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

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MAR 13 1991

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IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 73729-43B AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER NO. G(P)003531-43B BY CITY OF LIVINGSTON	)	AMENDED 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. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 18, 1990, Proposal for Decision, with the exception of the place of use.

The Hearing Examiner, in her Proposal for Decision, omitted all of Section 26, Township 2 South, Range 9 East, as part of the place of use for Permit No. 73729-43B and for Authorization No. G(P)003531-43B, the SE¼ of Section 24, W½E½ of Section 23, and all of Section 26, all in Township 2 South, Range 9 East, in Park County, Montana.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G(P)003531-43B is hereby granted to

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change the point of diversion to the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County and the Application for Beneficial Water Use Permit No. 73629-43B is hereby granted to appropriate 203.00 gallons per minute up to 173.00 acre-feet of water per year for municipal purposes in the City of Livingston at a point in the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County, Montana.

The place of use for the Beneficial Water Use Permit No. 73729-43B and the Authorization for Change of Appropriation Water Right No. G(P)003531-43B shall be W½ of Section 7 and the W½ of Section 18, both in Township 2 South, Range 10 East; the S½ of Section 12, all of Section 13, all of Section 24, the S½ of Section 14, the E½ of Section 23, and all of Section 26, Township 2 South, Range 9 East, Park County, Montana.

The Authorization to Change Appropriation Water Right No. G(P)3531-43B and Permit No. 73729-43B are subject to the following:

A. The Permit and Authorization are subject to all prior water rights in the source of supply. Further, these water rights are subject to any final determination of existing water rights, as provided by Montana law.

B. This well shall be constructed so it will not allow water to be wasted, or contaminate other water supplies or sources. The final completion of the well must include an access

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port of at least .50 inch so the static water level may be measured.

C. Permit No. 73729-43B is used in conjunction with Authorization to Change No. G(P)003531-43B. The combined appropriation as granted shall not exceed a total of 625 gallons per minute up to 500 acre-feet per year.

D. These water rights are subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded, The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said record no later the November 30 of each year to the Bozeman Water Resources Regional Office.

E. If at any time after these water rights are issued, a written complaint is received by the Department alleging that diverting from this source is adversely affection a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the permittee to show cause why the Permit and Authorization should not be modified or revoked. The Department may then modify or revoke the Permit and Authorization or allow the water rights to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

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F. Issuance of the Permit and Authorization by the Department shall not reduce the City of Livingston's liability for damages caused by the exercise of these water rights, nor does the Department acknowledge any liability for damages caused by exercise of the Permit and Authorization, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

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

Dated this 4 day of March, 1991.

Lawrence Siroky for
Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, MT 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amended Final Order was duly served upon all parties of record at their address or addresses this 5th day of March, 1991 as follows:

City of Livingston
414 East Callender
Livingston, MT 59047

David G. Colmey
Box 521
Livingston, MT 59047

John M. Melvin
J & L County Store Exxon
Rt. 62, Box 3201
Livingston, MT 59047

Park Road Trailer Court
c/o Harold R. Crowell
Rt. 62, Box 3061
Livingston, MT 59047

CASE # 3531

L.E. and Alice Bahn
Box 331
Livingston, MT 58047

Warren W. Harper, Sr. and
Gayle J. Harper
Rt. 62, Box 3020
Livingston, Mt 59047

Gerald D. and Gwen Norskog
527 N. 7th East
Livingston, MT 59047

Harry and Eileen Hannan
Rt. 62, Box 3065
Livingston, MT 59047

Ted Schleicher s/p/a
T.F. Schleicher
Box 1045
Livingston, MT 59047

Jerry & Elisabeth McCormick
Box 838
Livingston, MT 59047

Jack Yardley
P.O. Box 482
Livingston, MT 59047

Vernon Lawrence
Rt. 62, Box 3089
Livingston, MT 59047

William T. Blassingham
Box 867
Livingston, MT 59047

R.S. and B.L. Clousing
Rt. 62, Box 3056
Livingston, MT 59047

Roland Clark Payne
P.O. Box 934
Livingston, MT 59047

Scott Compton, Regional Mgr.
Bozeman Water Resources
Regional Office
111 N. Tracy

Harry Jr. and Hazel K. Payne
P.O. Box 1375
Livingston, MT 59047

Richard Payne, Jr.
Rt. 62, Box 3100
Livingston, MT 59047

Vivian Lighthizer
Hearing Examiner
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Cindy G. Campbell
Cindy G. Campbell
Hearings Unit Secretary

CASE # 3531

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 73729-43B AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(P)003531-43B BY THE CITY OF LIVINGSTON	)	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. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 18, 1990, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G(P)003531-43B is hereby granted to change the point of diversion to the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County, and Application for Beneficial Water Use Permit No. 73729-43B is hereby granted to appropriate 203.00 gallons per minute up to 173.00 acre-feet of water per year for municipal

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purposes in the City of Livingston at a point in the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County, Montana.

The Authorization to Change Appropriation Water Right No. G(P)003531-43B and Permit No. 73729-43B are subject to the following:

A. The Permit and Authorization are subject to all prior water rights in the source of supply. Further, these water rights are subject to any final determination of existing water rights, as provided by Montana law.

B. This well shall be constructed so it will not allow water to be wasted, or contaminate other water supplies or sources. The final completion of the well must include an access port of at least .50 inch so the static water level may be measured.

C. Permit No. 73729-43B is used in conjunction with Authorization to Change No. G(P)003531-43B. The combined appropriation as granted shall not exceed a total of 625 gallons per minute up to 500 acre-feet per year.

D. These water rights are subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records no later than November 30 of

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each year to the Bozeman Water Resources Field Office.

E. If at any time after these water rights are issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the applicant to show cause why the Permit and Authorization should not be modified or revoked. The Department may then modify or revoke the permit and authorization to protect existing rights or allow the water rights to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

F. Issuance of the Permit and Authorization by the Department shall not reduce the City of Livingston's liability for damages caused by the exercise of these water rights, nor does the Department acknowledge any liability for damages caused by exercise of the permit and authorization, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

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

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Dated this 12 day of October, 1990.

Laurence Siroky for

Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16th day of October, 1990 as follows:

City of Livingston
414 East Callender
Livingston, MT 59047

John M. Melvin
J & L Country Store Exxon
Rt. 62, Box 3201
Livingston, MT 59047

L.E. and Alice Bahn
Box 331
Livingston, MT 59047

Warren W. Harper, Sr. and
Gayle J. Harper
Rt. 62, Box 3020
Livingston, MT 59047

Gerald D. and Gwen Norskog
527 N. 7th East
Livingston, MT 59047

Harry and Eileen Hannan
Rt. 62, Box 3065
Livingston, MT 59047

David G. Colmey
Box 521
Livingston, MT 59047

Park Road Trailer Court
c/o Harold R. Crowell
Rt. 62, Box 3061
Livingston, MT 59047

William T. Blassingham
Box 867
Livingston, MT 59047

R.S. and B.L. Clousing
Rt. 62, Box 3056
Livingston, MT 59047

Roland Clark Payne
P.O. Box 934
Livingston, MT 59047

Scott Compton, Field Manager
Bozeman Water Resources
Field Office
111 N. Tracy
Bozeman, MT 59715

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Ted Schleicher s/p/a/
T.G. Schleicher
Box 1045
Livingston, MT 59047

Jerry & Elisabeth McCormick
Box 838
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Jack Yardley
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Livingston, MT 59047

Vernon Lawrence
Rt. 62, Box 3089
Livingston, MT 59047

Harry Jr. & Hazel K. Payne
P.O. Box 1375
Livingston, MT 59047

Richard Payne, Jr.
Rt. 62, Box 3100
Livingston, MT 59047

Vivian Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Cindy G. Campbell

Cindy G. Campbell
Hearings Unit Secretary

CASE # 3351

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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 73729-43B AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(P)003531-43B BY THE CITY OF LIVINGSTON	)	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 in the above-entitled matters on August 15, 1990, in Livingston, Montana.

Applicant City of Livingston, hereafter City or Applicant, appeared at the hearing by and through its attorney, Robert Jovick.

Roger Miller, Consulting Hydrogeologist, appeared as a witness for the Applicant.

David Mosser, Professional Engineer with Morrison-Maierle/CSSA, Inc., appeared as a witness for the Applicant.

Clint Tinsley, Water Systems Foreman, appeared as a witness for the Applicant.

Objectors L. E. and Alice Bahn appeared pro se.

Objector Ted Schleicher appeared pro se.

Objector Park Road Trailer Court appeared by and through its owner, Harold R. Crowell.

Objectors Jerry and Elisabeth S. McCormick appeared by and through Elisabeth S. McCormick.

Objectors Harry Jr., and Hazel K. Payne appeared pro se.

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Objector William T. Blassingham appeared pro se.

Objectors R. S. and B. L. Clousing appeared by and through William T. Blassingham.

Objector John M. Melvin and Lynn Melvin appeared pro se.

Objector David G. Colmey appeared pro se.

Objector Richard Payne, Jr. appeared pro se.

Objectors Roland C. and Irene Payne appeared by and through Richard Payne, Jr.

Objectors Harry and Eileen Hannan; Gayle J. and Warren W. Harper, Sr.; Gerald D. and Gwen Norskog; and Vernon Lawrence did not appear at the hearing, therefore, their objections are dismissed.

Jan Mack, Water Right Specialist III with the Bozeman Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter, Department, appeared at the hearing.

EXHIBITS

Applicant's Exhibit 1 is a water quality diagram comparing relative abundance of common ions in water from Livingston wells.

Applicant's Exhibit 2 is a diagram showing hypothetical drawdown at various distances from pumped well at two pumping rates.

Applicant's Exhibit 3 is a diagram showing observed drawdown in pumped well and observation well.

Applicant's Exhibit 4 is an ownership map of the City in the areas of the Livingston Clinic well and the Billman Creek well. The scale of this map is one inch equals 300 feet. This map has

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been enhanced to show the location of Interstate 90 and Highway 89 in orange tape. The zone of influence of the Billman Creek well is depicted by the lower red circle on the map; the higher red circle is the Livingston Clinic well site and does not pertain to this hearing. A yellow dot indicates the location of the Billman Creek well. The blue dots are objectors outside the zone of influence; the red dots are objectors inside the influence area who have not signed agreements with the City and the orange dot indicates the well of Objectors Harry and Eileen Hannan. The Hannans have signed an agreement with the City. This Exhibit is approximately two and one half feet wide and three and one quarter feet long.

Applicant's Exhibit 5 is an aerial photograph, approximately two feet and four inches square, of the Billman Creek area. There are red circles drawn on this map indicating the distance in feet for certain drawdown amounts. This information was obtained by using a computer model. The yellow dot indicates the well location. The orange dot is the Hannans' well and the red dots are objectors who have not signed an agreement with the City. The outer red circle is labeled "R=800'- 0' Drawdown", however, Roger Miller testified it was 850 feet. The Hearing Examiner accepts 850 feet as correct.

Applicant's Exhibit 6 is an actual plot of the drawdown data in the test well.

Applicant's Exhibit 7 is an actual plot of the drawdown data in the observation well.

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Applicant's Exhibit 8 is a copy of an agreement between Harry and Eileen Hannan and the City.

There were no exhibits offered by any of the objectors.

All parties had opportunity to examine the Department files which were accepted into the record without objection.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions do not apply in the present matter.

Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter. Thus the Department has jurisdiction.

2. The Application for Change of Appropriation Water Right No. G(P)003531-43B was duly filed with the Department on March 26, 1990 at 10:35 a.m. The Application for Beneficial Water Use Permit No. 73729-43B was duly filed with the Department on March 26, 1990, at 10:30 a.m.

3. The pertinent portions of these Applications were published in The Livingston Enterprise on May 16, 1990. There was an error in this publication. The "in conjunction with"

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remark stated the combined appropriation as granted shall not exceed a total of 625.00 gallons per minute (gpm) up to 821.00 acre-feet per annum.

The total combined appropriation will not exceed 500.00 acre-feet of water per year. An error of this nature is addressed in ARM 36.12.205 of the Procedural Rules for Water Right Contested Case Hearings which states in pertinent part:

> (2) ... When either during the time the notice of application is being published or at any subsequent time, the department discovers that the notice of the application omits or erroneously describes the period of appropriation or the total amount appropriated (rate of flow or volume); the place of diversion, place of use, purpose of use or place of storage; which are claimed by the applicant in his filed application and which the department determines to be material errors or material omissions, the notice of application shall be republished to correct such material omissions or material errors. The determination of whether an omission or error is material shall be made by the hearing examiner. If the hearing examiner makes the determination that the omissions or errors are not material, the applicant has the discretion to republish the notice of application.

The Hearing Examiner finds the error to be immaterial. The error was in a remark meant to limit the volume of water to be appropriated each year, however, the correct volume for each water right was stated in the main body of the notice at item "TOTAL VOLUME". The error indicated a volume greater than the proposed appropriation, thus cannot prejudice any objector. There is no need to publish the Notice of Application again.

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4. The Applicant requested the Hearing Examiner to take administrative notice of the entire record of the hearing held August 14, 1990, In the Matter of the Application for Beneficial Water Use Permit No. 73697-43B and Application for Change of Appropriation Water Right No. G(W) 193768-43B (hereinafter, City's Applications No. 73697 and 193768) which she agreed to do.

5. The Applicant seeks to change the point of diversion for Water Right No. P003531-43B. Application No. 73729-43B is to appropriate 203.00 gallons per minute up to 173.00 acre-feet per year of groundwater. These Applications will be combined for one well. The total withdrawal of the proposed well will be 625 gpm up to 500 acre-feet per year. The proposed places of use are: the W½ of Section 7 and the W½ of Section 18, both in Township 2 South, Range 10 East; the S½ of Section 12, all of Section 13, the S½ of Section 14, the E½ of Section 23, and all of Section 24; all in Township 2 South, Range 9 East, Park County. The proposed places of use are within the City's public right of way and jurisdiction. (Department file and testimony of David Mosser.)

6. Permit to Appropriate Water No. P003531-43B is for a well originally located in the NE¼NE¼NW¼ of Section 18, Township 2 South, Range 10 East, Park County. The priority date of this Permit is September 6, 1974, at 1:33 p.m. This well is referred to as the "Q Street well" throughout the hearing. (Department file.)

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7. The "Q" Street well was 43 feet deep and produced 422.00 gpm up to 327 acre-feet per year. This well has been abandoned due to contamination by petroleum chemical spills at the Livingston Rail Yard. The proposed well will be located in the same aquifer as the "Q" Street well. The possibility of the new well becoming polluted from the same source of pollution is remote even though the new well is in the same aquifer because the new well is up-gradient from the pollutant source. (Testimony of David Mosser and Roger Miller.)

8. The new proposed point of diversion is Lot A-2, Amended Plat 465, NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 West, Park County. (Department file.)

9. A pumping test and well monitoring have been performed to determine the zone of influence of the proposed well. The test well, 78 feet deep and 10 inches in diameter, was completed with 12 foot, 10 inch screen. An observation well is located 46 feet from the test well. A multitude of problems were encountered during this test. The most important was the problem of surging in the well. (Testimony of Roger Miller and Department file No. G(P)003531-43B.)

10. Using the worst case scenario, pumping 525 gpm for 1000 minutes, would create an area of influence of 1000 feet. At 750 gpm for 4000 minutes the area of influence would be 1600 feet. The actual conditions when conducting the test were: 510 gpm for 300 minutes would create a zone of influence at 100 feet. A composite of the 510 gpm for 300 minutes plus 495 to 700 gpm for

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700 minutes creates an area of influence of 250 feet. Using the computer model, pumping 625 gpm would create the following: at 50 feet the drawdown would be four feet; at 450 feet the drawdown would be one foot; and at 850 feet, the outer edge of the drawdown cone, there would be no drawdown after pumping for 4,000 minutes. (Testimony of Roger Miller, Applicant's Exhibits 2, 3, 4, and 5.)

11. Of the 15 objectors, only four are in the predicted area of influence, Park Road Trailer Court; Lynn and John Melvin; David Colmey; and Harry and Eileen Hannan. Most likely, the drawdown in the Melvin and Colmey wells would be approximately one foot after pumping at a rate of 625 gpm for 4,000 minutes or nearly three days of continuous pumping. Park Road Trailer Court is located on the outer boundary of the area of influence. (Applicant's Exhibit 4, Department file, and testimony of Roger Miller.)

12. The groundwater level in the Livingston area fluctuates between two to five feet with the seasons. The testing was performed in late November when the water levels are generally the lowest of the season. The period of peak water use by the City and the surrounding well owners is in the spring and summer when the groundwater level is at its highest. (Testimony of Roger Miller.)

13. The Department of Health and Environmental Sciences has approved the plans for the proposed well and distribution system.

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(Testimony of David Mosser during City's Applications No. 73697 and 193768 hearing.)

14. The proposed well normally would not be operated continuously except for fire fighting purposes. (Testimony of Clint Tinsley during City's Applications No. 73697 and 193768 hearing.)

15. The aquifer at Billman Creek is nearly 60 feet thick, overlain with approximately 15 feet of clay. The City's proposed well would be 75 feet deep. A 13 foot screen will be installed slightly off the bottom of the well and the pump will be installed just above the screen at approximately 55 to 60 feet. During periods of high water levels, the well would be pumped at 625 gpm; during low water levels, 550 gpm. The static water level during periods of high water levels would be 18 feet; during low water levels, 24 feet. The specific capacity of the well would be 25 gpm per foot of drawdown. (Testimony of David Mosser and Applicant's Exhibit 2 of City's Applications No. 73697 and 193768.)

16. Objector Bahn's well is 40 feet deep with a static water level of 11 feet. Objector Schliecher has two wells; one is 40 feet deep and the other is 44 feet deep. The 40 foot well has a static water level of 18 feet. There is no record of the static water level for the other well. Objectors McCormick's well is 50 feet deep with a static water level of 33 feet. Objector Harry Payne's well is 45 feet deep; the static water level is 24 feet. Objector Blassingham's well is 47 feet deep

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and the static water level is 16 feet. Roland Payne's well is 30 feet deep with a static water level of 12 feet. R. S. and B. L. Clousing claim a use right with no record of the depth of the well or the static water level. John and Lynn Melvin hold Certificate of Water Right No. C70876-43B for a well 60 feet deep that was drilled in 1970 with no record of the static water level. Objector Park Road Trailer Court holds Certificate of Water Right No. C057134-43B for a well that is 50 feet deep and has a static water level of eight feet and five inches. (Department files and records.)

17. Objector Park Road Trailer Court through Harold Crowell stated that when his well was first drilled (in 1984) it was pumped at 532 gpm for five hours and had no effect to his neighbor's well, but three years later, the neighbor can't water his garden. Mr. Crowell offered no other evidence to support his statement nor did he identify his neighbor. A review of the Department's record of Mr. Crowell's water right revealed the well had been pumped at a rate of 250 gpm for an unspecified period of time causing a drawdown in the well of 10.5 feet.

18. There are no planned uses or developments for which a permit has been issued or for which a reservation has been granted which the proposed project may interfere with unreasonably. (Department records.)

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

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CONCLUSIONS OF LAW

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.

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

2. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) 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; and
> (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.
> ...
> (4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply

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> data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

3. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence the following criteria set forth in § 85-2-402 (2), MCA, have been met:

> (a) the proposed use 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.
> (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
> (c) The proposed use of water is a beneficial use.
> (d) The Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water us to be put to beneficial use.

4. The proposed use of water, municipal, is a beneficial use. See § 85-2-102(a), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 13, 14, and 15.

6. The Applicant does not have possessory interest in the proposed place of use, however, as part of its governmental duties, it is required to supply water to the residents of the City. See Finding of Fact 5.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been

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issued or for which water has been reserved. See Finding of Fact 18.

8. There are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to beneficial use, in the amount the City seeks to appropriate, during the period the City seeks to appropriate.

The test for availability of unappropriated water consists of proving the physical presence of water at the proposed point of diversion. See § 85-2-311(1)(a), MCA.

Applicant produced substantial credible evidence that clearly established the physical presence of water sufficient for the proposed use at the proposed point of diversion during the time it can be put to beneficial use. See Findings of Fact 10, 11, 12, 14, and 15.

9. The Applicant has provided substantial credible evidence that the water rights of prior appropriators will not be adversely affected by the proposed appropriation. There was no alleged adverse effect to other well owners during the pumping test which was conducted over a period of 4,000 minutes or almost three days, much longer than the production well will be pumped ordinarily. See Findings of Fact 10, 11, 12, and 14.

Upon the Applicant's discharge of the burden to produce substantial credible evidence by submitting independent hydrologic evidence and other data on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly within their power to do so.

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Objectors must show they have water rights, describe the operation of their rights, state how they expect the proposed use will change the conditions of water occurrence in the source of supply or how it will otherwise affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed condition. See In re Application No. 60117-76L by William Houston.

Park Road Trailer Court was the only objector to testify alleging any adverse effect; the alleged adverse effect its well had on an unnamed neighbor with no evidence to substantiate the allegation. See Finding of Fact 17.

There were many speculative questions and statements from all the objectors in the record, but no evidence to substantiate or establish a claim of adverse effect related to the test well during the test or to the proposed production well.

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 set forth below, Application for Change of Appropriation Water Right No. G(P)003531-43B is hereby granted to change the point of diversion to the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County, and Application for Beneficial Water Use Permit No. 73729-43B is hereby granted to appropriate 203.00 gallons per minute up to 173.00 acre-feet of water per year for municipal

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purposes in the City of Livingston at a point in the NW¼NE¼NE¼ of Section 26, Township 2 South, Range 9 East, Lot A-2, Amended Plat 465, Park County, Montana.

The Authorization to Change Appropriation Water Right No. G(P)003531-43B and Permit No. 73729-43B are subject to the following:

A. The Permit and Authorization are subject to all prior water rights in the source of supply. Further, these water rights are subject to any final determination of existing water rights, as provided by Montana law.

B. This well shall be constructed so it will not allow water to be wasted, or contaminate other water supplies or sources. The final completion of the well must include an access port of at least .50 inch so the static water level may be measured.

C. Permit No. 73729-43B is used in conjunction with Authorization to Change No. G(P)003531-43B. The combined appropriation as granted shall not exceed a total of 625 gallons per minute up to 500 acre-feet per year.

D. These water rights are subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records no later than November 30 of each year to the Bozeman Water Resources Field Office.

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E. If at any time after these water rights are issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the applicant to show cause why the Permit and Authorization should not be modified or revoked. The Department may then modify or revoke the permit and authorization to protect existing rights or allow the water rights to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

F. Issuance of the Permit and Authorization by the Department shall not reduce the City of Livingston's liability for damages caused by the exercise of these water rights, nor does the Department acknowledge any liability for damages caused by exercise of the permit and authorization, even if such damage is a necessary and unavoidable consequence of the same.

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

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filed by another party within 20 days after service of the exception. However, 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 18th day of September, 1990.

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposed Order was duly served upon all parties of record at their addresses this 18th day of September, 1990, as follows:

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Livingston, MT 59047

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Cindy G. Campbell

Cindy G. Campbell
Hearings Unit Secretary

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