

*Chuck*

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

\* \* \* \* \*

IN THE MATTER OF THE )  
APPLICATION 40A-108497 BY ) FINAL  
ALEX MATHESON ) ORDER

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. A letter from Objector Rath regarding the proposal for decision was received which was not copied to all parties. The letter did not specifically set forth precise portions of the proposed decision to which exception is taken, the reasons for the exception, authorities upon which the party relies, or specific citations to the record in support of the exception. Objector was telephoned and asked whether the letter was to be considered an exception and the Objector said he would telephone back with an answer but the Objector did not telephone back. The letter does not qualify as an exception under Mont. Admin. R. 36.12.229 (1994). The letter commenting on the proposal will be sent to the Water Rights Bureau Chief, but will not be considered as part of this hearing process.

Therefore, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 26, 2000, Proposal for Decision. The Department ORDERS as follows:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 40A-108497 is hereby

**CASE #** 108497

granted to Alex Matheson to appropriate up to 11.18 acre-feet of water per year from Dean Creek in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East, Musselshell County, Montana. The permitted uses are 7.7 acre-feet for irrigation, 3 acre-feet for lawn and garden irrigation, and 0.48 acre-feet for stock use. The permitted place of use for irrigation is 20 acres in the NW $\frac{1}{4}$  of Section 9. The permitted place of use for lawn and garden is 1 acre in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The place of use for stock is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The permitted means of diversion and place of storage is a 7.6 acre-foot enlargement of an existing reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, and a new 0.1 acre-foot reservoir in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The permitted period of diversion is January 1 to December 31, inclusive, of each year. The irrigation, and lawn and garden period of use is May 1 through October 1; the stock period of use is January 1 through December 31, both inclusive, of each year. Said lands are all within Township 6 North, Range 24 East, Musselshell County, Montana.

A. The total combined volume of water used for irrigation under this permit and 40A-P007547 cannot exceed 40.0 acre-feet.

B. This permit is subject to all prior existing water rights in the source of supply, including instream livestock uses which were exempt from the filing requirements of the on-going statewide water adjudication. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

C. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in

issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for 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 2<sup>nd</sup> day of August, 2000.

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

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 14<sup>th</sup> day of August, 2000, as follows:

ALEX MATHESON  
15 MATHESON RD  
LAVINA MT 59046

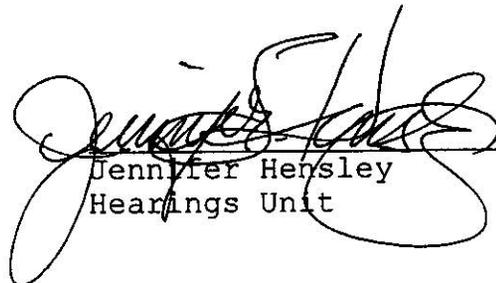
ROBERT & JANET HAMILL  
PO BOX 129  
LAVINA MT 59046

GARY RATH  
1006 HWY 3 BOX 26  
BROADVIEW MT 59015

ROBERT M KAMPFER  
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SCOTT IRVIN, MANAGER  
ANDY BRUMMOND, WRS  
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WATER RIGHTS BUREAU CHIEF  
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Jennifer Hensley  
Hearings Unit

Chuck

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION ) PROPOSAL  
FOR BENEFICIAL WATER USE PERMIT 40A- ) FOR  
108497 BY ALEX MATHESON ) 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 February 2, 2000 in Ryegate, Montana to determine whether a Beneficial Water Use Permit should be granted to Alex Matheson for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-311(1) and (5) (1999).

APPEARANCES

Mr. Matheson appeared in person and by and through counsel Robert Snively. Loren Hogarty and Frank Dodd were called to testify by the Applicant.

Objector Gary Rath appeared in person. Sylvan Anderson was called to testify for Objector Rath. Objector Robert and Janet Hamill appeared in person and by and through counsel Robert M. Kampher.

Andy Brummond, Water Resources Specialist with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation was called to testify by the hearings examiner.

EXHIBITS

Applicant offered seven exhibits for the record. All were accepted without objection. Objector Hamill offered ten exhibits numbered 001-011 for the record. All were accepted without objection.

**CASE # 108497**

Objector Hamill did not offer an exhibit numbered 010, and See Preliminary Matters, below, regarding Exhibit 012.

**Applicant's Exhibit 1** consists of eight pages containing sixteen photographs showing portions of the Dean Creek channel from the headwaters to  $\frac{1}{4}$  mile above Applicant's upper reservoir.

**Applicant's Exhibit 2** consists of five pages containing eleven photographs showing portions of the Dean Creek channel from  $\frac{1}{4}$  mile above Applicant's upper reservoir to  $\frac{1}{4}$  mile below the lower reservoir including the upper and lower reservoirs.

**Applicant's Exhibit 3** consists of two pages containing four photographs of a test hole located 400 feet downstream of the lower reservoir.

**Applicant's Exhibit 4** consists of nine pages containing twenty-five photographs showing Applicant's stock well, stock tank and discharge near the lower reservoir; open water in the upper reservoir; lower dam, spillway, and release pipe; and portions of the Dean Creek channel and flows from the lower reservoir to  $\frac{1}{4}$  mile below the lower reservoir.

**Applicant's Exhibit 5** consists of two pages containing three photographs showing the lower end of Dean Creek near the mouth.

**Applicant's Exhibit 6** is a plastic bag containing a sample of the material from test hole shown in Applicant's Exhibit 3.

**Applicant's Exhibit 7** consists of a copy of one page of the Department's on-line water right point of diversion index for section 4, Township 6 North, Range 24 East.

**Objector Hamill's Exhibit 001-004** are photographs of Dean Creek and a homestead cabin on Lot 497.

Objector Hamill's Exhibit 005 consists of a two page copy of Objector Hamill's Acknowledgment of Exempt Water Right No. 40A-E-110618

Objector Hamill's Exhibit 006 is a copy of Water Use Permit No. 40A-P-11113 issued to Merle E Hunt.

Objector Hamill's Exhibit 007 is a three page copy of a warranty deed from Gary and Glennis Rath to Robert and Janet Hamill.

Objector Hamill's Exhibit 008 is a copy of a map showing lot numbers and a hand drawn line depicting Dean Creek through the Rath and Hamill lots.

Objector Hamill's Exhibit 009 is a copy of a map showing lot numbers and CRP outline and number of acres in the Rath and Hamill lots.

Objector Hamill's Exhibit 011 is a copy of a right of way easement for roads.

#### PRELIMINARY MATTERS

Objector Hamill raised the issue of the project plan required in Mont. Code Ann. § 85-2-310 (4)(iv) (1999). The project was complete at the time the application was submitted according to the Department file and Applicant testimony. The need for a project plan to assess the Applicant's bona fide intent seems unnecessary.

A motion to dismiss the application because no permit had been received prior to diversion of the water as set forth in Mont. Code Ann. §85-2-302 (1999) was overruled. Water use permit contested case hearings are conducted only to determine if the criteria in Mont. Code Ann. §85-2-311 are met. These criteria do not include whether or not a diversion had been constructed and used prior to the application. In this case, the application was submitted to obtain compliance with

Mont. Code Ann. §85-2-302 which requires a permit for such diversion.

No law allows the Department to deny a permit on the basis that the diversion may have been illegal prior to obtaining the permit.

At the close of the hearing there was confusion over whether Hamill Exhibit 012 (copy of original land patent for land now owned by Objector Hamill) had been offered or admitted. It was not admitted at the hearing because the hearing examiner's records did not show it had been introduced. The verbatim record of the hearing confirms the Hamill Exhibit 012 had been offered but was not included in the exhibits handed to the examiner. Hamill Exhibit 012 was not admitted into the record. Hamill Exhibit 012 was offered as dated evidence of the stock use of water on the Hamill property. The omission of Hamill Exhibit 012 does not prejudice Objector Hamill's position because Objectors Rath and Hamill testified of stock use by the original Ebeling Ranch dating at least from 1964. Objector Rath and Objector Hamill are successors to portions of Ebeling Ranch. Thus, both are successors to whatever portions of the Ebeling Ranch pre July 1, 1973 stockwater right they received with the lands they purchased. In this matter actual date of first use is not material; stock use prior to July 1, 1973 is.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 40A-108497 in the name of and signed by Alex Matheson was filed with the Department on August 5, 1999. (Department file.)
2. Applicant seeks to appropriate up to 11.48 acre-feet of water per year from Dean Creek at points in NW¼SW¼NW¼ of Section 9, Township 6

North, Range 24 East in Musselshell County. The proposed uses are 3 acre-feet for domestic lawn and garden from January 1 through December 31, inclusive, of each year; 8 acre-feet fish and wildlife from January 1 through December 31, inclusive, of each year; 8 acre-feet for additional irrigation storage for use on Permit 40A-007547 place of use from May 1 through October 1, inclusive, of each year; 8 acre-feet for recreation from January 1 through December 31, inclusive, of each year; and 0.48 acre-feet for stock from January 1 through December 31, inclusive, of each year. The proposed places of storage are a new instream reservoir with a proposed capacity of .4 acre-feet located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East, and a 7.6 acre-foot enlargement of an existing instream reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East with a proposed total capacity of 11.6 acre-feet. The proposed place of use for the lawn and garden irrigation is 1 acre within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East, and the irrigation place of use is that of existing Permit 40A-007547 further described as 20 acres in the NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East (Department file)

3. Applicant has proven water is physically available. Dean Creek drainage above Applicant reservoirs is 24,000 acres. Average annual runoff for the Dean Creek basin is .5 inches. One half inch of runoff from 24,000 acres provides 1,000 acre-feet of water at Applicant's reservoirs. Dean Creek typically flows on the surface only through mid-June or during thunderstorms at the Applicant's reservoirs. Upstream of Applicant's reservoirs Dean Creek is ephemeral. Water overflows the upper reservoir only during wet spring seasons or during precipitation events. During a 1999 two inch precipitation event,

both the upper and lower reservoirs filled. (Department file, testimony of Loren Hogarty, Frank Dodd, Alex Matheson)

4. Applicant has proven water is legally available. Three downstream legal demands were identified on Dean Creek; one water use permit for irrigation, and two exempt instream livestock uses. Department records indicate the downstream Hunt irrigation permit, now owned by Objector Rath, was completed as permitted. However, Objector Rath has not used the Hunt irrigation permit 40A-011113. Objectors Rath and Hamill have instream stock uses downstream of the proposed project. Objector Hamill has not exercised his livestock water right since 1996. Objector Rath has regularly used his livestock right; but, had to remove his livestock from the pastures in 1999 because Dean Creek dried up. The applicant's reservoirs were in place during the 1999; but, the reservoirs were not the cause of Dean Creek drying up at Objector Rath's place of use. When Dean Creek was dry at Objector Rath's it was also dry upstream of Applicant's reservoirs. Upstream of Applicant's reservoirs Dean Creek is ephemeral; thus, Applicant's ponds will only impound flow during wet spring seasons or during heavy precipitation events when downstream uses would not be affected. There are four springs and 20 gpm continuous flow from Applicant's well tributary to Dean Creek downstream of Applicant's reservoirs, which will contribute to downstream stockwater uses. The proposed project was not the cause of 1999 problems, and the reservoirs have drainage devices so that water can be released to honor a call from a downstream senior appropriator, so water is legally available. (Department file, testimony of Frank Dodd, Alex Matheson, Gary Rath, John Hamill)

5. Applicant has proven the water rights of a prior appropriator will not be adversely affected. Objectors Rath and Hamill are successors of downstream Ebeling Ranch exempt instream livestock rights from Dean Creek. There is conflicting testimony as to the frequency that Dean Creek flows into the Musselshell River. The pictures of the mouth of Dean Creek suggest that flows into the Musselshell River are infrequent. Pictures of Dean Creek on Objector Hamill's ownership suggest that Dean Creek typically has water as evidenced by the cattails in the channel. Objector Rath contended that Applicant's lower reservoir caused Dean Creek to stop flowing in 1999. However, during the time Dean Creek dried up downstream of Applicant's reservoirs in 1999, it was also dry upstream of the reservoirs. 1999 was a dry year. Applicant has installed pipes with valves so he can release water from the reservoirs in the event of a call by downstream senior appropriators. (Department file, testimony of Alex Matheson, Andy Brummond, Gary Rath, Robert and Janet Hamill)

6. Applicant has not proven the proposed means of diversion, construction, and operation of the appropriation works of the lower reservoir at the 0.4 acre-foot capacity is adequate. The lower dam was constructed as a roadbed using gravel to allow water to pass through it. Applicant provided no plans to alter the lower dam to make it hold water. If filled to the spillway crest, water seeps through the gravel in the roadbed until the depth in the pond is only one foot. The capacity of the lower reservoir at a one foot depth is 0.1 acre-feet. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works of the lower reservoir at a 0.1 acre-foot capacity is adequate.

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works of the upper reservoir is adequate. The upper reservoir has a spillway, pipe and valve to release water through the embankment, and holds water. The total storage in the upper reservoir is the sum of the existing 4.0 acre-foot reservoir and the 7.6 acre-foot enlargement for a total capacity of 11.6 acre-feet. (Department file, Alex Matheson testimony)

8. Applicant has proven that the proposed use of water, irrigation, is a beneficial use of water. The enlarged upper reservoir will benefit the appropriator by providing additional storage of 7.6 acre-feet of water for use later in the season on acreage covered by Applicant's existing permit 40A-P007547. The 4.0 acre-foot reservoir which was enlarged is the permitted storage for Applicant's existing permit 40A-P007547. Neither the total storage capacity of the upper reservoir, nor the irrigation volume of 40 acre-feet on the existing permit exceed the crop requirements in this area. If conditioned such that the combined irrigation volume on these acres does not exceed the existing permitted volume of 40 acre-feet, the use is beneficial.

(Department file, Alex Matheson testimony, Department file 40A007547)

9. Applicant has proven the proposed use of water, domestic lawn and garden irrigation, is a beneficial use of water. Applicant typically uses the upper reservoir for garden irrigation, but would like the option to use the water from the lower reservoir for irrigation of his existing 1 acre garden. This is a standard amount of water for this use in this area. (Department file, Alex Matheson testimony, Department file 40A007547)

10. Applicant has proven the proposed use of water, stock, is a beneficial use of water. Applicant's 140 sheep and goats drink from

the water stored in the reservoirs. This amount of water is reasonable for this number and type of livestock. (Department file, Alex Matheson testimony)

11. Applicant has not proven the proposed use of water, fish and wildlife, is a beneficial use of water. The description of the wildlife component of the application was that the habitat for area wildlife and water fowl would be improved and the Applicant likes to have them come around. There was no additional explanation of how the Applicant would benefit from the use of water by the area wildlife, or how much water is needed to sustain the wildlife use. The department may issue a permit for less than the amount requested, but may not issue a permit for more water than can be beneficially used without waste for the purpose stated in the application. The record does not contain sufficient information to quantify even a lesser amount than what was requested for this use. (Alex Matheson testimony, Memorandum [below])

12. Applicant has not proven the fisheries component of the use of water is beneficial. The Applicant will stock the upper pond with catfish and carp in unknown numbers for his personal use. Catfish and carp are currently found in the upper reservoir. However, Applicant did not provide any justification of why this volume of water is needed for use by an unknown number of catfish or carp. There was no discussion of how the fishery and irrigation storage use can coexist in the same reservoir on an ephemeral stream. The department may issue a permit for less than the amount requested, but may not issue a permit for more water than can be beneficially used without waste for the purpose stated in the application. The record does not contain

sufficient information to quantify even a lesser amount than what was requested for this use. (Alex Matheson testimony, Memorandum [below])

13. Applicant has not proven the proposed use of water, recreation, is a beneficial use of water. Applicant's family will float the upper reservoir on rafts for personal pleasure. Applicant did not provide justification for why this volume of water is needed for an occasional 'float on the pond'. The department may issue a permit for less than the amount requested, but may not issue a permit for more water than can be beneficially used without waste for the purpose stated in the application. The record does not contain sufficient information to quantify even a lesser amount than what was requested for this use. (Department file, Alex Matheson testimony, Memorandum [below])

14. Applicant has proven by a preponderance of evidence that he 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. (Department file, Alex Matheson testimony)

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

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the Applicant proves the criteria in §85-2-311.
2. Applicant has met the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 15.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit 40A-108497 is hereby granted to Alex Matheson to appropriate up to 11.18 acre-feet of water per year from Dean Creek in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, Township 6 North, Range 24 East, Musselshell County, Montana. The permitted uses are 7.7 acre-feet for irrigation, 3 acre-feet for lawn and garden irrigation, and 0.48 acre-feet for stock use. The permitted place of use for irrigation is 20 acres in the NW $\frac{1}{4}$  of Section 9. The permitted place of use for lawn and garden is 1 acre in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The place of use for stock is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The permitted means of diversion and place of storage is a 7.6 acre-foot enlargement of an existing reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, and a new 0.1 acre-foot reservoir in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The permitted period of diversion is January 1 to December 31, inclusive, of each year. The irrigation, and lawn and garden period of use is May 1 through October 1; the stock period of use is January 1 through December 31, both inclusive, of each year. Said lands are all within Township 6 North, Range 24 East, Musselshell County, Montana.

A. The total combined volume of water used for irrigation under this permit and 40A-P007547 cannot exceed 40.0 acre-feet.

B. This permit is subject to all prior existing water rights in the source of supply, including instream livestock uses which were exempt from the filing requirements of the on-going statewide water adjudication. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

C. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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

MEMORANDUM

The Department has been issuing water use permits for pond uses since the inception of the Water Use Act. It seems that the Department has become the resource used by applicants to quantify how much water is required for a proposed fish, wildlife, or recreation pond. The Department has a policy to guide staff as to what is a reasonable flow rate (turnover or exchange rate) for ponds. Applicants often turn to the Department and its pond policy for flow rate and volume justification to complete their water use permit application.

This use of the Department is similar, but not the same as, the approach to proposed irrigation. Often a landowner comes to the department with a desire to irrigate some land. The number of acres to be irrigated and crop are fed into a Natural Resources and Conservation Service "formula" which suggests a reasonable quantity of irrigation water for the particular climactic area and crop. How many acres will end up irrigated is not evaluated in the "formula". That is left to a water availability analysis, and the resources of the applicant.

The current approach to proposed ponds does not ask how much water the "crop" (e.g., fish, wildlife, or recreation) requires. Instead the size (capacity) of a proposed pond forms the basis for the application rate and/or volume. Just as a potential irrigator must gather information to decide how much water, flow rate and volume, is needed for a proposed project, so must a potential pond owner. The amount of water needed to sustain the intended use(s) of a pond without wasting water requires quantification for each pond application and each pond use.

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. §85-2-101 (1) (a), (1999), and §85-2-311 (1) (a) (i & ii), (1999). 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) (1999). 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)*.

There was testimony that there are fish in the proposed pond. There was no testimony of how many fish would be placed in the proposed pond, or other evidence, that might quantify the amount of

water needed for the fishery use. If water is to be set aside to sustain a beneficial use, it must be put to the use. That is, the pond must be stocked to the extent of the water right. There is simply no evidence to support the volume requested for a fishery.

There was testimony that the proposed pond will be used for recreational floating. There was no testimony explaining why this or a lesser volume of water is necessary to sustain a recreation use. There is simply no evidence to support the volume requested for recreation.

The wildlife use associated with this project is not wildlife brought in by the applicant. The specific amount of water to create a wildlife habitat has not been identified. Instead an unknown number of area wildlife use the pond. The applicant has not determined how much water is necessary to sustain the proposed wildlife use. Without such determination, a water right for this purpose cannot be granted.

There is simply no evidence to support the volume requested for a wildlife pond.

Thus, this permit does not grant water for the fishery, wildlife, and recreation purposes because the amount of water needed was not, or could not be, shown as necessary.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception

and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 26<sup>th</sup> day of May, 2000.



Charles F Brasen, Hearing Examiner  
Department of Natural Resources  
and Conservation  
48 N Last Chance Gulch  
POB 201601  
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was duly served upon all parties listed below this 30<sup>th</sup> day of May, 2000, as follows:

ALEX MATHESON  
15 MATHESON RD  
LAVINA MT 59046

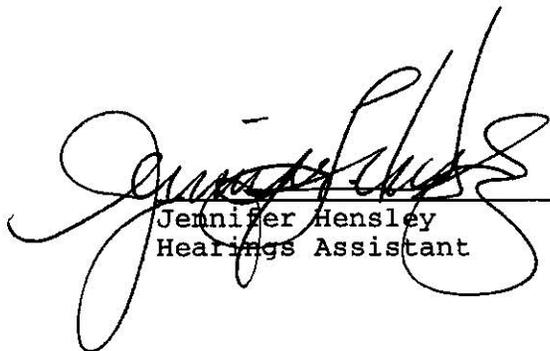
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ANDY BRUMMOND, WRS  
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\_\_\_\_\_  
Jennifer Hensley  
Hearings Assistant