STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 5638-g76LJ and 5639-g76LJ BY GROSSWILER DAIRY, INC.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FILED

APR 2 1977

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on January 12, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is slightly modified in wording in Items 6 and 7.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 5638-g76LJ is hereby granted allowing for the appropriation of 2.67 cubic feet per second of water, equivalent to 1,200 gallons per minute, not to exceed 720 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, at a point in the SW¼ SW¼ NW¼ of Section 33, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 90 acres in Section 32 and 150 acres in Section 33, all in Township 29 North, Range 22 West, M.P.M., and containing a total of 240 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit No. 5639-g76LJ is hereby granted allowing the appropriation of 5.57 cubic feet per second of water, equivalent to 2,500 gallons per minute, and not to exceed 1,100 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, located at a point in the SE¼ SE¼ NW¼ of Section 27, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 120 acres in Section 22 and 320 acres in Section 27, all in Township 29 North, Range 22 West, M.P.M., and containing a total of 440 acres, more or less, from April 15 to October 15, inclusive, of each year.

3. These Provisional Permits are granted subject to all prior water rights in the source or sources of supply.

4. These Provisional Permits are granted subject to the right of the Department to order the Applicant to cease appropriations and to enter on to the premises for testing at any reasonable hour. Such demand by the Department shall be based upon a bonifide complaint by any of the holders of prior water rights in the area.

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5. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

6. These Provisional Permits are granted subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.

7. These Provisional Permits are granted subject to these additional conditions:

a) That the final completion of each well include an access port of at least 0.5-inch diameter so that the static water level of the wells may be accurately measured.

b) That each well shall be subject to Sections 89-2926, R.C.M. 1947, which requires that all wells be constructed so that they do not allow water to be wasted, contaminate other water supplies or sources, and that all flowing artesian wells be capped or equipped so that the flow of water may be stopped when not being put to beneficial use.

c) That a flowmeter capable of accurately measuring the rate and volume of water diverted be installed on each well.

d) That the Applicant keep an accurate, written record of periods of diversion. This includes the times and dates the pumps were started and shut off, the rate water was diverted during each pumping period, and the total volume of water diverted during each period from each well.

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 and protection.

Done this 28th day of February, 1977.

Orrin Ferris

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

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

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 5638-g76LJ AND NO. 5639-g76LJ)
BY GROSSWILER DAIRY, INC.)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the Kalispell City Hall, City Council Chambers, Kalispell, Montana, on Tuesday, September 14, 1976, at 1:15 p.m., Daniel G. Diemert, Hearing Examiner, presiding.

Mr. Paul Grosswiler attended the hearing and was represented by Mr. Douglas Dasinger, an attorney with the firm of Murphy, Robinson, Heckathorn & Phillips of Kalispell, Montana.

Objections to the Application No. 5638-g76LJ were received by the Department from Roger W. Thompson, Alice Thibert, Jess Urban, Alvin Keller, Warren S. Lynch, Peter J. and Kathryn Viano, Melvin M. and Inga C. Mumbower, Douglas D. and Helen Konshur, and Alfred J. Gustafson. Objections to the Application No. 5639-g76LJ were received by the Department from Jess Urban, Alvin Keller, Warren S. Lynch, Peter J. and Kathryn Viano, Melvin M. and Inga Mumbower, and Douglas and Helen Konshur.

Jim Rehbein and Tom Patton attended the hearing on behalf of the Department of Natural Resources and Conservation.

As required by law the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator, Water Resources

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Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate ground water by means of a well with a maximum yield of 100 gallons per minute outside the boundaries of a controlled ground-water area.

2. On June 9, 1975, the Department received an Application for Beneficial Water Use Permit No. 5638-g76LJ from Grosswiler Dairy, Inc., who sought to appropriate 2.67 cubic feet of water per second equivalent to 1,200 gallons of water per minute not to exceed 720 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, at a point in the SW1/4 SW1/4 NW1/4 of Section 33, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 90 acres in Section 32 and 150 acres in Section 33, all in Township 29 North, Range 22 West, M.P.M., and containing a total of 240 acres, more or less, from April 15 to October 15, inclusive, of each year.

3. On June 9, 1975, the Department received an Application for Beneficial Water Use Permit No. 5639-g76LJ from Grosswiler Dairy, Inc., who sought to appropriate 5.57 cubic feet of water per second equivalent to 2,500 gallons of water per minute not to exceed 1,100 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, located at a point in the SE1/4 SE1/4 NW1/4 of Section 27, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 120

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acres in Section 22 and 320 acres in Section 27, all in Township 29 North, Range 22 West, M.P.M., and containing a total of 440 acres, more or less, from April 15 to October 15, inclusive, of each year.

4. On September 24, 1975 the Department issued an interim permit to the Applicant for Application No. 5639-g76LJ for drilling and testing purposes only. This interim permit was issued subject to the denial, approval, or modification of the Provisional or Final Permit.

5. There are times when there exists unappropriated waters in the source of supply.

6. If the proposed applications are conditioned upon the right of the department to order the Applicant to cease appropriating when it has reason to believe the Applicant is interfering with the rights of prior appropriators, those rights of prior appropriators will not be adversely affected.

7. It appears that the proposed means of diversion or construction are adequate.

8. The proposed use of water to irrigate is a beneficial use.

9. The proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved.

10. The Applicant has not asked in either of the applications, for an appropriation of 15 cubic feet of water per second or more. It therefore is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

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11. It is apparent from the testimony of both Dr. Dunn and Mr. Patton that the relationships between the applied-for wells and existing wells cannot be accurately predicted.

12. If the Applicant is required to keep accurate and detailed records of withdrawals and recharge rates of the wells for three years, such relationship can be more accurately assessed.

From the above Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 5638-g76LJ should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of Montana.

2. The Application for Beneficial Water Use Permit No. 5639-g76LJ should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of Montana.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

4. The Department can condition permits issued by it so as to protect the rights of prior appropriators.

5. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the appropriation, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

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6. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent to reach a conclusion herein.

7. A Provisional Permit can be conditioned to require the Applicant to cease appropriation upon notice by the Department and allow the Department to enter upon his premises for testing at reasonable hours.

8. Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 5638 g76LJ is hereby granted allowing for the appropriation of 2.67 cubic feet of water per second equivalent to 1,200 gallons of water per minute not to exceed 720 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep at a point in the SW1/4 SW1/4 NW1/4 of Section 33, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 90 acres in Section 32 and 150 acres in Section 33 all in Township 29 North, Range 22 West, M.P.M., and containing a total of 240 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. Subject to the conditions cited below the Applicant's Provisional Permit No. 5639-g76LJ is hereby granted allowing

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the appropriation of 5.57 cubic feet of water per second equivalent to 2,500 gallons of water per minute not to exceed 1,100 acre-feet of water per annum, in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, located at a point in the SE1/4 SE1/4 NW1/4 of Section 27, Township 29 North, Range 22 West, M.P.M., and used for supplemental irrigation on 120 acres in Section 22 and 320 acres in Section 27, all in Township 29 North, Range 22 West, M.P.M. and containing a total of 440 acres, more or less, from April 15 to October 15, inclusive, of each year.

3. These Provisional Permits are granted subject to all prior water rights in the source or sources of supply.

4. These Provisional Permits are granted subject to the right of the Department to order the Applicant to cease appropriations and to enter on to the premises for testing at any reasonable hour. Such demand by the Department shall be based upon a bonifide complaint by any of the holders of prior water rights in the area.

5. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

6. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

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7. This Provisional Permit is granted subject to these additional conditions:

a) That the final completion of the well include an access port of at least 0.5-inch diameter so that the static water level of the well may be accurately measured.

b) That the well shall be subject to Section 89-2926, R.C.M. 1947, which requires that all wells be constructed so that they do not allow water to be wasted, contaminate other water supplies or sources, and that all flowing artesian wells be capped or equipped so that the flow of water may be stopped when not being put to beneficial use.

c) That a flowmeter capable of accurately measuring the rate and volume of water diverted be installed on the well.

d) That the applicant keep an accurate written record of periods of diversion. This includes the times and dates the pump was started and shut off, the rate water was diverted during each pumping period, and the total volume of water diverted during each period.

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NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the administrator of the Water Resources Division.

DATED this 12 day of January, 1977.

Daniel G. Diemert

DANIEL G. DIEMERT
HEARING EXAMINER

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