STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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| IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO'S. 8010-s76LJ AND 8246-s76LJ BY BRUCE REIMER | ) ) ) ) | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 30, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. The Application for Beneficial Water Use Permit No. 8010-s76LJ by Bruce Reimer is granted to appropriate 1.74 cfs, or 785 gallons of water per minute, not to exceed 144 acre-feet per annum from Haskill (Second) Creek, a tributary of the Whitefish River, in Flathead County, Montana to be diverted from Haskill (Second) Creek by means of a pump at a point in the NW¼ NE¼ SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M., and used for irrigation on a total of 120 acres, more or less, in said Section 4, from April 15 to July 15, inclusive, of each year.

2. The above Provisional Permit No. 8010-s76LJ is inclusive of, not additional to, any final determination of prior existing water rights in the source of supply provided for by Montana Law.

3. The Application for Beneficial Water Use Permit No. 8246-s76LJ by Bruce Reimer is granted to appropriate 4.13 cfs, or 1,855 gallons of water per minute, not to exceed 480 acre-feet per annum from the Whitefish River, a tributary of the Stillwater River, in Flathead County, Montana, to be diverted from the Whitefish River by means of a pump at a point in the NW¼ SE¼ NE¼ of Section 8, Township 30 North, Range 21 West, M.P.M., and used for new irrigation on a total of 140 acres, more or less, in Section 4, Township 30 North, Range 21 West, M.P.M., from May 1

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to October 1, inclusive, of each year (and for supplemental irrigation for 40 acres in the SE¼ NW¼ and 80 acres in the E½ SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M., from May 1 to October 1, inclusive, of each year.)

The Applicant shall install and maintain a flowmeter or other satisfactory measuring device at each point of diversion for the above provisional permits and shall submit to the Department, upon request, records of the rate, period of diversion and volume of water diverted.

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

RECOMMENDATION

The Department recommends that all parties in this matter 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 20th day of January, 1978.

Orrin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
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| IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 8010-s76LJ and 8246-s76LJ BY BRUCE REIMER | ) ) ) ) | PROPOSAL FOR DECISION |

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Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held August 8, 1977, at Kalispell, Montana, for the purpose of hearing objections to the above-named applications, William F. Throm, Hearing Examiner, presiding.

The Applicant, Bruce Reimer, appeared at the Hearing to present testimony in support of the above applications. Mr. Reimer was represented by Mr. Leonard Kaufman, Attorney At Law. Mr. Kaufman introduced into evidence, on behalf of the Applicant, five exhibits: a photo copy of SCS Conservation Plan Map for Bruce Reimer; a topographic map U.S.G.S. Whitefish Quadrangle; a letter from A. R. Appelgren for right-of-way easement to Bruce Reimer; SCS Sprinkler Irrigation Design Guide; and a copy of a Notice of Appropriation of Water Right by John E. Reimer, filed for record on April 15, 1926. The aforementioned exhibits were received into evidence without objection and were marked Applicant's Exhibits No. 1, 2, 3, 4, and 5 respectively. Also appearing to testify on behalf of the Applicant were Mr. Ed Hawkinson and Mr. Roy LaBar.

Mr. Ray Sherlock and Naomi Sherlock appeared in objection to both applications. Mr. Klaus and Ms. Joaquenia Heinrich appeared in objection to Application No. 8010-s76LJ on Haskill Creek.

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Mr. Klaus Heinrich introduced into evidence a cross-section of Haskill Creek with flow calculations which was received into evidence without objection and was marked as Objector's Exhibit No. 1. None of the objectors were represented by an attorney.

Mr. Jim Rehbein, Field Office Manager, Kalispell Water Rights Field Office, appeared at the hearing to represent the Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On April 16, 1976, the Department received Application for Beneficial Water Use Permit No. 8010-s76LJ from Bruce Reimer to appropriate 1.74 cubic feet of water per second or 785 gallons per minute and not to exceed 350 acre-feet per annum from Haskill (Second) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from Haskill (Second) Creek by means of a pump at a point in the NW¼NE¼SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M., and used for new irrigation on a total of 140 acres, more or less, in said Section 4 from April 15 to October 1, inclusive, of each year.

2. On May 7, 1976, the Department received Application for Beneficial Water Use Permit No. 8246-s76LJ from Bruce Reimer to appropriate 4.13 cubic feet per second of water or 1,855 gallons per minute and not to exceed 662.5 acre-feet per annum from the Whitefish River, a tributary of the Stillwater River, in Flathead County, Montana, to be diverted from the Whitefish River by means of a pump at a point in the NW¼SE¼NE¼ of Section 8, Township 30 North, Range 21 West, M.P.M., and used for new irrigation on a total of 265 acres, more or less, in Section 4, Township 30 North, Range 21 West, M.P.M., from May 1 to October 1, inclusive, of each year.

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3. On August 12, 19, and 26, 1976 the Department caused to be duly published in the Hungry Horse News, Columbia Falls, Montana, notice of above Application No. 8010-s76LJ and on August 19, 26, and September 2, 1976, the Department caused to be duly published in the Hungry Horse News, Columbia Falls, Montana, notice of above Application No. 8246-s76LJ.

4. Objections were received by the Department to the above applications as follows:

- September 15, 1976, objection to Application No. 8010-s76LJ from Klaus and Joaquenia Heinrich
- September 17, 1976, objection to Application No. 8010-s76LJ from Jerrold E. and Maragret A. Johnson.
- September 20, 1976, objections to Application No. 8010-s76LJ and Application No. 8246-s76LJ from Ray Sherlock.

5. At the Hearing, the Applicant testified that Application No. 8010-s76LJ to appropriate 1.74 cfs. from Haskill (Second) Creek was in error; that he has a use right on Haskill Creek which was established by an appropriation of water made by his father and filed on April 15, 1926; that the filing was for 8 inches of water from what was then known as Second Creek but is now called Haskill Creek; that the quantity of water indicated on the filing was obviously in error as a knowledgeable person would know that this would be an insufficient rate of flow to irrigate the 40 acres in the SE¼NW¼ of Section 4, Township 30 North, Range 21 West, intended to be irrigated and that the size of the ditch specified in the filing would indicate an intent to appro-

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priate a larger quantity of water; that a volume of water sufficient to irrigate 60 acres was in fact diverted and put to beneficial use until 1933 when additional land was cleared and put under irrigation as rapidly as possible and by 1950, 120 acres had been irrigated from the original source of supply and has continued to be irrigated since that time depending upon the availability of the water or the needs of the crops, and that the water was diverted from the source at the same point until about two years ago when a change in point of diversion was made to that now existing. The Applicant further testified that there is no intent on his part as is erroneously indicated by this Application to appropriate any more water from Haskill Creek or to use it for any purpose or place of use other than that which has been established since the water was first appropriated and which is presently being used. The Applicant testified that the purpose of the Application is to consolidate his position in regards to water rights from Haskill Creek.

In view of the foregoing, the Applicant submitted a revised Application for Beneficial Water Use Permit No. 8010-s76LJ dated August 8, 1977, to appropriate 1.74 cfs or 785 gpm and not to exceed 144 acre-feet per annum from Haskill (Second) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from Haskill (Second) Creek by means of a pump at a point in the NW¼NE¼SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M. and used on presently irrigated land totalling 120 acres in the NW¼ and SW¼ of said Section 4 from April 15 to July 15, inclusive, of each year.

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6. The Applicant testified that Application No. 8246-s76LJ to appropriate 4.13 cubic feet per second from the Whitefish River is for new irrigation on 140 acres and for supplemental irrigation on the 120 acres partially irrigated from Haskill Creek on a total of 260 acres and not to exceed 480 acre feet per annum. The Applicant further testified that Haskill Creek becomes short of water in early July and is almost always out of water for irrigation purposes in August. He further testified that he has never known the Whitefish River to be short of water; that the Whitefish River water is needed to provide him with a full irrigation supply for his cropland; that the Soil Conservation Service has provided him with a sprinkler irrigation system plan and he will install his sprinkler irrigation system in accordance with that plan and will irrigate pasture, hay and potatoes. He testified that he has been granted permission for easements for pipeline access rights-of-way to the Whitefish River for this proposed project.

7. Objectors Klaus and Joaquenia Heinrich claimed that granting of the Application No. 8010-s76LJ would endanger their prior water rights on Haskill Creek and would endanger beaver and other instream uses and values.

Objector Ray Sherlock claimed that the Applicant had not obtained necessary easements for right-of-way for Application No. 8246-s76LJ and that the proposed diversion from the Whitefish River would make it difficult to maintain the necessary suction head on his pump during dry seasons.

The above objectors all questioned the Applicant's claimed date of establishment of a use right and in particular questioned

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the claimed place of use and quantification of that claimed use.

PROPOSED CONCLUSIONS OF LAW

1. The Applicant has apparent existing rights from Haskill Creek for the diversion of water at the same rate and quantity and for the same, or a portion of the same, place and purpose of use as applied for in Application No. 8010-s76LJ. The final determination of the validity and quantification of such rights are not within the jurisdiction of the Hearings Examiner nor the Department of Natural Resources and Conservation. Since this is an Application for Beneficial Water Use Permit to appropriate 1.74 cubic feet of water per second from Haskill Creek, it should be treated solely as an application for a new appropriation; however, a permit, if granted, should not be additional to existing rights which may be validated by a final determination rendered in the adjudication process in accordance with the provisions of the 1973 Montana Water Use Act. Documentation of the date of priority and quantification of use right is the responsibility of the Applicant.

2. The objectors have apparent existing water use rights on Haskill (Second) Creek, the proposed source of supply for Application No. 8010-s76LJ and on the Whitefish River, the proposed source of supply for Application No. 8246-s76LJ; however, only objections pertaining to adverse affects to prior rights and beneficial uses as defined by law prior to July 1, 1973, may be given consideration as valid objections. Such uses as instream flow requirements for fish, wildlife, recreation and scenic values were not defined as beneficial uses prior to the enactment of the 1973 Montana Water Use Act and therefore can be given no weight

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by the Hearings Examiner.

3. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply.

4. There are unappropriated waters in Haskill (Second) Creek and the Whitefish River. Said unappropriated waters are available from the Whitefish River, except perhaps during extreme drought conditions which is relatively rare. Unappropriated waters are normally available from Haskill (Second) Creek in the spring and early summer to mid-July only, thereafter Haskill (Second) Creek is fully appropriated.

5. The rights of prior appropriators will be protected if the permits are conditioned to protect those rights.

6. The proposed means of diversion will be adequate.

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

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

9. The Application for Beneficial Water Use Permits Nos. 8010-s76LJ and 8246-s76LJ may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. The Application for Beneficial Water Use Permit No. 8010-s76LJ by Bruce Reimer is granted to appropriate 1.74 cfs, or 785 gallons of water per minute, not to exceed 144 acre-feet per annum from Haskill (Second) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from

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Haskill (Second) Creek by means of a pump at a point in the NW¼NE¼SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M., and used for irrigation on a total of 120 acres, more or less, in said Section 4, from April 15 to July 15, inclusive, of each year.

2. The above Permit No. 8010-s76LJ is inclusive of, not additional to, any final determination of prior existing water rights in the source of supply provided for by Montana Law.

3. The Application for Beneficial Water Use Permit No. 8246-s76LJ by Bruce Reimer is granted to appropriate 4.13 cubic feet per second, or 1,855 gallons of water per minute, not to exceed 480 acre-feet per annum from the Whitefish River, a tributary of the Stillwater River, in Flathead County, Montana, to be diverted from the Whitefish River by means of a pump at a point in the NW¼SE¼NE¼ of Section 8, Township 30 North, Range 21 West, M.P.M., and used for new irrigation on a total of 140 acres, more or less, in Section 4, Township 30 North, Range 21 West, M.P.M., from May 1 to October 1, inclusive, of each year and for supplimental irrigation for 40 acres in the SE¼NW¼ and 80 acres in the E½SW¼ of Section 4, Township 30 North, Range 21 West, M.P.M., from May 1 to October 1, inclusive, of each year.

The Applicant shall install and maintain a flowmeter or other satisfactory measuring device at each point of diversion for the above permits and shall submit to the Department, upon request, records of the rate, period of diversion and volume of water diverted.

The above Permits are granted subject to prior existing water

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rights in the source of supply and any final determination of prior existing water rights as provided for by Montana Law.

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 30th day of November, 1977.

WILLIAM F. THROM
Hearing Examiner

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