shallow water areas (fish habitat, and emergent and sub-aquatic vegetation habitat to attract wildlife), and riparian habitat which can be used by naturally occurring fish, wildlife, and waterfowl in the area. Identified uses include spawning habitat for brown trout, rearing habitat for brown and rainbow trout; seasonal and nesting habitat for mallards, teal, coots, geese; use of the marshy area by blue herons, pheasants, and redwing blackbirds; high quality habitat for muskrats, painted turtles, frogs, and possibly beaver; and occasional use by whitetail deer, skunks, raccoons, and moose.

15. A portion of this use of water will indirectly benefit the public in that their fish and wildlife resources will have access to additional habitat designed for their use.

16. Objector MFWP stated in their objection their interpretation of beneficial use for fish, wildlife, and recreation. MFWP states their definition of beneficial use is "the proposed use of water provides a net benefit to public fish, wildlife, and recreation resources." Objector MFWP's casual observations of the Applicant's recent work on Mitchell Slough indicate the fishery in that reach has benefited.

After working with the Applicant, Objector MFWP conditionally withdrew its objection.

17. Direct benefits to the Applicant (including invited personal and business guests) from the man-made habitat are recreation opportunities including bird watching, canoeing, hunting, and fishing.

18. The intent is not to raise a definite number of stocked fish in the ponds, other wildlife, or waterfowl. Instead it is to create an improved natural habitat that is attractive to naturally occurring area fish, wildlife, and waterfowl.

19. Because the habitat is intended to benefit the natural fishery, Applicant has agreed to use diversion structures which allow for fish migration. A portion of the flows are to assure and maintain a surface water connection at the return to the Mitchell to attract natural species.

20. MFWP pond stocking permits are not needed when artificial ponds will not be stocked.

21. The flows for the proposed uses were determined in part by totaling the volumes for increasing the water level in the pond above the local water table (mounding), seepage from the pond, pond evaporation, and a turnover rate sufficient to control temperature in the summer and provide sufficient oxygen in the winter. This volume was then back calculated for the period of diversion to get a flow rate. Then Applicant's fisheries expert was asked to make a fisheries assessment of the North Complex (See Proposal For Decision 76H-106454 herein at page 27). This approach is not the more typical approach where the fisheries biologist is asked for the water requirements required to produce a viable habitat for a specific species and number of fish. Applicant's fisheries expert recommended[3] that the flows diverted to the ponds need to be balanced with those in the source. Applicant followed the recommendation and amended the requested flows to assure the biological needs of the Mitchell are not compromised by the Applicant's project. The reduced flows do not compromise the Applicant's purpose because the channel from the source to the ponds

3 The recommendations made for the North Complex were then applied to the other three applications.

was redesigned to provide appropriate habitat at the lesser flows. Applicant recognizes that design adjustments to accommodate the flow reductions (as amended) and resulting lower water temperatures, reduced wetted perimeter of the ponds, reduced outflows, and increase in frozen pond surface area in winter may be needed to maintain the intended habitat. Under the reduced flows the habitat will still be viable; it just won't be ideal.

22. The Applicant has used a fisheries biologist, a wildlife biologist, and a hydrologist to design and create the intended habitat. The habitat created will be monitored to determine the most advantageous flow balance based on fish species utilization between the Mitchell and the created pond/wetland ecosystem. Upon completion of the habitat, a fishery assessment will be conducted to determine if the improved fishery habitat desired can be achieved at lower flows from the Mitchell. An opportunity to provide the required assessment is with the *Notice of Completion* for the project.

23. A portion of the water requested is to raise the water level above the local groundwater level to create the riparian habitat desired. The local groundwater levels are near the surface of the ground in the area. Experts deemed the use of pond liners not appropriate here to raise the water level because they will not create the desired riparian habitat, and may not be stable given the high rate of groundwater movement in the area.

24. After a period of use fine sediments are expected to decrease seepage from the inlet ditch and pond bottom. After this occurs, less water will be required to keep the water level above the groundwater level.

25. Applicant's fisheries biologist stated that the inflow is also needed to create the fishery habitat; where the water leaves the pond, by bottom seepage or a surface outflow, is not material to the pond habitat. (Department file, testimony of Clint Brown, Brian Riggers, and Karl Uhlig)

Possessory Interest

26. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. Applicant has a possessory interest in the place of use. (Department file)

Water Quality Issues

27. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure

28. The priority date of this application is prior to the March 29, 1999 effective date of the Bitterroot River subbasin temporary closure. The application is not subject to the closure.

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

CONCLUSIONS OF LAW APPLICATION 76H-106451

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit may be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised by an objector, the water quality of

a prior appropriator will not be adversely affect, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-311 (1), (2).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 4.

4. The Applicant has proven that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 5, 6.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 8, 9, 10.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 11.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. The Applicant has not provided evidence to establish a direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife or waterfowl population, or recreational activity. Mont. Code Ann. § 85-2-311(1)(d). See Memorandum.

8. The Applicant has not proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 13 and Memorandum.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 26.

10. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not

being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Finding of Fact No. 27.

11. The Bitterroot River subbasin temporary closure does not apply to the application. Mont. Code Ann. § 85-2-344. See Finding of Fact No. 28.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant has provided no term or condition that would satisfy the burden of establishing beneficial use. Mont. Code Ann. § 85-2-312.

13. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven a beneficial use to which Applicant can put the water to use by a preponderance of the evidence, a permit may not be granted.

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

PROPOSED ORDER APPLICATION 76H-106451

The Application is DENIED.

FINDINGS OF FACT APPLICATION 76H-106452

(Vetsch Ponds)

General

1. Application for Beneficial Water Use Permit 76H-106452 in the name of Kenneth F. and Judith A. Siebel and signed by Kenneth F. Siebel was filed with the Department on March 19, 1999. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 250 gallons per minute (gpm) up to 341.50[4] acre-feet of water per year from a surface source known as Mitchell Slough, Mitchell Ditch, or the Mitchell. The water is to be diverted at a point in the NE¼NW¼NW¼ of Section 10[5], Township 8 North, Range 20 West, Ravalli County, Montana. The proposed means of diversion is a headgate. The proposed use is combined multiple purposes of fishery, recreation, and wildlife/waterfowl in a single reservoir. The proposed period of appropriation and associated maximum flow rates are shown in the following table:

Purpose	Flow Rate gpm	Volume ac ft	Period of Diversion
Fishery	250	258.62	Apr 1 to Nov 14
	188	24.11	Nov 15 to Dec 14
	126	34.83	Dec 15 to Feb 28
	188	23.94	Mar 1 to Mar 31
Recreation	(Incl. in fishery)	(2.80)	Jan 1 to Dec 31
Wildlife/waterfowl	(Incl. in fishery)	(2.80)	Jan 1 to Dec 31
	Total Annual Volume ac ft	341.50	

The proposed place of use is an off stream reservoir located in the S½SW¼SW¼ of Section 3, Township 8 North, Range 20 West, Ravalli County, Montana. (Department file)

4 The sum of volumes for period of use (fishery) is 341.5, not 342.5 shown on the settlement abstract.

5 NE¼NW¼NW¼ of Section 10 is the location from the public notice and Applicant's Exhibit 1. The NE¼NE¼NW¼ of Section 10 is what is shown on the settlement abstract.

Physical Availability

4. Applicant measured flows in the East Branch of the Mitchell at 11.84 cubic feet per second (cfs) during the low flow period to 55.8 cfs during the high flow period. High flows occur seasonally after upstream irrigation has begun and irrigation return flows contribute to the flows in the Mitchell. The Hearing Examiner notes that 250 gpm flowing between April 1 and November 14 (228 days) will only produce 251.89 acre-feet instead of the 258.62 acre-feet requested. (Department file)

Legal Availability

5. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

6. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

Adverse Effect

7. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

8. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right.

9. The Mitchell joins the Bitterroot River about two miles downstream of the point of diversion. Applicant agreed to the time sensitive diversion rates, measure the flows diverted, and install fish friendly inlet control structure to mitigate possible project impacts on downstream objectors' rights.

10. Applicant agreed to be subject to the authority of court appointed Bitterroot River water commissioners, when appointed. (Department file)

Adequacy of Appropriation Works

11. Applicant has used expertise knowledgeable in hydrology, channel construction, and channel restoration to design and construct the project. (Department file, testimony of Clint Brown, Karl Uhlig, Brian Riggers)

Beneficial Use

12. Applicant has provided evidence that the proposed use of water is for multiple use fishery, recreation, and wildlife/waterfowl habitat.

13. The Applicant is a private entity. The Applicant's proposal is not pursuant to any federal or state mandate or program to manage fish or wildlife.

14. The Applicant's intent is to create a natural appearing yet functional man-made ecological community comprised of ditches, ponds with deep and shallow water areas (fish habitat, and emergent and sub-aquatic vegetation habitat to attract wildlife), and riparian habitat which can be used by naturally occurring fish, wildlife, and waterfowl in the area. Identified uses include spawning habitat for brown trout, rearing habitat for brown and rainbow trout; seasonal and nesting habitat for mallards, teal, coots, geese; use of the marshy area by blue herons, pheasants, and redwing blackbirds; high quality habitat for muskrats, painted turtles, frogs, and possibly beaver; and occasional use by whitetail deer, skunks, raccoons, and moose.

15. A portion of this use of water will indirectly benefit the public in that their fish and wildlife resources will have access to additional habitat designed for their use.

16. Objector MFWP stated in their objection their interpretation of beneficial use for fish, wildlife, and recreation. MFWP states their definition of beneficial use is "the proposed use of water provides a net benefit to public fish, wildlife, and recreation resources." Objector MFWP's casual observations of the Applicant's recent work on

Mitchell Slough indicate the fishery in that reach has benefited. After working with the Applicant, Objector MFWP conditionally withdrew its objection.

17. Direct benefits to the Applicant (including invited personal and business guests) from the man-made habitat are recreation opportunities including bird watching, canoeing, hunting, and fishing.

18. The intent is not to raise a definite number of stocked fish in the ponds, other wildlife, or waterfowl. Instead it is to create an improved natural habitat that is attractive to naturally occurring area fish, wildlife, and waterfowl.

19. Because the habitat is intended to benefit the natural fishery, Applicant has agreed to use diversion structures which allow for fish migration. A portion of the flows are to assure and maintain a surface water connection at the return to the Mitchell to attract natural species.

20. MFWP pond stocking permits are not needed when artificial ponds will not be stocked.

21. The flows for the proposed uses were determined in part by totaling the volumes for increasing the water level in the pond above the local water table (mounding), seepage from the pond, pond evaporation, and a turnover rate sufficient to control temperature in the summer and provide sufficient oxygen in the winter. This volume was then back calculated for the period of diversion to get a flow rate. Then Applicant's fisheries expert was asked to make a fisheries assessment of the North Complex (See Proposal For Decision 76H-106454 herein at page 27). This approach is not the more typical approach where the fisheries biologist is asked for the water requirements required to produce a viable habitat for a specific species and number of fish. Applicant's fisheries expert recommended[6] that the flows diverted to the ponds need to be balanced with those in the source. Applicant followed the recommendation and amended the requested flows to assure the biological needs of the Mitchell are not compromised by the Applicant's project. The reduced flows do not compromise the

6 The recommendations made for the North Complex were then applied to the other three applications.

Applicant's purpose because the channel from the source to the ponds was redesigned to provide appropriate habitat at the lesser flows. Applicant recognizes that design adjustments to accommodate the flow reductions (as amended) and resulting lower water temperatures, reduced wetted perimeter of the ponds, reduced outflows, and increase in frozen pond surface area in winter may be needed to maintain the intended habitat. Under the reduced flows the habitat will still be viable; it just won't be ideal.

22. The Applicant has used a fisheries biologist, a wildlife biologist, and a hydrologist to design and create the intended habitat. The habitat created will be monitored to determine the most advantageous flow balance based on fish species utilization between the Mitchell and the created pond/wetland ecosystem. Upon completion of the habitat, a fishery assessment will be conducted to determine if the improved fishery habitat desired can be achieved at lower flows from the Mitchell. An opportunity to provide the required assessment is with the *Notice of Completion* for the project.

23. A portion of the water requested is to raise the water level above the local groundwater level to create the riparian habitat desired. The local groundwater levels are near the surface of the ground in the area. Experts deemed the use of pond liners not appropriate here to raise the water level because they will not create the desired riparian habitat, and may not be stable given the high rate of groundwater movement in the area.

24. After a period of use fine sediments are expected to decrease seepage from the inlet ditch and pond bottom. After this occurs, less water will be required to keep the water level above the groundwater level.

25. Applicant's fisheries biologist stated that the inflow is also needed to create the fishery habitat; where the water leaves the pond, by bottom seepage or a surface outflow, is not material to the pond habitat. (Department file, testimony of Clint Brown, Brian Riggers, and Karl Uhlig)

Possessory Interest

26. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. Applicant has a possessory interest in the place of use. (Department file)

Water Quality Issues

27. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure

28. The priority date of this application is prior to the March 29, 1999 effective date of the Bitterroot River subbasin temporary closure. The application is not subject to the closure.

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

CONCLUSIONS OF LAW 76H-106452

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit may be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised by an objector, the water quality of

a prior appropriator will not be adversely affect, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-311 (1), (2).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 4.

4. The Applicant has proven that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 5, 6.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 8, 9, 10.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 11.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. The Applicant has not provided evidence to establish a direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife or waterfowl population, or recreational activity. Mont. Code Ann. § 85-2-311(1)(d). See Memorandum.

8. The Applicant has not proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 13 and Memorandum.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 26.

10. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not

being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Finding of Fact No. 27.

11. The Bitterroot River subbasin temporary closure does not apply to the application. Mont. Code Ann. § 85-2-344. See Finding of Fact No. 28.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant has provided no term or condition that would satisfy the burden of establishing beneficial use. Mont. Code Ann. § 85-2-312.

13. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven a beneficial use to which Applicant can put the water to use by a preponderance of the evidence, a permit may not be granted.

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

PROPOSED ORDER 76H-106452

The Application is DENIED.

FINDINGS OF FACT APPLICATION 76H-106454

(North Complex Ponds)

General

1. Application for Beneficial Water Use Permit 76H-106454 in the name of Kenneth F. and Judith A. Siebel and signed by Kenneth F. Siebel was filed with the Department on March 19, 1999. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 2.29 cubic feet per second (cfs) up to 1364.9 acre-feet of water per year from a surface source known as Mitchell Slough, Mitchell Ditch, or the Mitchell. The water is to be diverted at two points; one in the NW¼SE¼SE¼ of Section 4, and one in NE¼SW¼NE¼ of Section 9[7], all in Township 8 North, Range 20 West, Ravalli County, Montana. The proposed means of diversion is two headgates. The proposed use is combined multiple purposes of fishery, recreation, and wildlife/waterfowl in an eight reservoir complex. The proposed period of appropriation and associated maximum flow rates are shown in the following table:

[illegible]	[illegible]	[illegible]	[illegible]
Fishery	2.29	1030.64	Apr 1 to Nov 14
	1.59	96.09	Nov 15 to Dec 14
	0.89	138.81	Dec 15 to Feb 28
	1.59	99.36	Mar 1 to Mar 31
Recreation	[illegible]	(21.95)	Jan 1 to Dec 31
Wildlife/waterfowl	[illegible]	(21.95)	Jan 1 to Dec 31
[illegible]	[illegible]	1364.90	[illegible]

The proposed place of use is three off stream reservoirs located in the N½NE¼, Section 9; and five off stream reservoirs located in the E½E½, Section 4, and W½W½, Section 3, all in Township 8 North, Range 20 West, Ravalli County, Montana. (Department file)

7 Amended at hearing from SW¼NE¼NE¼

Physical Availability

4. Applicant measured flows in the West Branch of the Mitchell at 3.47 cfs in January 2000 during the low flow period, and 37.8 cfs in June, 1999 during the irrigation season or high flow period. Flows available at the second, downstream, point of diversion include those remaining in the Mitchell and those returned to the Mitchell from the first diversion point. The Hearing Examiner notes that 1.59 cfs flowing between November 15 and December 14 (30 days) will only produce 94.61 acre-feet instead of the 96.09 acre-feet requested, .89 cfs flowing between December 15 and February 28 (76 days) will only produce 134.15 acre-feet instead of the 138.81 acre-feet requested, and 1.59 cfs flowing between March 1 and March 31 (31 days) will only produce 97.76 acre-feet instead of the 99.36 acre-feet requested. (Department file)

Legal Availability

5. Appropriations from the Mitchell other than Applicant's are upstream of the point of diversion. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system, before it leaves Applicant's property. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

6. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right. (Department file)

Adverse Effect

7. Water diverted into the pond / wetland / waterfowl complex which is not consumed by evaporation will likely be returned directly to the Mitchell or to the shallow area groundwater aquifer, which is a part of the Bitterroot River system.

8. A control gate that diverts water from the Mitchell can be closed to stop diversion to the pond / wetland / waterfowl complex if a legitimate call is received from a downstream senior right.

9. The Mitchell joins the Bitterroot River about two miles downstream of the point of diversion. Applicant agreed to the time sensitive diversion rates, measure the flows diverted, and install fish friendly inlet control structure to mitigate possible project impacts on downstream objectors' rights.

10. Applicant agreed to be subject to the authority of court appointed Bitterroot River water commissioners, when appointed. (Department file)

Adequacy of Appropriation Works

11. Applicant has used expertise knowledgeable in hydrology, channel construction, and channel restoration to design and construct the project. (Department file, testimony of Clint Brown, Karl Uhlig, Brian Riggers)

Beneficial Use

12. Applicant has provided evidence that the proposed use of water is for multiple use fishery, recreation, and wildlife/waterfowl habitat.

13. The Applicant is a private entity. The Applicant's proposal is not pursuant to any federal or state mandate or program to manage fish or wildlife.

14. The Applicant's intent is to create a natural appearing yet functional man-made ecological community comprised of ditches, ponds with deep and shallow water areas (fish habitat, and emergent and sub-aquatic vegetation habitat to attract wildlife), and riparian habitat which can be used by naturally occurring fish, wildlife, and waterfowl in the area. Identified uses include spawning habitat for brown trout, rearing habitat for brown and rainbow trout; seasonal and nesting habitat for mallards, teal, coots, geese; use of the marshy area by blue herons, pheasants, and redwing blackbirds; high quality habitat for muskrats, painted turtles, frogs, and possibly beaver; and occasional use by whitetail deer, skunks, raccoons, and moose.

15. A portion of this use of water will indirectly benefit the public in that their fish and wildlife resources will have access to additional habitat designed for their use.

16. Objector MFWP stated in their objection their interpretation of beneficial use for fish, wildlife, and recreation. MFWP states their definition of beneficial use is "the proposed use of water provides a net benefit to public fish, wildlife, and recreation resources." Objector MFWP's casual observations of the Applicant's recent work on Mitchell Slough indicate the fishery in that reach has benefited. After working with the Applicant, Objector MFWP conditionally withdrew its objection.

17. Direct benefits to the Applicant (including invited personal and business guests) from the man-made habitat are recreation opportunities including bird watching, canoeing, hunting, and fishing.

18. The intent is not to raise a definite number of stocked fish in the ponds, other wildlife, or waterfowl. Instead it is to create an improved natural habitat that is attractive to naturally occurring area fish, wildlife, and waterfowl.

19. Because the habitat is intended to benefit the natural fishery, Applicant has agreed to use diversion structures which allow for fish migration. A portion of the flows are to assure and maintain a surface water connection at the return to the Mitchell to attract natural species.

20. MFWP pond stocking permits are not needed when artificial ponds will not be stocked.

21. The flows for the proposed uses were determined in part by totaling the volumes for increasing the water level in the pond above the local water table (mounding), seepage from the pond, pond evaporation, and a turnover rate sufficient to control temperature in the summer and provide sufficient oxygen in the winter. This volume was then back calculated for the period of diversion to get a flow rate. Then Applicant's fisheries expert was asked to make a fisheries assessment of the North Complex . This approach is not the more typical approach where the fisheries biologist is asked for the water requirements required to produce a viable habitat for a specific

species and number of fish. Applicant's fisheries expert recommended[8] that the flows diverted to the ponds need to be balanced with those in the source. Applicant followed the recommendation and amended the requested flows to assure the biological needs of the Mitchell are not compromised by the Applicant's project. The reduced flows do not compromise the Applicant's purpose because the channel from the source to the ponds was redesigned to provide appropriate habitat at the lesser flows. Applicant recognizes that design adjustments to accommodate the flow reductions (as amended) and resulting lower water temperatures, reduced wetted perimeter of the ponds, reduced outflows, and increase in frozen pond surface area in winter may be needed to maintain the intended habitat. Under the reduced flows the habitat will still be viable; it just won't be ideal.

22. The Applicant has used a fisheries biologist, a wildlife biologist, and a hydrologist to design and create the intended habitat. The habitat created will be monitored to determine the most advantageous flow balance based on fish species utilization between the Mitchell and the created pond/wetland ecosystem. Upon completion of the habitat, a fishery assessment will be conducted to determine if the improved fishery habitat desired can be achieved at lower flows from the Mitchell. An opportunity to provide the required assessment is with the *Notice of Completion* for the project.

23. A portion of the water requested is to raise the water level above the local groundwater level to create the riparian habitat desired. The local groundwater levels are near the surface of the ground in the area. Experts deemed the use of pond liners not appropriate here to raise the water level because they will not create the desired riparian habitat, and may not be stable given the high rate of groundwater movement in the area.

24. After a period of use fine sediments are expected to decrease seepage from the inlet ditch and pond bottom. After this occurs, less water will be required to keep the water level above the groundwater level.

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8 The recommendations made for the North Complex were then applied to the other three applications.

25. Applicant's fisheries biologist stated that the inflow is also needed to create the fishery habitat; where the water leaves the pond, by bottom seepage or a surface outflow, is not material to the pond habitat. (Department file, testimony of Clint Brown, Brian Riggers, and Karl Uhlig)

Possessory Interest

26. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. Applicant has a possessory interest in the place of use. (Department file)

Water Quality Issues

27. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure

28. The priority date of this application is prior to the March 29, 1999 effective date of the Bitterroot River subbasin temporary closure. The application is not subject to the closure.

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

CONCLUSIONS OF LAW 76H-106454

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit may be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state

reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised by an objector, the water quality of a prior appropriator will not be adversely affect, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-311 (1), (2).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 4.

4. The Applicant has proven that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 5, 6.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 8, 9, 10.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 11.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. The Applicant has not provided evidence to establish a direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife or waterfowl population, or recreational activity. Mont. Code Ann. § 85-2-311(1)(d). See Memorandum.

8. The Applicant has not proven the proposed use of water is a beneficial use of water for which Applicant can establish a water

right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 13 and Memorandum.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 26.

10. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Finding of Fact No. 27.

11. The Bitterroot River subbasin temporary closure does not apply to the application. Mont. Code Ann. § 85-2-344. See Finding of Fact No. 28.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant has provided no term or condition that would satisfy the burden of establishing beneficial use. Mont. Code Ann. § 85-2-312.

13. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven a beneficial use to which Applicant can put the water to use by a preponderance of the evidence, a permit may not be granted.

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

PROPOSED ORDER 76H-106454

The Application is DENIED.

MEMORANDUM

"An essential element of a water right under the Appropriation Doctrine is that the use of water must be for a beneficial purpose. Montana first adopted this concept in the statutes in 1885, although it was part of the common law before then. It is often said that beneficial use is the basis, measure, and limit of an appropriative right. [E.g., McDonald v. State, 220 Mont. 519, 530 (1986)]. This means that the water right is limited by the amount of water that can be used beneficially. An Appropriation Doctrine water right therefore has an upper limit in terms of quantity of water that may be used. And, of course, the purpose must always be beneficial." T. DONEY, MONTANA WATER LAW HANDBOOK § 2.4.1, at 24 (1981). Beneficial use continues to be an essential element of a water right under the permitting system, i.e., it continues to be the basis, measure and limit of the appropriative right acquired by compliance with the Montana Water Use Act. Simply stated, there is a measure and a limit to the right in addition to it being beneficial. Under Mont. Code Ann. §85-2-311, the applicant has the burden to establish the measure and the limit, and it is not enough to establish that it is beneficial by definition alone. As stated by Doney, "[I]t is difficult to imagine any use of water under this [the statutory definition at Mont. Code Ann. § 85-2-102] that wouldn't be beneficial. The more difficult problem, then, in dealing with the concept of beneficial use is determining the quantity of water attached to an appropriative water right." Id. at 25.

The quantity of water necessary for the declared beneficial use is the rule of law in Montana. In Irion v. Hyde, 107 Mont. 84 (1938), the Montana Supreme Court noted that the right of an appropriator may not be measured entirely by what was claimed in a notice of appropriation, but must be measured by beneficial use over reasonable periods. The bottom line is that water rights in Montana are and always have been limited to the amount necessary by the amount of water needed and/or used for beneficial use. Essentially, a rule of law has developed in case law. The rule may be succinctly stated as, "the quantity of water attached to a water right is limited in time

and volume by the capacity of the appropriation facilities, actual use, actual need, or original intent, whichever is less." Id. at 27. The rule follows from cases, such as those dealing with appropriation facilities [Conrow v. Huffine, 48 Mont. 437 (1914) (headgate capacity); Wheat v. Cameron, 64 Mont. 494 (1922) (ditch capacity); Carron v. Wood, 10 Mont. 500 (1891) (headgate capacity)], cases involving situations in which the amount actually used is less than the facilities will accommodate, then the right is measured by amount actually used [Conrow, supra; Federal Land Bank v. Morris, 112 Mont. 445 (1941); Spaulding v. Stone, 46 Mont. 483 (1913)], cases in which the amount reasonably necessary was found to be the limit[Dern v. Tanner, 60 F.2nd 626 (D. Mont. 1932); Allen v. Petrick, 69 Mont. 373 (1924); Conrow, supra], cases in which the amount was measured by the original intent [Allen, supra (amount claimed); Bailey v. Tintinger, 45 Mont. 154 (1912) (intent); Smith v. Duff, 39 Mont. 382 ((1909) (intent); Marks v. Hilger, 262 F. 302 (1920) (decree)], and case concerning the period of actual need [Dern, supra; Quigley v. McIntosh, 110 Mont. 495 (1940); Galiger v. McNulty, 80 Mont. 339 (1927); Duff, supra].

If a pond is desired by a landowner and a quantity of water cannot be determined as necessary to sustain the use, a water use permit cannot be granted. The Montana appropriation statutes refer to "an amount or quantity of water". See Mont. Codes Ann. §§ 85-2-102 (1)(a), and 85-2-311 (1)(a)(i & ii). Elsewhere the statutes specifically state "The Department may issue a permit...but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application..." Mont. Codes Ann. §85-2-312 (1).

Department contested case orders show a repeating pattern that before a permit for a beneficial use or purpose can be granted, the use must be quantified.. *See In The Matter of* Application 41Q-033983 by Hoyt, Proposal for Decision, (1982); Application 76L-050510 by Meyer, Proposal for Decision, (1986); Application 41H-055362 by Kenney, Proposal for Decision, (1986); Application 41H-081855 by Martin and Ewing, Proposal for Decision, (1993).

Here, there was expert testimony that the proposed fish ponds could support a calculated number of fish. However, Applicant does not intend to stock the ponds. Instead, naturally occurring fish may or may not choose to use the ponds. There was no testimony of how many fish would be placed in the proposed ponds to quantify the amount of water needed.

The wildlife (and other riparian aquatic life) associated with this project is not wildlife brought in or controlled by the applicant; nor has a specific amount of water to create a wildlife habitat based upon the number of wildlife controlled by Applicant been identified. Instead an unknown number of naturally occurring area wildlife (and other riparian aquatic life) may use the pond. The applicant has not determined the minimum water necessary to sustain the proposed wildlife use, or that they have control over the wildlife.

Applicant does not have an association with a governmental entity with the legal duty to protect natural fish or wildlife resources such as Montana Fish, Wildlife & Parks, or the U.S. Fish and Wildlife Service. The withdrawal of these parties' objections to these applications is not an indication of an association between them to manage the fish or wildlife resource. Instead Recital #7 of the Joint Stipulation To Amend And Withdraw Applications And To Withdraw Objections Subject To Proposed Conditions states "The parties agreement to resolve the objections to the Siebel' [sic] applications as set forth herein shall not be used in any other proceeding as evidence for or against that party's position in such proceedings."

Without such an association and determination of the minimum amount of water necessary for the proposed use, a water right to an individual for this purpose cannot be granted.

Objector's Exhibit 02, although not admitted for evidentiary purposes, is hereby incorporated by reference as the legal grounds for concluding that the Applicant has not established beneficial use in this matter.

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 and request oral argument 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 6TH day of March, 2002.

Charles F Brasen
Hearings Officer
Water Resources Division
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and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 6th day of March, 2002.

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