Chuck

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

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 41H-104667 and APPLICATION TO CHANGE APPROPRIATION WATER RIGHT 41H-G(W)125497 BY RONALD J. WOODS	)))))	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. It has come to the Department's attention that the water use permit flow rate will not produce the volume granted in the proposal for decision. Therefore, the volume granted is 63.6 acre-feet, and the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law contained in the April 19, 2000, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

APPLICATION FOR BENEFICIAL WATER USE PERMIT 41H-104667

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit 41H 104667-00 is hereby granted to Ronald J. Woods with a priority date of October 14, 1998, to appropriate 39.4 gallons per minute up to 63.6 acre-feet of the waters Dry Creek at a point in the SW¼SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County. During the period January 1 through December 31, inclusive of each year, Applicant may appropriate

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39.4 gallons per minute up to 62.4 acre-feet for a non-consumptive fisheries purpose. During the period January 1 through December 31, inclusive of each year, applicant may appropriate 1.2 acre-feet of water for fire protection purposes. The place of use shall be an off-stream reservoir located in the S½SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall line beneath or convey in pipe all diverted water between the point of diversion and the point of return to the source to prevent seepage loss. The liner and pipe must equal or exceed the specifications of the impervious liner and pipe used at the time of pond construction.

C. Permittee shall install measuring devices approved by the Bozeman Water Resources Regional Office Manager at the point of diversion and the point of return to the source to determine the amount of water lost to evaporation. Evaporation shall be replaced by water made available for this purpose by changing a portion of 41H-W125497-00 to this use. The appropriator shall maintain the measuring devices so they always operate properly and measure the flow rates accurately.

D. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted from Dry Creek for fisheries, and evaporation make-up. The appropriator must also keep written monthly records of flow rate of water returned to Dry Creek, including the period of time, and shall submit the records by November 30 of each year. The Department may also request measurement records at other times of the year.

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Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Bozeman Water Resources Regional Office.

E. To meet the requirements of the Upper Missouri Basin closure, the initial fill of water for this fishery and storage pond can only occur during high spring flows.

F. To meet the requirements of the Upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond for the fisheries purpose. The appropriator must document with water measurements the amount of flow rate and volume of water added to the pond under changed right 41H-W125497 to make up for evaporation losses.

G. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation and expenses incurred in the distribution of the waters. The fee will be set by district court.

H. 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.

I. 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.

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APPLICATION TO CHANGE WATER RIGHT NO. 41H-G(W)125497

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization To Change 41H-G(W)125497-00 is granted to Ronald J. Woods to move the point of diversion for all of 41H-W125497-00 to the SW¼SW¼NW¼, Section 35, Township 2 North, Range 4 East, Gallatin County; to change the place of use for 4.5 acre-feet to an off-stream reservoir located in the S½SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County; and to change the type of use for 4.5 acre-feet of water to a fishery use.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and §85-2-404.

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

C. Appropriator shall line beneath or convey in pipe all diverted water between the point of diversion and the point of return to the source to prevent seepage loss. The liner and pipe must equal or exceed the specifications of the impervious liner and pipe used at the time of pond construction.

D. Appropriator shall install a measuring device at the point of diversion, at the secondary irrigation point of diversion at the pond, and at the point of return to the source. These measuring devices must be approved by the Bozeman Water Resources Regional Office Manager. The appropriator shall maintain the measuring devices so they always operate properly and measure the flow rate accurately.

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E. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted from Dry Creek for fisheries, evaporation make-up, and irrigation. The appropriator must also keep written monthly records of flow rate of water diverted from the pond for irrigation purposes, and water returned to Dry Creek, including the period of time, and shall submit the records by November 30 of each year. The Department may also request measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Bozeman Water Resources Regional Office.

F. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation and expenses incurred in the distribution of the waters. The fee will be set by district court.

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

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Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 1ST day of JUNE, 2000.

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

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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 2nd day of June, 2000, as follows:

RONALD J WOODS
13285 DRY CREEK ROAD
BELGRADE MT 59714

DOUGLAS E DANIELS
205 WEST DRY CREEK ROAD
BELGRADE MT 59714

CARLETON J JOHNSON
8611 DRY CREEK ROAD
BELGRADE MT 59714

JOHN BLOOMQUIST
DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.
POB 1185
HELENA MT 59624-1185

SCOTT COMPTON, MANAGER
JAN MACK, WRS
BOZEMAN WATER RESOURCES REGIONAL OFFICE
151 EVERGREEN DRIVE, SUITE C
BOZEMAN MT 59715

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
POB 201601
HELENA MT 59620-1601

Jennifer Hensley
Hearings Assistant

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Chuck

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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 41H-104667 and APPLICATION TO CHANGE APPROPRIATION WATER RIGHT 41H-G(W)125497 BY RONALD J. Woods	)	Proposal For Decision

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on January 20, 2000 in Belgrade, Montana, to determine whether a Beneficial Water Use Permit and associated Authorization To Change A Water Right should be issued to Ronald J. Woods for the above-entitled applications under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1999) and § 85-2-402 (2) (1999) .

APPEARANCES

Applicant Ronald J. Woods appeared by and through counsel John E Bloomquist. Carl Neely, Bootstrap Ranch Boys School, and Lynn Bacon, Wetlands West, Inc., were called to testify by the applicant. Objector Doug Daniels appeared at the hearing in person. Jan Mack, Water Resources Specialist, Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the applicant. Objector Carelton J Johnson did not appear and has defaulted under Mont. Admin. R. 36.12.208 (1999).

EXHIBITS

Both applicant and objector offered exhibits for the record. Applicant offered eleven exhibits for the record. All were accepted into the record.

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Applicant's Exhibit A-1 is a 24 inch by 36 inch plan map labeled *Fire Pond Design* by C&H Engineering And Surveying, Inc. of the pond area. It shows some pond design features, land surface contours, pond, buildings, and proposed conveyance pipe locations, slope, and lengths.

Applicant's Exhibit A-2 is a 2 photograph panorama taken by Jan Mack looking north across the pond, showing the inlet pipe at the pond.

Applicant's Exhibit A-3 is a photograph taken by Jan Mack below the outlet of the pond showing the condition of the upstream end of the two pond overflow culverts on August 24, 1999.

Applicant's Exhibit A-4 is a photograph taken by Jan Mack of the downstream end of one of the pond overflow culverts and the intake to the buried pipeline which returns water to Dry Creek.

Applicant's Exhibit A-5 is a photograph taken by Jan Mack of the pipeline where the pond water is returned to the source.

Applicant's Exhibit A-6 is a series of seven photographs taken by Wetlands West, Inc. in December 1999. The photographs show the view from the point of diversion at the source towards the pond, the pond, the pond inlet pipe, the pond outlet area, the overflow channel, and the outlet pipe where it returns water to the source.

Applicant's Exhibit A-7 consists of a four inch diameter piece of the pond liner with joint material and tape attached.

Applicant's Exhibit A-8 consists of a two page document from Wetlands West, Inc. containing pond construction specifications, and water flow and volume calculations pertaining to the Water Use Permit application.

Applicant's Exhibit A-9 is eight copies from the water right change file No. 41H-G(W)-132259. They are the Authorization to Change issued

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by the Department to Doug Daniels and Marlene R Phillips, the Sever and Sell application form, two pieces of file correspondence discussing the proposed change, and a map of the proposed change.

Applicant's Exhibit A-10 is a one page document from Wetlands West, Inc. of calculations relating to Application to Change Water Right No. 41H-G(W)-125597.

Applicant's Exhibit A-11 consists of copies of two pages from *NOAA Technical Report NWS 34* showing the mean annual evaporation from shallow lakes and reservoirs for the state of Montana.

Objector offered one exhibit for the record. Exhibit O-1 was accepted without objection.

Objector's Exhibit O-1 is a hand drawn sketch used by Objector Daniels in his discussion of channel and ditch losses.

PRELIMINARY MATTERS

Prior to the start of the hearing the cases were consolidated. The testimony relative to the Application For Beneficial Water Use Permit was followed by testimony for the Application To Change A Water Right.

By reason of the default, Objector Carelton's interest in this proceeding is dismissed.

APPLICATION FOR BENEFICIAL WATER USE PERMIT 41H-104667

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 41H-104667 in the name of and signed by Ronald J. Woods was filed with the Department on June 25, 1998. The priority date was changed to October 14, 1998 when the application was made correct and complete. (Department file.)

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2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the source, on December 2, 1998. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. Two objections were received by the Department. Applicant was notified of the objections by a letter from the Department dated January 8, 1999.

3. Applicant seeks to appropriate 89.76 gallons per minute up to 144.78 acre-feet of water per year from Dry Creek at a point in the SW¼SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County. The proposed use is fish and wildlife, and fire protection. The proposed place of use is an off-stream pond with a capacity of 1.2 acre-feet located in the S½SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County. The proposed means of diversion is a headgate. The proposed period of diversion is from January 1 through December 31, inclusive of each year. (Department file)

4. Applicant has proven water is physically and legally available. C&H Engineering measured the flow in Dry Creek April 26, 1998 at 6.2 cfs (2783 gallons per minute). An affidavit by the former ranch manager who was born and raised on what is now applicant's ranch states that the low flow in Dry Creek is at least half of the flow measured by C&H Engineering on April 29, 1998. Half of the April 29, 1998 flow, 3.1 cfs (1391.5 gallons per minute), exceeds the 89.7 gallons per minute requested. If properly constructed and operated, the pond will be non-consumptive, and legal availability will be unaffected. (Department file, Carl Neely testimony)

5. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, a

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certificate, a permit, or a state water reservation. There are surface water rights on Dry Creek downstream of the applicant's proposed point of diversion. There are no Dry Creek appropriations between the point of diversion and the point of return to Dry Creek. There are times when Dry Creek freezes above Objector Daniel's downstream Dry Creek point of diversion. During these times Dry Creek only flows at an estimated thirty gallons per minute. Objector Daniels asserts that removing 89.7 gallons per minute from Dry Creek between the proposed point of diversion and point of return will increase the amount of time Dry Creek will be frozen. In the past the Objector Daniels has increased the flows into the Dry Creek channel to get water at his point of diversion when there was a freezing problem. Because of the non-consumptive nature of the pond the flow below the point of return to Dry Creek will be the same as it is above the point of diversion. In the event of freezing problems calling the source to increase the flows or following the past practice of increasing the flow into Dry Creek is not an adverse affect to Objector Daniels.

The applicant will divert water from the stream with a Waterman C-8 Ditch Gate (or equivalent) that can control the applicant's diversion of water. If it is determined that the applicant is diverting water that should be allowed to flow to downstream appropriators, the diversion gate can be closed to stop the flow of water to the pond. (Department file, Lynn Bacon testimony, Doug Daniels testimony)

6. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. In the Upper Missouri basin closure area, which includes Dry Creek, no new consumptive water use permits may be issued. The pond has been constructed in a highly permeable soil. Water will be conveyed in a pipe from the point of diversion to the pond, and from the pond back

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to the source. The pond and outlet area have been lined with a synthetic liner to prevent seepage losses. Pond evaporation losses will be made up by decreasing acres irrigated by water right No. 41H W-125497. The flow rate of water diverted and flow rate of water returned to Dry Creek can be measured to determine evaporative losses and assure the pond remains non-consumptive. After the initial fill, the only time the pond will be drained is during fire suppression. (Department file, Jan Mack testimony, Lynn Bacon testimony, application to change [consolidated with this case])

7. Applicant has proven the proposed use of water, fire protection, is a beneficial use of water. The need for a water reservoir for fire fighting purposes is a county subdivision approval requirement to provide for rural fire protection. The pond is required before Bootstrap Ranch High School buildings, located on Applicant Woods' property, can be occupied. The pond design construction notes require dry fire hydrants and a two inch service from the Bootstrap water distribution system to maintain the capacity of the pond should flow from the Dry Creek channel be insufficient. Applicant will benefit by the use of this water by having a 1.2 acre-foot pond with a usable capacity of 270,000 gallons of water available for fire protection for the Bootstrap Ranch High School facilities on the property to meet county requirements. Refills of the reservoir during or after a fire can be made as a temporary emergency appropriation. (Department file, Carl Neely testimony)

8. Applicant has not proven the proposed use of water, fish and wildlife, is a beneficial use of water in the amount requested. No justification for the wildlife component was presented. The applicant will stock the pond with an undetermined type and number of fish to improve campus life at Bootstrap Ranch High School, located on

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Applicant Woods' property. That is, so students at the high school can fish in the pond. Applicant states the 89.7 gallons per minute flow rate, a three day pond volume turnover rate, will assure adequate oxygen and appropriate water temperatures for a healthy fish population in the pond. This exchange rate exceeds the department's findings of reasonable turnover flow rates. No justification for the higher flow rate was provided. A reasonable exchange rate for fish ponds with capacities less than ten acre-feet is seven days. A flow of 39.4 gallons per minute can turnover a 1.22 acre-foot pond volume in seven days. As modified, 39.4 gallons per minute up to 63.6 acre-feet is reasonable for the proposed fisheries use.

Additional applicant justification for the flow is that 89.7 gallons per minute will prevent freezing of the flow at the pond inlet and outlet. There is no evidence supporting this flow rate or discussion why other methods can not be employed at the pipe outlet and inlet. A small amount of water to prevent freezing may not be wasteful; but, the flow rate cannot exceed the amount justified or needed. (Department file, Carl Neely testimony, Jan Mack testimony, Applicant's exhibit 10)

9. Applicant has proven 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. Bootstrap Ranch High School is a private school owned by and located on the property owned by Applicant Woods. Mr Woods is on the Board of Directors of Bootstrap Ranch High School. (Department file, Carl Neely testimony)

10. No objections relative to water quality were filed against this application nor were there any objections relative to the ability

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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 gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 1 and 2.

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10.

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 41H 104667-00 is hereby granted to Ronald J. Woods with a priority date of October 14, 1998, to appropriate 39.4 gallons per minute up to 64.8 acre-feet of the waters Dry Creek at a point in the SW¼SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County. During the period January 1 through December 31, inclusive of each year, Applicant may appropriate 39.4 gallons per minute up to 63.6 acre-feet for a non-consumptive fisheries purpose. During the period January 1 through December 31, inclusive of each year, applicant may appropriate 1.2 acre-feet of water for fire protection purposes. The place of use shall be an off-stream reservoir located in the S½SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County.

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A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall line beneath or convey in pipe all diverted water between the point of diversion and the point of return to the source to prevent seepage loss. The liner and pipe must equal or exceed the specifications of the impervious liner and pipe used at the time of pond construction.

C. Permittee shall install measuring devices approved by the Bozeman Water Resources Regional Office Manager at the point of diversion and the point of return to the source to determine the amount of water lost to evaporation. Evaporation shall be replaced by water made available for this purpose by changing a portion of 41H-W125497-00 to this use. The appropriator shall maintain the measuring devices so they always operate properly and measure the flow rates accurately.

D. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted from Dry Creek for fisheries, and evaporation make-up. The appropriator must also keep written monthly records of flow rate of water returned to Dry Creek, including the period of time, and shall submit the records by November 30 of each year. The Department may also request measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Bozeman Water Resources Regional Office.

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E. To meet the requirements of the Upper Missouri Basin closure, the initial fill of water for this fishery and storage pond can only occur during high spring flows.

F. To meet the requirements of the Upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond for the fisheries purpose. The appropriator must document with water measurements the amount of flow rate and volume of water added to the pond under changed right 41H-W125497 to make up for evaporation losses.

G. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation and expenses incurred in the distribution of the waters. The fee will be set by district court.

H. 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.

I. 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.

APPLICATION TO CHANGE WATER RIGHT NO. 41H-G(W)125497

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

FINDINGS OF FACT

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1. Application to Change A Water Right **41H-G(W)125497** in the name of and signed by Ronald J. Woods was filed with the Department on October 14, 1998.

2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the source, on December 2, 1998. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. Two objections were received by the Department. Applicant was notified of the objections by a letter from the Department dated January 8, 1999.

3. Applicant seeks to change the point of diversion for all of the right. Applicant seeks a new place of use and new purpose of use for 4.5 acre-feet of right 41H W125497.

4. Applicant has proven the proposed point of diversion change will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. Objector Daniels alleges that Dry Creek channel losses may increase when the changed water is added to that now running in Dry Creek. He alleges that if the same amount of water is diverted at the new point of diversion as was diverted at the old point of diversion, the flows below the new point of diversion may be lower. There is no evidence that the addition of .25 cubic feet per second to the flows of Dry Creek will increase the stream channel losses (or gains). The irrigation water will be pumped from the pond. There will be 4.5 acre-feet less water applied to irrigation purposes to make up pond evaporation and to assure there is no adverse affect by making the proposed changes. (Department file, Jan Mack testimony, Doug Daniels testimony)

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5. Applicant has proven the proposed place of use and type of use changes will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. Two and one quarter acres of historically irrigated land will no longer be irrigated. The lands removed from irrigation are those lands in new roadway and building sites. There will be 4.5 acre-feet less water diverted by ceasing irrigation of these 2.25 acres. The estimated pond evaporation is 0.61 acre-feet per year which is less than the water made available by ceasing irrigation of the 2.25 acres. (Department file, Lynn Bacon testimony, Jan Mack testimony)

6. Applicant has proven the proposed diversion, construction, and operation of the appropriation works are adequate. Water will be diverted by a headgate, measured, and conveyed to and from the lined pond in a buried PVC pipe. (Department file, Lynn Bacon testimony, Jan Mack testimony)

7. Applicant has proven the proposed fishery use of water is a beneficial use of water. Applicant will benefit by the use of this water because it will provide evaporation makeup water to assure the fish pond proposed in associated Application 41H 104667 is non-consumptive. (Department file, See Application 41H-104667 Finding of Fact 8)

8. Applicant has proven 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)

9. No valid 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

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of his permit. Objector Daniels identified a water quality concern, but did not provide substantial credible information establishing that the water quality criteria are not met. The water quality portion of the objection is not valid. (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 gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. *See* Findings of Fact 1 and 2.

2. Applicant has met the criteria for issuance of an authorization to change appropriation water right. *See* Findings of Fact 3 through 9.

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, authorization to change 41H-G(W)125497 is granted to Ronald J. Woods to move the point of diversion for all of 41H-W125497 to the SW¼SW¼NW¼, Section 35, Township 2 North, Range 4 East, Gallatin County; to change the place of use for 4.5 acre-feet to an off-stream reservoir located in the S½SW¼NW¼ Section 35, Township 2 North, Range 4 East in Gallatin County; and to change the type of use for 4.5 acre-feet of water to a fishery use.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings

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pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and § 85-2-404.

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

C. Appropriator shall line beneath or convey in pipe all diverted water between the point of diversion and the point of return to the source to prevent seepage loss. The liner and pipe must equal or exceed the specifications of the impervious liner and pipe used at the time of pond construction.

D. Appropriator shall install a measuring device at the point of diversion, at the secondary irrigation point of diversion at the pond, and at the point of return to the source. These measuring devices must be approved by the Bozeman Water Resources Regional Office Manager. The appropriator shall maintain the measuring devices so they always operate properly and measure the flow rate accurately.

E. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted from Dry Creek for fisheries, evaporation make-up, and irrigation. The appropriator must also keep written monthly records of flow rate of water diverted from the pond for irrigation purposes, and water returned to Dry Creek, including the period of time, and shall submit the records by November 30 of each year. The Department may also request measurement records at other times of the year. Failure to submit reports may be cause for

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revocation or modification of the permit. The records must be sent to the Bozeman Water Resources Regional Office.

F. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation and expenses incurred in the distribution of the waters. The fee will be set by district court.

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 19th day of April, 2000.

Charles F. Brasen
Hearing Officer
Department of Natural Resources
and Conservation
POB 201601
Helena, Montana 59620-1601

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CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was duly served upon all parties listed below this 20th day of April, 2000, as follows:

RONALD J WOODS
13285 DRY CREEK ROAD
BELGRADE MT 59714

DOUGLAS E DANIELS
205 WEST DRY CREEK ROAD
BELGRADE MT 59714

CARLETON J JOHNSON
8611 DRY CREEK ROAD
BELGRADE MT 59714

JOHN BLOOMQUIST
DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.
POB 1185
HELENA MT 59624-1185

SCOTT COMPTON, MANAGER
JAN MACK, WRS
BOZEMAN WATER RESOURCES REGIONAL OFFICE
151 EVERGREEN DRIVE, SUITE C
BOZEMAN MT 59715

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
POB 201601
HELENA MT 59620-1601

Jennifer L. Hansley
Hearing Assistant

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