

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 2418-s41K BY  
LARRY SEMENZA AND ALFRED B. MURI

}  
} FINDINGS OF FACT, CONCLUSIONS  
} OF LAW, AND ORDER  
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Pursuant to the Montana Water Use Act and the Administrative Procedure Act, after due notice a hearing was held on January 6, 1975, at Fairfield, Montana, for the purpose of hearing objections to the above-named application.

The Applicant, Larry Semenza, appeared at the hearing and presented testimony. Alfred B. Muri, co-applicant and tenant-in-common did not appear. They were represented by counsel, K. Dale Schwanke, Esq., of Great Falls, Montana.

The Sun River Valley Ditch Company, Greenfields Irrigation District, Fort Shaw Irrigation District, Hamilton Ranch Company, Arthur W. Mills, Joseph B. Simpson, and Walter H. Savoy all filed timely objections to the application.

Reed C. Christensen, ditch manager, and Alex Purvis, president of the Sun River Valley Ditch Company, appeared at the hearing and presented testimony. They were represented by counsel, Kenneth R. Neill, Esq., of Great Falls.

W. E. Graves, Jr., manager of the Greenfields Irrigation District, appeared at the hearing and presented testimony. He was represented by counsel, R. Keith Strong, Esq., of Great Falls.

A. D. McGillis, general manager of the Hamilton Ranch Company, appeared at the hearing and presented testimony. He was represented by counsel, Randall Swanberg, Esq., of Great Falls.

Walter H. Savoy appeared at the hearing and presented testimony. He was not represented by counsel.

**CASE # 2418**

Herbert A. Sharpe, manager of the Fort Shaw Irrigation District, appeared at the hearing and presented testimony. He was represented by counsel, Randall Swanberg, Esq., of Great Falls.

Arthur W. Mills appeared at the hearing and presented testimony. He was not represented by counsel.

Joseph B. Simpson did not appear at the hearing, nor did he send a representative.

Bill Olsen, Stan Stelling, Ralph Parker, Melford Worley, and Dan Sands all presented testimony as users of Sun River water.

R. Keith Strong, Esq., offered into evidence a map of the Sun River in the vicinity of the proposed points of diversion and two tables showing the water stored and delivered by the Greenfields Irrigation District. These figures and the map were received into evidence without objection and marked as Objector Greenfields' "Exhibits No. 1, 2, and 3."

After the Applicant presented testimony, Counsel R. Keith Strong for Objector Greenfields Irrigation District moved to dismiss the application because the Applicant failed to carry the burden of proving the existence of unappropriated waters and no adverse effect on prior rights. Randall Swanberg, counsel for Fort Shaw Irrigation District and Hamilton Ranch Company, joined in this motion to dismiss the application.

This motion was taken under advisement and was overruled in a separate order and memorandum attached to and incorporated with the Proposal for Decision.

On May 5, 1975, the Hearing Examiner served copies of nine Department exhibits on all parties to the hearing, giving them five (5) days to except to the evidence contained in the exhibits or to object to receiving the exhibits into evidence. Walter H. Savoy objected to receiving Exhibits No. 3, 5, 6, and 9 into evidence for reason that these exhibits are inaccurate.

On behalf of the Applicant, K. Dale Schwanke, Esq., objected to receiving Exhibit No. 1 into evidence for reason that Exhibit No. 1 contains no information relating to ditch loss and water requirement per acre.

On behalf of Objectors Hamilton Ranch and Fort Shaw Irrigation District, Gorham Swanberg, Esq., objected to receiving Exhibits No. 1, 2, 3, 4, 5, 6, 8, and 9 into evidence for the reason that introduction of these exhibits deprives all parties of the right to cross-examination.

On behalf of Objector Sun River Valley Ditch Company, Kenneth R. Neill, Esq., objected to receiving any of the exhibits into evidence for reasons that:

1. The Department waived its right to introduce said exhibits into the record when it failed to do so at hearing.
2. No foundation has been laid for the introduction of said proposed exhibits.
3. Said proposed exhibits constitute hearsay evidence.
4. Objectors have had no opportunity to cross-examine witnesses in light of said proposed exhibits.
5. Said proposed exhibits are not the best evidence.
6. Objectors are contending that the burden of proof is upon the Applicant and that Applicant failed to carry said burden; that said proposed exhibits would prejudice Objectors' position on this issue.

On behalf of Objector Greenfields Irrigation District, R. Keith Strong objected to receiving exhibits No. 1, 2, 3, 4, 5, 6, 8, and 9 into evidence for reason that the Department had opportunity to present this information at the hearing and did not do so, and consequently, Greenfields Irrigation District has been unable to cross-examine witnesses who are able to testify to the validity of the facts contained in the Department's exhibits.

Objector Arthur W. Mills did not object to receiving these proposed exhibits into evidence.

Upon consideration of the proposed Department exhibits and the aforementioned objections to receiving into evidence these proposed exhibits, the Hearing Examiner declined to consider Exhibits 1, 2, 3, 4, 5, 6, 8, and 9 for the reason that the introduction into the record of said Exhibits 1, 2, 3, 4, 5, 6, 8, and 9 would deprive all parties to the hearing of the right to cross-examine witnesses as to the validity of said proposed exhibits. Exhibit 7 is a copy of material presented at the hearing, and all parties had opportunity to cross-examine the Department's water-rights analyst as to said exhibit's validity; therefore, inclusion of this material does not deprive any of the parties of the right to cross-examination.

A Proposed Order (Proposal for Decision) on the above hearing and attached Order Denying a Motion to Dismiss and Memorandum in Support of Denial of Motion to Dismiss were issued by the Hearing Examiner, James A. Lewis, on May 3, 1975. (It should be noted that the Proposed Order was incorrectly dated and should correctly read "June 3, 1975.")

The Proposed Order specified that the Proposed Order would become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, that pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190 written exceptions to the Proposed Order could be filed with the Administrator within ten (10) days of service of the Proposed Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and make oral arguments before the Administrator.

On June 16, 1975, the Department received an Exception to the Proposal for Decision dated June 13, 1975, from Randall Swanberg, filed on behalf of his clients, Hamilton Ranch Company and Fort Shaw Irrigation District.

On June 18, 1975, Dale Schwanke filed an Exception on behalf of the Applicants, which was received by the Department on June 19, 1975. On June 19, 1975, Kenneth R. Neill filed an Exception on behalf of his client, Sun River Valley Ditch Company, which was received by the Department on June 23, 1975. R. Keith Strong filed an Exception with the Department June 16, 1975, on behalf of his client, Greenfields Irrigation District.

The Department by letters of June 30, 1975, acknowledged receipt of the four Exceptions filed by Mr. Strong, Mr. Neill, Mr. Schwanke, and Mr. Swanberg on behalf of their respective clients. They were advised of their opportunity to file briefs supporting their objections and exceptions within twenty (20) days upon receipt of the Department's notice. They were further informed that if so requested and warranted a hearing in Helena could be held later, before the Water Resources Division Administrator for the purpose of presenting oral argument in support of the briefs filed.

By letter of July 3, 1975, Mr. Strong informed the Department that he would file a brief supporting the objections and exceptions of Greenfields Irrigation District on or before July 23, 1975. The Department by letter of July 14, 1975, acknowledged receipt of Mr. Strong's letter.

On July 22, 1975, the Department received a Brief in Support of Applicant's Exceptions to Proposal for Decision dated July 21, 1975, as filed by K. Dale Schwanke on behalf of the Applicants. On July 22, 1975, the Department received the Brief of Objectors Hamilton Ranch Company and Fort Shaw Irrigation District dated July 21, 1975, filed by Gorham E. Swanberg on behalf of his clients. R. Keith Strong filed a Brief in Support of Exceptions and Request for Oral Argument dated July 18, 1975, on behalf of his client, Greenfields Irrigation District. Kenneth R. Neill informed the Department by letter of July 21, 1975, that on behalf of his client, Sun River Valley Ditch Company, he would not file a brief in support of his

client's objection and exception, but would rely on the statements made in the Exceptions as well as the previous Brief. The Department by letter of July 28, 1975, acknowledged receipt of Mr. Neill's letter of July 21, 1975.

By letters of July 24, 1975, the Department acknowledged receipt of the Briefs filed by Mr. Schwanke, Gorham E. Swanberg, and R. Keith Strong on behalf of their respective clients.

On August 18, 1975, the Department received a Reply Memorandum dated August 15, 1975, filed by K. Dale Schwanke on behalf of the Applicants. The Department by letter of August 19, 1975, acknowledged receipt of said Reply Memorandum filed by Mr. Schwanke.

On February 24, 1976, the Department received a letter dated February 23, 1976, with Proposed Conclusions of Law and Proposed Order attached, from Mr. Schwanke, attorney for the Applicants, addressed to Mr. Ted Doney, Department Chief Legal Counsel, Mr. R. Keith Strong, Mr. Kenneth R. Neill, and Mr. Gorham Swanberg. In said letter, Mr. Schwanke stated, "I have now reduced to writing a proposed solution to the problem that now confronts all of us as regards my clients' Application for Beneficial Water Use Permit, and a photocopy of my rough draft containing Proposed Conclusions of Law and a Proposed Order is being forwarded to all of you herewith. What I have tried to do basically is to tie in my clients' use of Sun River waters to the drawdown dates for the Greenfields Irrigation District storage reservoirs. The Order has been modified also to allow my clients to use water during the period from September 7 to October 15 of each year, subject, of course, to all prior existing water rights. I would appreciate it if all of you could review the proposal and then let me have your comments."

Mr. Doney on behalf of the Department replied on March 18, 1976, to Mr. Schwanke's letter noted above by stating, "We have received and reviewed your proposal for settling the above-referenced application by your client,

Larry Semenza (also Alfred B. Muri). We are prepared to adopt as a Final Order any order that is legal under the Water Use Act. In my view, your proposal is acceptable, and our agency would have the authority to adopt it. Upon confirmation in writing (preferably by stipulation) from all parties in this matter that the proposed order may be adopted, we will adopt the same. I assume that you will prepare and have signed such a stipulation." Copies of Mr. Doney's letter were sent to Orrin Ferris, Administrator of the Department's Water Resources Division, R. Keith Strong, Kenneth R. Neill, and Gorham Swanberg.

On April 30, 1976, the Department received a letter and Stipulation, both dated April 29, 1976, from Mr. Schwanke. In said letter Mr. Schwanke stated, "Enclosed please find original Stipulation between counsel for the Applicants for the above-described permit and the objectors who have continued to appear in this matter; namely, Greenfields Irrigation District, Hamilton Ranch, Fort Shaw Irrigation District, and Sun River Valley Ditch Company. As you can see, the Stipulation provides for entry of Conclusions of Law and an Order similar to the Proposed Conclusions of Law and Proposed Order affixed to the Stipulation. I gather from our previous conversations that as long as the parties agreed to a form for the final Conclusions and Order, the entry of the same would be acceptable to the Department. The enclosed Proposed Conclusions of Law and Proposed Order conform substantially to those I had originally drafted and forwarded to you for the Department's review."

The Stipulation as noted above and dated on April 29, 1976, was signed by R. Keith Strong on behalf of his client, Greenfields Irrigation District; Randall Swanberg on behalf of his clients, Hamilton Ranch and Fort Shaw Irrigation District; Kenneth R. Neill on behalf of his client, Sun River Valley Ditch Company; and K. Dale Schwanke on behalf of his clients and the Applicants, Mr. Larry Semenza and Mr. Alfred B. Muri.

Since an acceptable Stipulation on this matter had been reached by all parties taking Exception to the Proposed Order, an oral argument hearing on the objections, exceptions, briefs, and reply brief was not held before the Water Resources Division Administrator; and therefore the Administrator hereby makes the following Final Order, based on the Proposal for Decision and attached Order Denying a Motion to Dismiss and Memorandum in Support of Denial of Motion to Dismiss of May 3, 1975, by the Hearing Examiner, the objections, exceptions, briefs, reply brief, the stipulation of April 29, 1976, and all pertinent information filed by all parties to this matter and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order, and the attached Order Denying a Motion to Dismiss and the Memorandum in Support of Denial of Motion to Dismiss in the matter of Application No. 2418-s41K, as entered on May 3, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order; except that the Proposed Conclusions of Law and the Proposed Order are hereby modified to coincide with the agreed, signed Stipulation of April 29, 1976, and except that the Proposed Order is further modified as follows:

FINAL ORDER

1. The Applicants' Provisional Permit is hereby conditionally granted, subject to, attached and made a part hereof, the Stipulation of April 29, 1976, for Application No. 2418-s41K to appropriate 15 cubic feet per second of water, not to exceed 1,800 acre-feet per annum, from the North Fork of the Sun River in Lewis and Clark County, Montana. The water will be diverted from the North Fork of the Sun River at the following three points: the SW $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 27, the SW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 26, and the SW $\frac{1}{4}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 25, all in Township 21 North, Range 6 West, M.P.M., and used for

irrigation purposes from May 1 to July 15, and from September 7 to October 15, inclusive, of each year, on 50 acres in Section 25, 80 acres in Section 26, 40 acres in Section 27, and 600 acres in Section 35, all in Township 21 North, Range 6 West, M.P.M., for a total of 770 acres, more or less. In addition, water will also be used for stock-watering purposes, to be limited to those amounts of water actually necessary for stock watering during each calendar year, but in no case will the combined uses of irrigation and stock exceed the total of 1,800 acre-feet per annum within the limitations set forth above.

2. The Permittee will cooperate with other water users in scheduling his withdrawals so that his periods of diversion will not adversely affect prior or existing rights.

3. The Permittee shall install and maintain adequate measuring devices so that he keeps a record of all quantities of water diverted and the periods of diversion, and shall supply said records to the Department upon request.

4. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

5. Anything contained in this Order to the contrary notwithstanding, until formal adjudication of the rights to the waters of the Sun River under the Montana Water Use Act or any successor thereto, as regards the waters granted herein for the period May 1 to July 15, inclusive, of each year, Permittee shall cease appropriating water from the Sun River within five (5) days after the giving of notice in writing by the Greenfields Irrigation District, that said district has begun to drawdown its storage reservoirs at Gibson Dam and Willow Creek Reservoir to meet the appropriations of its own appropriators and those of appropriators who claim rights prior to those claimed by Greenfields Irrigation District. Said district shall also be

required to give timely written notice to the Permittees when the district has ceased drawing down said dam and reservoir, and thereupon, Permittees may reassert their right to the waters herein above granted to them. Any notices provided for herein shall be deemed to have been given when mailed by certified or registered mail to the Permittees and addressed to the Permittees at: Mr. Larry Semenza, 414 - 24th Street South, Great Falls, Montana 59401, and Mr. Alfred B. Muri, Eastern Brokerage Service, P.O. Box 817, Miles City, Montana 59301. Permittees may hereafter designate in writing a different address or addresses or persons to whom such notice shall be given, provided that such designation must also be filed with the Administrator, Water Resources Division, Department of Natural Resources and Conservation, or his successor. Service of such notice by mail shall be deemed complete when the same is enclosed in an envelope, duly sealed, and deposited in the United States mail, at Fairfield, Montana, properly addressed with postage fully prepaid thereon.

6. Nothing in this Order contained shall be deemed in any way to deprive the Permittees of the right to the waters applied for by Permittees during the periods described in their application in the event that through the adjudication process authorized under the Montana Water Use Act it is determined that unappropriated waters were available to fill the request set forth in said application when the same was filed.

7. The issuing of this Provisional Permit by the Department in no way reduces the Permittees liability for damage caused by the Permittees' exercise of their Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittees' exercise of their Provisional Permit.

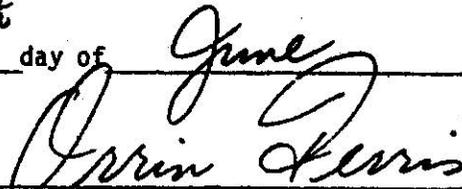
8. The Stipulation of April 29, 1976, as agreed upon and signed by R. Keith Strong on behalf of his client, Greenfield Irrigation District;

Randall Swanberg on behalf of his clients, Hamilton Ranch and Fort Shaw Irrigation District; Kenneth R. Neill on behalf of his client, Sun River Valley Ditch Company; and K. Dale Schwanke on behalf of his clients and Applicants, Larry Semenza and Alfred B. Muri, is hereby attached to this Final Order and made a part hereof.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights.

Done this 10<sup>th</sup> day of June, 1976.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

**CASE # 2418**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 2418-s41K, LARRY  
SEMENZA AND ALFRED B. MURI

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts after due notice a hearing was held on January 6, 1975 at Fairfield, Montana for the purpose of hearing objections to the above-named application.

The Applicant, Larry Semenza, appeared at the hearing and presented testimony. Alfred B. Muri, co-applicant and tenant in common did not appear. They were represented by counsel, Mr. K. Dale Schwanke, Esq. of Great Falls, Montana.

Sun River Valley Ditch Company, Greenfields Irrigation District, Fort Shaw Irrigation District, Hamilton Ranch Company, Arthur W. Mills, Joseph B. Simpson, and Walter H. Savoy all filed timely objections to the application.

Mr. Reed C. Christensen, Ditch Manager, and Alex Purvis, President of the Sun River Valley Ditch Company, appeared at the hearing and presented testimony. They were represented by counsel, Mr. Kenneth R. Neill, Esq., of Great Falls.

Mr. W.E. Graves, Jr., Manager of the Greenfields Irrigation District appeared at the hearing and presented testimony. They were represented by counsel, Mr. R. Keith Strong, Esq., of Great Falls.

Herbert A. Sharpe, Manager of the Fort Shaw Irrigation District, appeared at the hearing and presented testimony. They were represented by counsel, Mr. Randall Swanberg, Esq., of Great Falls.

Mr. A.D. McGillis, General Manager of the Hamilton Ranch Company, appeared at the hearing and presented testimony. They were represented by counsel, Mr. Randall Swanberg, Esq., of Great Falls.

Mr. Walter H. Savoy appeared at the hearing and presented testimony. He was not represented by counsel.

Mr. Arthur W. Mills appeared at the hearing and presented testimony. He was not represented by counsel.

Mr. Joseph B. Simpson did not appear at the hearing nor did he send a representative.

Mr. Bill Olsen, Mr. Stan Stelling, Mr. Ralph Parker, Mr. Melford Worley, and Mr. Dan Sands all presented testimony as users of Sun River water.

Mr. R. Keith Strong, Esq., offered into evidence a map of the Sun River in the vicinity of the proposed points of diversion and two tables showing the water stored and delivered by Greenfields. These figures and the map were received into evidence without objection and marked as Objector Greenfield's Exhibits Numbers 1, 2, and 3.

After the Applicant presented testimony, Counsel R. Keith Strong for the Objector Greenfields Irrigation District, moved to dismiss the application because the Applicant failed to carry the burden of proving the existence of unappropriated waters and no adverse effect on prior rights. Mr. Randall Swanberg, counsel for Fort Shaw Irrigation District, and Hamilton Ranch Company, joined in this motion to dismiss the application.

This motion was taken under advisement and is hereby overruled in a separate order and memorandum attached to and hereby incorporated in this proposal for decision.

On May 5, 1975 the Hearing Examiner served copies of nine exhibits on all parties to the hearing giving them (5) five days to except to the evidence contained in the exhibits or to object to receiving the exhibits into evidence.

Mr. Walter H. Savoy objected to receiving exhibits numbers 3, 5, 6, and 9 into evidence for reason that these exhibits are inaccurate.

On behalf of the Applicant, Mr. K. Dale Schwanke, Esq. objected to receiving exhibit No. 1 into evidence for reason that exhibit No. 1 contains no information relating to ditch loss and water requirement per acre.

On behalf of Objectors Hamilton Ranch and Fort Shaw Irrigation District, Mr. Gorham Swanberg, Esq. objected to receiving exhibits numbers 1, 2, 3, 4, 5, 6, 8, and 9 into evidence for the reason that introduction of these exhibits deprives all parties of the right to cross examination.

On behalf of Objectors Sun River Valley Ditch Company, Kenneth R. Neill, Esq. objected to receiving any of the exhibits into evidence for reasons that:

1. The Department waived its right to introduce said exhibits into the record when it failed to do so at hearing.

2. No foundation has been laid for the introduction of said proposed exhibits.

3. That said proposed exhibits constitute hearsay evidence.

4. That Objectors have had no opportunity to cross examine witnesses in light of said proposed exhibits.

5. That said proposed exhibits are not the best evidence.

6. That Objectors are contending that the burden of proof is upon the Applicant and that Applicant failed to carry said burden; that said proposed exhibits would prejudice Objectors' position on this issue.

On behalf of Objector Greenfields Irrigation District, Mr. R. Keith Strong, Esq. objected to receiving exhibits numbers 1, 2, 3, 4, 5, 6, 8 and 9, into evidence for reason that: the Department had opportunity to present this information at the hearing and did not do so, and, consequently, Greenfields Irrigation District has been unable to cross examine witnesses who are able to testify to the validity of the facts contained in the Department's exhibits.

Objector Mr. Arthur W. Mills did not object to receiving these proposed exhibits into evidence.

Upon consideration of the proposed exhibits and the aforementioned objections to receiving into evidence these proposed exhibits, the Hearing Examiner hereby declines to consider exhibits 1, 2, 3, 4, 5, 5, 8 and 9 for the reason that the introduction into the record of said exhibits numbers 1, 2, 3, 4, 5, 6, 8 and 9 would deprive all parties to the hearing of the right to cross examine witnesses as to the validity of said proposed exhibits. Exhibit No. 7 is a copy of material presented at the hearing and all parties had opportunity to cross examine the Department's water rights analyst as to said exhibit's validity; therefore, inclusion of this material does not deprive any of the parties of the right to cross examination.

As required by law, the Hearing Examiner hereby makes the following proposed findings of fact, conclusions of law, and order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On May 22, 1974, the Applicant submitted Application for Beneficial Water Use Permit No. 2418-s41K, seeking to appropriate 15 cubic feet per second and not to exceed 1800 acre-feet per annum of water from the North Fork of the Sun River in Lewis and Clark County, Montana. The Application is for water to be diverted from the North Fork of the Sun River at the following three points: the SW $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 27, the SW $\frac{1}{2}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 26 and the SW $\frac{1}{2}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 25, T. 21 N., R. 6 W., M.P.M., and used from May 1 to September 30 inclusive of each year for irrigation on 50 acres in Section 25, 80 acres in Section 26, 40 acres in Section 27, and 600 acres in Section 35, and used from January 1 to December 31 inclusive of each year for stockwatering.

2. On November 6, 1974, the Sun River Valley Ditch Company submitted a timely objection to the application on the grounds that there are no unappropriated waters in the source of supply and that the rights of a prior appropriator will be adversely affected.

On November 6, 1974 Walter H. Savoy submitted timely objection to the application on the grounds that there are no unappropriated waters in the source of supply.

On November 8, 1974 Joseph B. Simpson submitted timely objection to the application on the grounds that there are no unappropriated waters in the source of supply.

On October 25, 1974 Greenfields Irrigation District submitted timely objection to the application on the grounds that there are no unappropriated waters in the proposed source of supply and rights of prior appropriators will be adversely affected.

On October 10, 1974 Arthur W. Mills, submitted timely objection to the application on the grounds that there are no unappropriated waters in the proposed source of supply.

On October 15, 1974 the Fort Shaw Irrigation District submitted timely objection to the application on the grounds that the Objector's water rights would be adversely affected.

On October 15, 1974 the Hamilton Ranch Company submitted timely objection to the application on the grounds that the objector's prior existing water right would be adversely affected.

3. The Applicant, Larry Semenza, testified that he and Alfred Muri are purchasing the property in question by a contract for deed from Mack Burgess. He said the purpose of the application for beneficial water use permit is to

improve his property by irrigation. The property lies approximately 2½ miles north of Augusta on the south bank of the North Fork of the Sun River. The acreage to be irrigated is composed of three separate parcels in Sections 26 and 27. The first parcel is approximately on the river bottom and comprises 110 acres of number 2 soil (according to the Montana Conservation study that was run on the place). The second parcel is on the bottom approximately a mile down river from the first parcel and is about 40 acres of number 2 soil. The third parcel is about 600 acres up on a bench with about a fifty foot lift up from the Sun River and is a number 3 soil. The Applicant intends to use turbine pumps run by three phase electricity to apply the water. He said that soil in Montana is classified 1 through 6 according to its susceptibility to irrigation, with 1 being the best soil and 6 being the worst. Number 4 soil is only marginally susceptible. 1, 2, and 3 are highly susceptible of irrigation. He said he is developing the property mainly as a ranching operation and that the production of feed on the property is essential to its survival as a unit.

He said that the 3rd parcel will be irrigated pasture and that the other two parcels will be used to produce hay and grain. He said that the property is now set up as a grazing unit, but to run a cow-calf operation the property must produce some hay. He said irrigating the bench land would increase the carrying capacity of the property. He testified that he needs the water to ensure survival of the ranch as a unit. He wants to use wheel line sprinkler systems with turbine pumps. Mr. Semenza has discussed the project with some representatives of irrigation companies and those representatives think the project is feasible. Mr. Semenza has been operating the ranch for approximately ten months and during that period of time he has observed the Sun River's Spring, Summer and Fall flows. It appears to him that water is available for irrigation. He does not know the extent of prior existing rights. Mr. Semenza

intends to use a limited amount of water for stockwater.

He testified that he would like to amend his application to allow him to apply water twice in the period from May 1 to July 15 and once in the period from September 7 to October 15. Each time he applies water he would like to use  $\frac{2}{3}$  of an acre foot per acre, for a total of 2 acre-feet per acre per annum. In 1974 Mr. Semenza seeded parcel #1 into winter wheat. There are no trees on parcel numbers 1 and 2. He testified that he intends to take the water directly from the Sun River.

Mr. Semenza testified that he thought that it would take him 10 to 12 days to apply  $\frac{2}{3}$  acre-foot of water per acre to the three parcels. He said he does not intend to appropriate any water between July 16 and September 6 inclusive of each year.

Mr. Semenza said that he has never seen the Sun River dry.

4. Mr. William E. Graves, Jr., Manager of the Greenfields Irrigation District, testified that the Greenfields Irrigation District is responsible for distributing water to 78,000 to 80,000 acres of irrigated ground.

This property is owned by 400 to 450 people. Mr. Graves caused the map marked Objectors' Exhibit Number 1 to be prepared for the hearing.

Greenfields Irrigation District receives its water from water stored in Gibson Reservoir, Pishkun Reservoir and Willow Creek Reservoir. The water in Willow Creek Reservoir is used to maintain a constant flow of water in the Sun River. The Applicant's proposed points of diversion are about three miles below the point where the Willow Creek Reservoir return canal flows into Sun River and several miles below the diversion dam where water is turned into Willow Creek Reservoir.

The water rights used by Greenfields Irrigation District were filed by the U.S. Government in 1911. This water right purports to give Greenfields the right to store and to distribute 2 acre feet per acre over 78,000 acres.

Greenfields use much more water than that due to ditch loss and evaporation.

Mr. Graves keeps daily records of water flowing over the diversion dam, water into and out of Pishkun Reservoir and water into and out of Willow Creek. Mr. Graves caused the compilation of these records marked as Objectors' Exhibit Number 2. Mr. Graves believes that these records show that there is not enough water to satisfy existing rights. Mr. Graves said that in 1973 there was not enough water in the Sun River to satisfy those rights prior to Greenfields, and Greenfields released water from Willow Creek Reservoir to satisfy rights prior to their own. In 1973, if Greenfields had taken the entire 156,000 acre feet which they claim, the Sun River would have been dry. All of Greenfields' points of diversion are above the Applicant's proposed points of diversion; however, Greenfields has released water to satisfy prior existing rights for which water is diverted from points downstream from the Applicant's proposed points of diversion.

For Objector's Exhibit Number 3, Mr. Graves compiled a record of the amount of water in acre-feet which was delivered to farms from 1955 to 1974. Several years in this period Greenfields was not able to deliver the entire 156,000 acre feet which Greenfields claims. This record of water delivered was compiled from books kept in the manager's office.

In Mr. Graves opinion as a person acquainted with the Sun River, there is no unappropriated water in the Sun River.

Mr. Graves testified that Greenfields voluntarily released water to downstream prior appropriators usually in the drier months of June, July, and August.

5. Mr. Herbert A. Sharpe, Manager of the Fort Shaw Irrigation District, testified that he has been manager of the District for 19 years. He said that the Fort Shaw Irrigation District covers 10,071 acres owned by 240 people. The Fort Shaw Irrigation District has a decreed water right for 500 cubic feet of

water per second. This water is diverted at a point on the south bank of the Sun River about 3 miles west of the Lewis and Clark and Cascade County line, downstream from the Applicant's proposed points of diversion.

Mr. Sharpe testified that the Fort Shaw Irrigation District has, at times, run short of water. On May 10, 1973 the Fort Shaw Irrigation District turned water back into the Sun River to protect fish life. The river was dry at the Fort Shaw Irrigation District point of diversion. Mr. Sharpe thinks that the 1973 Water Use Act requires the District to maintain a flow of water in the streambed to protect fish life. Mr. Sharpe visits the point of diversion several times daily. He believes that he can estimate the quantity of small streamflows in cubic feet per second. He said he tries not to reduce streamflows below 25 cubic feet per second on past the Fort Shaw Irrigation District point of diversion. Mr. Sharpe has, at times, seen flows of less than 25 cubic feet per second at the Fort Shaw Irrigation District point of diversion. Mr. Sharpe is of the opinion that if Mr. Semenza were allowed to divert 15 cubic feet per second from his proposed points of diversion, in these times of low water, there would not be enough flow to support fish life. Mr. Sharpe has seen the Sun River flow 7,000 to 8,000 cubic feet per second of water in June, but in 1973 he testified there was practically no flow in June. The Fort Shaw Irrigation District paid one third of the cost of the original construction of the Willow Creek Reservoir and a right to one third of the water stored in the Willow Creek Reservoir. The earliest time in Mr. Sharpe's experience that the Fort Shaw Irrigation District released water to its users was April 21, 1961. The latest time was May 15, 1959. The usual time is May 1. The water is usually shut off between October 1 and October 15.

6. Mr. A.D. McGillis, General Manager of the Hamilton Ranch Company, testified that he has worked for the ranch for 20 years and has been manager

for the last 10 years, and that he is familiar with all of the ranch's operations.

The Hamilton Ranch Company was once known as the Floweree Ranch and owns the same water rights as the Floweree Ranch. Mr. McGillis said that the Hamilton Ranch Company irrigates about 22,000 acres on which they raise wheat, barley, alfalfa and grass. The Hamilton Ranch Company owns a 185 cubic feet per second water right which is diverted into the Floweree Canal above the Applicant's proposed points of diversion, and a 66 cubic feet per second right which is diverted into the Alfalfa Valley Ditch below. Both these rights are prior in time to the Greenfields rights. The Hamilton Ranch Company has, on occasion, had difficulty getting water to satisfy its rights. Mr. McGillis has never known a time when the Hamilton Ranch Company has filled its water rights from the natural flow of the Sun River without using water stored in the Willow Creek Reservoir. The Hamilton Ranch Company also owns a water right for 20 cubic feet per second for the Soldiers Home Ditch which is downstream from the other two rights. Altogether Hamilton Ranch Company has rights for 271 cubic feet per second of water from the Sun River. Mr. McGillis has seen the Sun River nearly dry at the Lawry Bridge in August of 1973. He has never seen the Sun River actually dry.

Mr. McGillis has added lateral ditches since he became General Manager. He said that the Alfalfa Valley Ditch does catch some return flow from the Floweree Canal. Hamilton Ranch Company begins delivery of water to its crops as soon as the snow gets out of the ditches. Mr. McGillis has seen water flowing past the Soldiers Home Ditch. Hamilton Ranch Company quits irrigating in late fall when it begins to freeze. Hamilton Ranch Company has no measuring devices at its points of diversion.

7. Mr. Reed C. Christensen, Manager of the Sun River Valley Ditch Company (S.R.V.D. Co.) testified that the S.R.V.D. Co. has one water right with an 1868 priority date and another filing May 1, 1902. Those are the only two filings;

however, the needs of the S.R.V. D. Company have grown beyond the quantity of these filings. There are 52 or 53 users of the S.R.V. D. Co. and they irrigate approximately 2900 acres. The S.R.V.D. Company's point of diversion is about 3 miles upstream from the town of Sun River. They are the lowest gravity flow appropriators on the Sun River.

S.R.V.D. Company has a measuring device, a Parshall Flume, which was installed in 1972. They have kept flow records for 1973 and 1974. The quantity of water diverted by S.R.V.D. Company varies from 139 cfs down to 65 cfs. The S.R.V.D. Company has its greatest demand for water usually in June, then, when haying season comes on, the need drops off, and then the demand increase again from July 10 to August 1. Mr. Christensen can recall when there have been times when S.R.V.D. Company has been short of water. Sometimes Mr. Christensen has been obliged to ask Greenfields and Fort Shaw Irrigation Districts to release water for the S.R.V.D. Company.

Mr. Christensen said that since the time of the original filing additional acreage has been irrigated from the Sun River Valley Ditch. Mr. Christensen said that S.R.V.D. has secondary sources of water from springs, Mill Creek, and waste flows from the Greenfields project. Mr. Christensen testified that the high spring runoff usually goes down in early July. He said that sometimes the water will come back up again in late summer.

Mr. Christensen thought that it usually took about 30 to 36 hours for water released from Willow Creek Reservoir to reach the Sun River Valley Ditch. Mr. Christensen has found the cooperation between water users along the Sun River to be excellent.

8. Objector, Mr. Walter H. Savoy testified that there have been times when the water was very low at the Rocky Reef Ditch Company diversion point and the Rocky Reef water right has not been satisfied. He said there have been

dry periods in May when Rocky Reef could not get enough water. Mr. Savoy testified that he has increased the amount of his irrigation since the early sixties.

9. Mr. Arthur W. Mills testified that he has one ditch out of the Sun River and two ditches out of the South Fork of the Sun River. Mr. Mills said that the South Fork of the Sun River was labelled Elk Creek on Objector Greenfields Map Exhibit Number 1. His diversion from the Sun River is about 6 miles upstream from the Fort Shaw Irrigation District diversion point.

10. Mr. Ralph Parker, an owner of land in both the Greenfields and Fort Shaw Districts, testified that he has lived on the river all his life and he, too, has seen the Sun River dry at the Fort Shaw Irrigation District diversion point, but that further downstream the river will run from water percolating out of the gravel. Mr. Parker thinks all the soil in the Sun River Valley is too shallow and will not retain enough water to support irrigation.

11. Mr. Melford Worley testified that he has lived on the river for several years and there is not going to be much flood water available after the 15th of June.

12. Mr. Swanberg and Mr. Strong, counsel for the Objectors, requested that the Department appoint a water commissioner if this Application No. 2418-s41K is approved.

13. Mr. Dan Sands, owner of a share of a water right in the Burch Meade Ditch, testified that there are times when the Burch Meade Ditch must wait for water and that he feels there isn't enough water in the Sun River.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, an Application

for Beneficial Water Use Permit is required to appropriate water from the Sun River.

2. In some years there are unappropriated waters in the Sun River particularly in the period of high spring runoff. There are not any unappropriated waters in the period July 15 to October 15.

3. Because there are at times unappropriated waters in the Sun River, the Applicant can make his withdrawals without adversely affecting prior existing rights.

4. The proposed use of water is a beneficial use.

5. The proposed means of diversion are adequate.

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, since no prior permits or reservations of water have been approved on this source pursuant to the Montana Water Use Act.

7. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947 have been met.

8. The application for beneficial water use permit may be granted in accordance with the provisions of Chapter 8, Title 89 of the Laws of the State of Montana.

Based on the above proposed findings of fact and conclusions of law, the following order is proposed.

#### PROPOSED ORDER

1. The Applicant's permit is granted allowing the appropriation of 15 cubic feet per second and not to exceed 1800 acre-feet of water per annum to be used for irrigation purposes from May 1 to July 15, and for limited stockwater during the same period. The water is to be diverted at the aforementioned three points in Sections 25, 26, and 27, T. 21 N., R. 6 W., M.P.M.

2. The Applicant will cooperate with other water users in scheduling his withdrawals so that his periods of diversion will not adversely affect prior existing water rights.

3. Applicant shall install and maintain adequate measuring devices so that he keeps a record of all quantities of water diverted and the periods of diversion.

4. Subject to all prior existing water rights in the source of supply.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6 (2)-P6190 written exceptions to this Proposed Order may be filed with the Administrator within ten (10) days of the service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

DATED this 3d day of May, 1975.

*James A. Lewis*  
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JAMES A. LEWIS  
HEARING EXAMINER *by [Signature]*