

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT G(C)010517-g76LJ BY LANDFALL )  
COMPANY )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on May 4, 1994. Objector William H. Bush (Objector) filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting a conditional Authorization to Change Appropriation Water Right to Landfall Company to change the point of diversion of Certificate 010517-g76LJ from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to three points of diversion in Section 18. One replacement well would be located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , the second well would be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and the third well would be located in the SW $\frac{1}{4}$  of Section 18, within the Ridgewood development in Section 18, Township 26 North, Range 19 West, Lake County. The well located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 would be limited to 20 gallons per minute; the well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 would be limited to 5 gallons per minute; and the third well located in the SW $\frac{1}{4}$  of Section 18 would be limited to 10 gallons per minute. The wells would be connected by a manifold system. The place of use would be the subdivision previously known as Sterling Estates now known as Ridgewood Estates which is located in the SW $\frac{1}{4}$  of said Section 18.

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For this review, the Department must accept the Proposal's Findings if the Findings were based upon competent substantial evidence and the proceedings on which the Findings were based, complied with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1993) and Mont. Admin. R. 36.12.229 (1994).

Much of Mr. Bush's exceptions reiterate allegations made at the hearing. Some of the exceptions set forth additional information to support his opposition to this project. Factual allegations unsubstantiated by the record and first presented for consideration after the hearing and therefore at a time when other parties have no opportunity to cross-examine or rebut, cannot be considered in the decision-making process. Consideration of this type of allegation would violate the statutory recognized procedural due process rights of other parties. Mont. Code Ann. § 2-4-612 (1993). *See In re Application 43024-s43D by Reiter and Grunstead* (1983).

According to Mont. Admin. R. 36.12.229 (1994), exceptions must specifically set forth the precise portions of the proposed decision to which the exception, the reason for the exception, authorities upon which the party relies, and specific citation of the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record, e.g., to exhibits or to specific testimony, will be accorded little attention.

Objector Bush did not identify any specific portion of the Proposal to which he took exception. Mr. Bush did argue in his

exception that the pump tests, one conducted by Mark Shapley in 1986 and the other conducted by Landfall in 1993, were invalid because Shapley's test was conducted under minimal use conditions and Landfall's test was conducted during an extremely wet year. Mr. Shapley conducted his test in January of 1986 when there are no summer visitors nor landscape watering to create a larger demand on the aquifer. John Robinson conducted the latest test for Landfall in August of 1993, a year with extraordinary rainfall. However, as the Hearing Examiner pointed out in Finding of Fact 24, even at high water levels, an aquifer will respond to stress tests the same way as it would at low water levels. The degree of response to a pump test may be a little different, but the fact it does respond and that it responds in a similar fashion is a correct assumption.

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 May 4, 1994, 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 listed below Authorization to Change Appropriation Water Right G(C)010517-g76LJ is hereby granted to Landfall Company to change the point of diversion of Certificate 010517-

g76LJ from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to three points of diversion in Section 18. One replacement well shall be located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , the second well shall be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and the third well shall be located in the SW $\frac{1}{4}$  of Section 18, within the Ridgewood development in Section 18, Township 26 North, Range 19 West, Lake County. The well located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 shall be limited to 20 gallons per minute; the well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 shall be limited to 5 gallons per minute; and the third well located in the SW $\frac{1}{4}$  of Section 18 shall be limited to 10 gallons per minute. The wells shall be connected by a manifold system. The place of use shall be the subdivision previously known as Sterling Estates now known as Ridgewood Estates which is located in the SW $\frac{1}{4}$  of said Section 18.

A. When the third well is completed, Applicant must notify, in writing, Objectors and the Kalispell Water Resources Regional Office before bringing the new well on line.

B. Any well completed pursuant to this Authorization to Change Appropriation Water Right shall not be used in conjunction with Beneficial Water Use Permit 12826-g76LJ. The wells authorized by said Permit and this Authorization to Change shall be used alternately.

C. The appropriator shall install an adequate flow and volumetric metering device on each well. The appropriator shall measure for each well used: 1) a quarterly pumping flow rate; 2) the quarterly volume of water used; and 3) the static water

level. These three items shall be measured once during each of the following time periods: 1) March 15 through 31; 2) June 15 through 30; 3) September 15 through 30; and 4) December 15 through 31. Records must include the water level, a pumping flow rate in gallons per minute, number of gallons used since the last measurement, method of measurement, date and time of measurement, and description of the measuring point on the casing. The measurements shall be recorded only at a time when the water level is static, or there is no significant change in measurements taken 1 to 2 minutes apart. The appropriator shall submit the records to the Kalispell Water Resources Regional Office, PO Box 860, Kalispell, MT 59903 upon request or by December 31 of each year.

D. This authorization is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

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

liability for damage caused by the Appropriator's exercise of this authorization.

F. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 18<sup>th</sup> day of July, 1994.

*Larry Holman*

Larry Holman, Chief  
Water Rights Bureau  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6631

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 18<sup>th</sup> day of July, 1994, as follows:

Landfall Company  
% Steve Felt  
P.O. Box 960  
Bigfork, MT 59911

Elk Glen Elk Ranch  
% Ray Schenck, Gen. Partner  
East Lakeshore  
Bigfork, MT 59911

Ron Stumm  
P.O. Box 1767  
Bigfork, MT 59911

M. Dean Jellison, Attorney  
431 First Ave. W.  
Kalispell, MT 59901

William H. Bush  
Clarice F. Bush  
Sylvan Drive  
Bigfork, MT 59911

Michael W. Frazer  
Thomas, Dean & Hoskins Inc.  
No. 6 Sunset Plaza  
Kalispell, MT 59901

Anne K. Tippet  
East Lakeshore  
Bigfork, MT 59911

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(Via Electronic Mail)

Vivian A. Lighthizer  
Hearing Examiner  
Dept. of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

*Cindy G. Campbell*  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT G(C)010517-g76LJ BY LANDFALL )  
COMPANY )

\* \* \* \* \*

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 matter on July 14, 1992, in Kalispell, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Landfall Company for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1991).

On August 7, 1992, an Interlocutory Order containing findings of fact and conclusions of law was issued granting an interim permit and requiring a testing program for both wells 1B and 2B be submitted to the Kalispell Regional Office of the Department of Natural Resources and Conservation for approval within 30 days after receipt of the Interlocutory Order. On September 10, 1992, an Order granting additional time to submit said testing program was issued extending the time to November 9, 1992. The preliminary monitoring plan was submitted to the Kalispell Regional Office on September 14, 1992. Charles Brasen, Manager of the Kalispell Regional Office, approved the monitoring plan with certain conditions.

The record was reopened on April 12, 1994, to hear evidence

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gained during the preliminary monitoring pertaining to the issues of adverse effect and water availability.

APPEARANCES

The following appeared at the April 12, 1994, hearing.

Applicant, Landfall Company, appeared by and through counsel, M. Dean Jellison and its owner, Steve Felt.

Marc Spratt, Hydrogeologist with Spratt and Associates, appeared at the hearing as a witness for the Applicant.

Mike Fraser, Consultant with Thomas, Dean and Hoskins Inc., appeared at the hearing as a witness for the Applicant.

John Robinson, who conducted the actual pump test, appeared at the hearing as a witness for the Applicant.

Objectors William H. and Clarice F. Bush appeared at the hearing by and through William H. Bush.

Charles Brasen, Manager of the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Marshall Corbett, Hydrogeologist with the Department's Kalispell Water Resources Regional Office, appeared at the hearing.

The decision in this matter has been made on the basis of the record which consists of testimony presented at the July 14, 1992, hearing; the testimony presented at the April 12, 1994, hearing; and the Department file which includes the Ridgewood Estates Subdivision Pump Test Analysis report dated November 2, 1993 (November 2 Report), and the Addendum to Pump Test Analysis

Ridgewood Estates Subdivision (Addendum) received by the Department on February 8, 1994.

This Proposal for Decision incorporates by reference the Findings of Fact and Conclusions of Law as contained in the Interlocutory Order of August 7, 1992, with the exception of Finding of Fact 5 and Conclusions of Law 7 and 9, as well as setting forth the following additional Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Finding of Fact 5 is amended as follows:

5. Applicant proposes to change the point of diversion of Certificate 010517-g76LJ from the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  of Section 18 to three points of diversion in Section 18. One replacement well would be located in the  $NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$ , one would be located in the  $NW\frac{1}{4}SE\frac{1}{4}SW\frac{1}{4}$ , and the third in the southern portion of the Ridgewood development in the  $SW\frac{1}{4}$  of Section 18. The well located in the  $NW\frac{1}{4}SE\frac{1}{4}SW\frac{1}{4}$  of Section 18 will produce 20 gallons per minute; the well located in the  $NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$  of Section 18 will produce 5 gallons per minute; and the third well is expected to produce 10 gallons per minute. The proposed wells are identified as wells 1B, located in the  $NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$  of Section 18; well 2B, located in the  $NW\frac{1}{4}SE\frac{1}{4}SW\frac{1}{4}$  of Section 18; and the third well will be identified as well 3B, located in the  $SW\frac{1}{4}$  of Section 18. All three wells would be connected in a manifold system which involves all subdivision wells. The change in place of use is simply a correction. The place of use indicated on Certificate

of Water Right 010517-g76LJ is the same ten-acre parcel as the point of diversion when actually the place of use has always been the subdivision previously known as Sterling Estates now known as Ridgewood Estates which is located in the SW $\frac{1}{4}$  of Section 18. (Testimony of Mike Fraser, Department file, and Department records.)

Well 2B is not located at the site proposed in the application. Because of easement problems, well 2B has been drilled at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, Lake County, Montana. (Testimony of Mike Fraser, Applicant's Exhibit 1, and Addendum.)

Landfall needs a third well to be able to divert a total of 35 gallons per minute. Well 1B produces five gallons per minute; well 2B produces 20 gallons per minute; thus a third well (3B) producing 10 gallons per minute is needed. The site has not been selected for this well and cannot be until some test drilling is performed. (Testimony of Mike Fraser.)

16. The actual test was performed on the proposed production well 2B from September 27, 1993, through October 8, 1993. Well 2B was pumped at a rate varying from 21 gallons per minute to 19 gallons per minute for 7.81 days. Recovery was monitored for approximately four days, October 5 through October 8. Four observation wells were monitored during the pump test. Applicant's wells #1 (permitted well, P12826-g76LJ); 1B; the pumped well, 2B; Anne Tippet's well; and Ron Stumm's well were monitored throughout the pump test.

Access to William and Clarice Bush's well was not available' nor was access to Ray Schenck's well. (November 2 Report, Addendum, and testimony of Mike Fraser and Marc Spratt.)

17. Although the Interlocutory Order required that any well to be used as a production well must be tested, Landfall's experts concluded it was not necessary to test well 1B since it had already been tested by Mark Shapley, a hydrogeologist formerly with the Department, in 1986. Because of excessive drawdown, that test was ended at 30 hours. This data was utilized in the modeling efforts for the instant application. It has been determined that well 1B is capable of sustained yields of five gallons per minute. (Department records, Addendum, and testimony of Mike Fraser and Marc Spratt.)

The source of the ground water in the area of Ridgewood Estates is fractured bedrock where the majority of the stored water is in the fissures, hence the storage is limited. This aquifer cannot support high rates of withdrawal. (November 2 Report and testimony of Marc Spratt and Marshall Corbett.)

18. The test performed by Mark Shapley in 1986 on well 1B at 30 gallons per minute for 20 hours showed no effect on Objectors Bush's well. Since the pump test in 1993 on well 2B

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'Mark Shapley had gained access to the Bushes' well with some difficulty in 1986. When the monitoring program was being instituted for the instant case, Mr. Bush was available and had agreed to monitoring his well; however, access to this well was impossible because of construction and wiring (the pressure tank is plumbed right to the well), according to John Robinson. Mr. Bush, however, indicated at the hearing the well could be monitored since Shapley had done so in 1986.

caused a drawdown of one foot in well 1B and the Bush well is more than twice the distance from well 1B as well 1B is from well 2B, Landfall's experts concluded that it is unlikely wells 1B and 2B are completed in the same fracture system as Objectors Bush's well. However in a fracture system, without direct monitoring of the two wells, a conclusion that there is no connection cannot be made. (Department records and testimony of Marc Spratt and Marshall Corbett.)

19. During the 1993 pump test on well 2B, there were no measurable impacts on Objector Tippett's well. The effects on the Stumm (formerly Objector Hogue) well were less than predicted indicating poor connection to the pumped well 2B. (November 2 Report and testimony of Marc Spratt.)

20. Ridgewood's development as it stands now, as long as the 35 gallons per minute pumping rate is not exceeded, would be well served without affecting the water rights of others. However, if the development expands further, more wells would be needed. Each time an additional demand is made, the water availability for existing wells is reduced. (Testimony of Marshall Corbett.)

21. There has been no significant snowfall in the Bigfork area in the last eight years. However, there was record rainfall in the summer of 1993. The ground water level had steadily declined during the last eight years. It began to recover with the rainfall and was still showing an upward trend in December. (Testimony of Marc Spratt, Marshall Corbett, and William Bush.)

22. Objectors Bush have been experiencing problems with their well and they believe these problems are a result of pumping by Applicant. A voltage regulator failed and there is air in the water. (Testimony of William Bush.) Mr. Bush did not produce static water levels of his well nor did he offer any other evidence to substantiate his claim of adverse effect caused by Applicant's pumping.

23. Mr. Bush believes the tests performed on the aquifer are completely invalid. He believes Mark Shapley's test, which was conducted in January of 1986, should have been conducted in July when the aquifer is most stressed, *i.e.* when everyone has summer visitors and the seasonal residents have returned for the summer, to show the true capability of the aquifer. Mr. Bush also believes the test performed in 1993 is completely invalid since it was conducted during the extraordinary rainfall that season. (Testimony of William Bush.)

24. Even at high water levels an aquifer should behave to stress tests the same way it would at low water levels if there is a connection between the two wells. The degree of response to a pump test might be a little different, but the fact it does respond and that it responds in a similar fashion is a correct assumption. (Testimony of Marshall Corbett and Marc Spratt.)

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

CONCLUSIONS OF LAW

Conclusions of Law 7 and 9 as contained in the August 7, 1992, Interlocutory Order are superseded by the following Conclusions of Law.

14. Applicant has provided substantial credible evidence there will be no adverse effect to the water rights of other persons. See Findings of Fact 16, 17, 18, 19, 20, and 21. Although Objectors Bush made allegations that their well was being adversely affected by the Ridgewood development, no evidence was offered to substantiate those allegations. See Finding of Fact 22. Mr. Bush challenged the validity of the pump tests, but offered no evidence other than his testimony that those tests were invalid while the testimony of experts verified that an aquifer behaves to stress in a similar manner regardless of the water level. See Findings of Fact 23 and 24.

Upon Applicant's discharge of the burden to produce substantial credible evidence on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce. Here Objectors Bush produced no evidence other than the testimony of William Bush. There were no static water level readings nor any other information to substantiate their allegations. The failure of a voltage regulator is not an indication of well failure; nor is air in the water.

15. The Department has the authority to place conditions on authorizations to change appropriation water right provided such

conditions are necessary to satisfy the criteria listed in Mont. Code Ann. § 85-2-402(2) (1991). Mont. Code Ann. § 85-2-312(1) (1991). Here Applicant proposes to construct a third well in a fractured bedrock aquifer. The evidence shows that when dealing with a fractured bedrock aquifer, the wells must be in the same fracture system for an effect to be observed. See Findings of Fact 7 and 10 of Interlocutory Order. Therefore an authorization to change issued for the instant application must be conditioned so that when the third well is completed, Applicant must notify Objectors before bringing the new well on line so Objectors can observe the static water levels in their wells prior to pumping of this well and may then periodically observe the static water level to determine whether the water level is declining to the point of adverse effect. The Kalispell Water Resources Regional Office must also be notified so the personnel will be aware the new well is going on line.

Based upon the Interlocutory Order and 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 listed below Authorization to Change Appropriation Water Right G(C)010517-g76LJ is hereby granted to Landfall Company to change the point of diversion of Certificate 010517-g76LJ from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to three points of diversion in Section 18. One replacement well shall be located

in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , the second well shall be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and the third well shall be located in the SW $\frac{1}{4}$  of Section 18, within the Ridgewood development in Section 18, Township 26 North, Range 19 West, Lake County. The well located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 shall be limited to 20 gallons per minute; the well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 shall be limited to 5 gallons per minute; and the third well located in the SW $\frac{1}{4}$  of Section 18 shall be limited to 10 gallons per minute. The wells shall be connected by a manifold system. The place of use shall be the subdivision previously known as Sterling Estates now known as Ridgewood Estates which is located in the SW $\frac{1}{4}$  of said Section 18.

A. When the third well is completed, Applicant must notify, in writing, Objectors and the Kalispell Water Resources Regional Office before bringing the new well on line.

B. Any well completed pursuant to this Authorization to Change Appropriation Water Right shall not be used in conjunction with Beneficial Water Use Permit 12826-g76LJ. The wells authorized by said Permit and this Authorization to Change shall be used alternately.

C. The appropriator shall install an adequate flow and volumetric metering device on each well. The appropriator shall measure for each well used: 1) a quarterly pumping flow rate; 2) the quarterly volume of water used; and 3) the static water level. These three items shall be measured once during each of the following time periods: 1) March 15 through 31; 2) June 15

through 30; 3) September 15 through 30; and 4) December 15 through 31. Records must include the water level, a pumping flow rate in gallons per minute, number of gallons used since the last measurement, method of measurement, date and time of measurement, and description of the measuring point on the casing. The measurements shall be recorded only at a time when the water level is static, or there is no significant change in measurements taken 1 to 2 minutes apart. The appropriator shall submit the records to the Kalispell Water Resources Regional Office, PO Box 860, Kalispell, MT 59903 upon request or by December 31 of each year.

D. This authorization is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

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

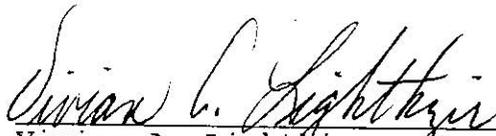
F. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4<sup>th</sup> day of May, 1994.



Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4<sup>th</sup> day of May, 1994, as follows:

Landfall Company  
% Steve Felt  
P.O. Box 960  
Bigfork, MT 59911

Elk Glen Elk Ranch  
% Ray Schenck, Gen. Partner  
East Lakeshore  
Bigfork, MT 59911

Ron Stumm  
P.O. Box 1767  
Bigfork, MT 59911

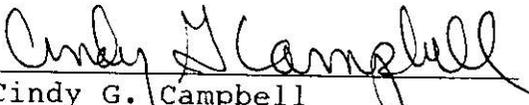
M. Dean Jellison, Attorney  
431 First Ave. W.  
Kalispell, MT 59901

William H. Bush  
Clarice F. Bush  
Sylvan Drive  
Bigfork, MT 59911

Michael W. Frazer  
Thomas, Dean & Hoskins Inc.  
No. 6 Sunset Plaza  
Kalispell, MT 59901

Anne K. Tippet  
East Lakeshore  
Bigfork, MT 59911

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(Via Electronic Mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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

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RIGHT G(C)010517-g76LJ BY LANDFALL )  
COMPANY )

\* \* \* \* \*

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 matter on July 14, 1992, in Kalispell, Montana, to determine whether the above Application should be granted to Landfall Company under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1991).

APPEARANCES

Applicant Landfall Company appeared at the hearing by and through counsel M. Dean Jellison.

Marc Spratt, Hydrogeologist with Spratt and Associates, appeared at the hearing as a witness for the Applicant.

Mike Fraser, Consultant with Thomas, Dean and Hoskins Inc., appeared at the hearing as a witness for the Applicant.

Objector Anne Tippett appeared at the hearing in person and by and through Ray Schenck.

Objector Elk Glen Elk Ranch appeared at the hearing by and through Ray Schenck.

Objectors William H. and Clarice F. Bush appeared at the hearing by and through William H. Bush.

Objectors Claude R. and Esther L. Hogue appeared at the hearing by and through William H. Bush.

**FILMED**

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**CASE # 010517**

BY

Charles Brasen, Manager of the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Marshall Corbett, Hydrogeologist with the Department's Kalispell Water Resources Regional Office, appeared at the hearing.

Cindy G. Campbell, Hearings Unit Legal Secretary, attended the hearing.

Roman J. and Helen A. Hanasz, Tom Pettigrew, and Charles A. Benjamin did not appear at the hearing nor had they contacted the Hearing Examiner prior to the hearing to explain their absence. Therefore, in accordance with Mont. Admin. R. 36.12.208 (1991) they are in default and their objections are hereby dismissed.

#### EXHIBITS

Applicant's Exhibit 1 is a map of Sterling Estates now called Ridgewood Estates which has been mounted on a foam board approximately two feet nine and one-half inches by one foot ten and one-half inches. There is an orange square with an arrow placed on the map in Lot 8 indicating the location of the failed well in the extreme southwest corner of the lot. There is a large blue circle covering parts of Lots 14 and 15 and Hilltop Terrace Street indicating the location of well 1B, one of the wells to replace the failed well. There are two small blue circles in a parcel adjacent to Lots 64, 65, 67, and 68 showing the location of the well authorized by Permit 12826-g76LJ (permitted well) and a storage reservoir. A large green circle

is located on parts of Lots 41, 42, and 43 and Pine Street showing the proposed location of the other replacement well for the failed well. This exhibit was accepted into the record without objection.

Applicant's Exhibit 2 is an 8.5 by 11 inch map showing the location of Ridgewood Estates, the location of the failed well, the proposed well site, and the approximate locations of Objectors wells. This exhibit was accepted into the record without objection.

Applicant's Exhibit 3 consists of eight pages documenting Marc Spratt's qualifications and experience. This exhibit was accepted into the record without objection.

Objector Schenck's Exhibit 1 is a corrected version of Mr. Schenck's and Mrs. Tippett's response to Applicant's discovery demands. Applicant objected to the inclusion of this exhibit into the record on the basis that it was irrelevant and pertained to adequate water supply which is not a criterion to be met for an Application to Change. Applicant also objected to statements attributed to Phyllis Snow, Hydrologist with Flathead National Forest; Ross D. Miller, Hydrologist Engineer with Land and Water Consulting Inc.; and Glen Nelson, Geological Engineer with Land and Water Consulting Inc. since none of these persons were available for cross-examination. There are two paragraphs dealing with statements attributed to those persons not available for cross-examination and those same two paragraphs also deal with water supply. Therefore the statements concerning water

supply, specifically paragraphs two and four of this exhibit, are not accepted into the record. However, the remainder of this exhibit deals with adverse effect to other water users which must be disproved before an Authorization to Change can be issued. The remainder of Objector Schenck's Exhibit 1 is entered into the record.

Department's Exhibit 1 consists of six pages. The first page is a Cooper-Jacob straight line plot using data from a 1991 pump test by Liberty Drilling and Pump Service (Liberty) on which the data is treated as though the aquifer were unconfined. The second page is a Cooper-Jacob straight line plot using the same data as above and treating it as though it came from a confined aquifer. Pages three, four, and five contain the data from the 1991 pump test by Liberty. Page six is the well log for well 1B. This exhibit was accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is entered into the record in its entirety.

#### PRELIMINARY MATTERS

Objectors Schenck and Tippett engaged Land and Water Consulting Inc. to prepare a report for a hearing in this matter. The authors of this report did not attend the hearing since Mr. Schenck and Mrs. Tippett did not intend to call them as witnesses. During the hearing, Mr. Schenck proposed to read a paragraph from that report into the record. Applicant objected to this proposal since the authors of the report were not

available for cross-examination and the subject matter pertained to an adequate water supply which is not a criterion to be met in an Application to Change. The Hearing Examiner reserved a ruling on this objection and allowed Mr. Schenck to read the paragraph. After giving the matter due consideration, the Hearing Examiner finds the information taken *prima facie* deals with adverse effect due to excessive drawdown when the well was pumped at 50 gpm and that after 2.5 hours of pumping, the pumping rate had to be reduced to between 30 to 35 gpm to stop the excessive drawdown. Granted, the authors were unavailable for cross-examination which would seem to be unfair to the Applicant. However, Mr. Schenck notified the Applicant in his reply to the discovery request that he intended to quote recommendations from the report and that he did not intend to call the authors. Mont. Admin. R. 36.12.221(1) (1991) specifically allows hearsay evidence if the evidence is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Therefore, the paragraph read by Mr. Schenck from the report is accepted into the record.

During the hearing Objector Bush was not allowed to produce certain evidence that applied to water availability and the hearing held in the matter of the Application for Water Use Permit 12826-g76LJ. Mr. Bush also requested copies of the written records required by a condition on Beneficial Water Use Permit 12826-g76LJ be attached to this Proposal. This hearing has nothing to do with the well authorized by Beneficial Water

Use Permit 12826-g76LJ; therefore any evidence or testimony regarding that permit is inadmissible. Moreover, there is no reason nor would it be proper to attach a copy of the written records required by Permit 12826-g76LJ to this Proposal for Decision. Mr. Bush commented several times that he had specifically asked for the hearing in the instant matter and had worked for two years to get the hearing. The Hearing Examiner notes that the instant Application was filed on June 20, 1991, a little over a year prior to the hearing and the public notice of the application was not published until September 4, 1991, less than a year prior to the hearing and that Mr. Bush could not have objected to the instant Application and worked for a hearing for a period of two years.

The Hearing Examiner takes official notice of the Department's records as they apply to the water rights of Objectors Schenck, Tippet, Bush, and Hogue and other water rights of the Applicant, specifically the portion of the record of Beneficial Water Use Permit 12826-g76LJ that pertains to the aquifer properties and Certificate of Water Right 010517-g76LJ.

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

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-402(1) (1991) 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.

2. On June 20, 1991, Landfall Company filed an Application for Change of Appropriation Water Right to change the point of diversion and place of use of Certificate of Water Right 010517-g76LJ. The proposed diversions, two new wells, would be located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, Lake County<sup>1</sup> and the water would be used in Ridgewood Estates located in the SW $\frac{1}{4}$  of Section 18.

(Department file.)

3. Pertinent portions of the Application were published in the Bigfork Eagle on September 4, 1991. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

The Department received seven objections to the Application and notified the Applicant of these objections by a letter dated September 30, 1991. (Department file.)

4. Ridgewood Estates was platted in 1977 and was approved by Department of Health and Environmental Sciences (DHES) for a community water system. Seventy-six lots were approved. The community water system entailed a 200,000 gallon storage tank, booster pump station, and several groundwater wells for supply.

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<sup>1</sup>Unless otherwise specified all land descriptions in the Proposal are in Township 26 North, Range 19 West, Lake County.

The subdivision was serviced by two wells, the well for which Certificate of Water Right 010517-g76LJ (the certified well) was issued with a priority date of November 22, 1976, at 2:20 p.m. and the permitted well with a priority date of May 16, 1977, at 9:48 a.m. Certificate of Water Right 010517-g76LJ certified a completed diversion of groundwater at a rate of 50 gpm up to 80 acre-feet per year for domestic and municipal use. Beneficial Water Use Permit 12826-g76LJ authorized diversion of groundwater at a rate of 35.00 gpm up to 56.46 acre-feet per year for multiple domestic use. However, the permitted well could only be operated when the certified well was not in operation, i.e., both wells could not be operated simultaneously. The certified well was abandoned when an attempt to lower the pump failed because the casing was broken. There is nothing in the record to explain why the pump in this well needed to be lowered. Applicant elected to replace this well with two wells. The certified well, at the time of the hearing for the permitted well, had been mechanically restricted to a pumping rate of 25 gpm because the well was drilled through highly fractured rock which, if the pumping rate were not restricted, would have been drawn into the screen and pump.

5. Applicant proposes to change the point of diversion of Certificate 015017-g76LJ from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to two points of diversion in Section 18. One replacement well would be located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the other would be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18. Applicant is expecting the well to be

located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to produce 30 gpm and the well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18 to produce 20 gpm. The proposed wells are identified as wells 1B, located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, and well 2B, to be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18. The change in place of use is simply a correction. The place of use indicated on Certificate of Water Right 010517-g76LJ is the same ten-acre parcel as the point of diversion when actually the place of use has always been the subdivision previously known as Sterling Estates now known as Ridgewood Estates which is located in the SW $\frac{1}{4}$  of Section 18. (Testimony of Mike Fraser, Department file, and Department records.)

6. Well 1B has been drilled at a point on the line common to Lots 14 and 15. The construction of this well was approved by DHES. Improvements to the well were approved by DHES on January 1, 1992. This well has been drilled and test pumped for a period of 30 hours at 30 gpm. (Testimony of Mike Fraser.)

7. The test on well 1B indicated that the well is constructed in argillite, a relatively tight formation that has very little porosity that is, at least locally, heavily fractured especially near the fault zones. The principal water source appears to be these fractures, sometimes referred to as secondary porosity. As a general rule, the yield of a well in this formation corresponds with the number and size of fractures intercepted by the well. Also, the effects of pumping these wells largely depend on whether any adjacent well is located in

the same fracture set. Similarly, the available water supply to any individual well is determined by the area that fracture set drains. Water availability will be highly variable from well to well. The test established that the new wells would be in the same formation as the original well, although not necessarily in the same fracture set. (Testimony of Marc Spratt and Marshall Corbett.)

8. There has been some other work in the area. Liberty conducted a pump test on the permitted well in 1982, but did not attempt to monitor any observation wells during the test. Mark Shapley, a Hydrogeologist formerly with the Department, conducted a pump test on the permitted well on January 23 and 24, 1986. Liberty conducted a pump test on well 1B on May 2 and 3, 1991; however, the pump in the well monitored during this test was running during the test rendering the data from the monitored well unusable.

During the test conducted by Mr. Shapley, the permitted well was pumped at a rate of 35 to 40 gpm for the first half-hour then the flow rate was decreased to an average of 27 gpm during the later hours of pumping. Since the well log for the permitted well did not identify water zones above 178 feet below the land surface, Mr. Shapley concluded that the well remained under confined conditions throughout the test. Mr. Shapley further concluded that at the discharge rates used in the aquifer test, withdrawals from the permitted well caused no apparent short-term effects to the Objectors' wells, suggesting strong anisotropy in

the behavior of the aquifer. However, Mr. Shapley admitted the test could not be continued long enough to ensure that frequent, sustained pumping of the sort that might be necessary to supply the entire 75 unit development proposed would not affect other wells in the area.

9. Mr. Spratt believes the model that best fits this aquifer is a fracture model that is mathematically the same as a leaky confined aquifer, an anomaly very commonly found in fracture systems. The reason for this anomaly, according to Mr. Spratt is that the individual fractures behave like a pipe. The water comes in at the upper end of the "pipe" and discharges from the well which is frequently lower down the hill so when a fracture is intercepted by a well, the water will rise to near the elevation of the upper end of the "pipe" which is up the hillside. Based on the test data available, Mr. Spratt finds there would be no measurable drawdown past a distance of approximately 100 feet from the pumped well. In Mr. Spratt's opinion, the installation of the two replacement wells, 1B and 2B, would result in no impact to surrounding wells; certainly, no impact greater than, possibly less than, the impact created by the existing certified well. (Testimony of Marc Spratt.)

10. Marshall Corbett reviewed Mark Shapley's report on the permitted well and the testing performed by Liberty on well 1B. Then Mr. Corbett conducted his own review of the pump test data on well 1B. Mr. Corbett basically agreed with Mr. Spratt's evaluation of the aquifer except that Mr. Corbett found no

evidence of leakage and believes the aquifer to be confined. The interconnection of the fractures in this aquifer become very important in characterizing the drawdown behavior. Without the primary porosity, this aquifer cannot be treated in the same fashion as an unconfined open system with isotropic conditions. It is the character of fracture aquifers that they are very anisotropic. They are very non-radial and directional because of the orientation of fracture systems. Fractures themselves, individually, could have different hydraulic conductivities. In other words, some fractures may be large and open and therefore transmit readily. Other fractures may be tight and plugged with extraneous materials like silts and transmit water with difficulty. According to Mr. Corbett, because of this highly anisotropic medium, it is very difficult to predict distance drawdowns from time drawdown data. For instance, it is possible to drill two wells 100 feet apart and have no interference by one on the other simply because the fracture systems do not connect. But at the same time, it is possible to drill two wells 1000 feet apart and have a very definite effect or impact of one on the other because they are in the same fracture system. A particular point of interest, when Mr. Corbett ran the data both as a confined and unconfined aquifer, at about 100 minutes into the test, there is a very strong departure from what one would expect to see on a straight line plot. In both cases, the strong departure indicates an increase in the rate of drawdown that seems to be very rapid and seems to suddenly go very steep. This

occurs again at about 1600 or 1700 minutes suggesting dewatering in the fractures. Up to that point, the fractures were behaving as a normal aquifer system. Mark Shapley showed a similar occurrence of a sudden increase in the rate of drawdown at the end of his 1986 test. For that reason, Mr. Corbett believes it is necessary to perform a drawdown test on each new well, monitoring not only the wells nearest the pumped well but all of the objectors' wells for drawdown.

If there were leakage as indicated by Mr. Spratt's testimony, it would have to come from either primary porosity in the argillites or an overlying horizon, in this case, glacial till which seems to be impermeable enough to permit artesian conditions to exist. If there were leakage there would have been a flattening of the curve prior to going back up again. That does not appear in the test performed by Shapley in 1986 nor in the test performed by Liberty in 1991. (Testimony of Marshall Corbett.)

11. In 1982, Liberty conducted a pump test of 22 hours on the permitted well. No monitoring of any observation wells was attempted. The discharge was 50 gpm at the beginning of the test; however this drew the water level down 178 feet in 2.5 hours, exposing the pump intake at 270 feet below the surface. Liberty then continued the test for another 19.5 hours at discharge rates between 30 and 35 gpm. Water levels were still dropping slowly when the test was ended with about 28 feet of

available head remaining above the pump intake. (Department records and testimony of Ray Schenck.)

12. The certified well has been used on a maximum of 16 lots at a flow rate of 35 gpm. Assuming one household and one-quarter acre of lawn and garden on each lot would use 1.5 acre-feet of water per year, the maximum use from the certified well would be approximately 24.00 acre-feet of groundwater per year. (Statements by Mr. Jellison.)

13. In an uncontradicted statement on the Application form, Applicant states it has possessory interest in the proposed place of use on which the water is to be put to beneficial use. (Department file.)

14. There are no planned uses or developments for which a permit has been issued or for which water has been reserved that would be adversely affected by the proposed change. (Department file and records.)

15. Objectors Bush have a domestic well located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 13 that is finished at a depth of 552 feet. This well was monitored during Mark Shapley's aquifer test in 1986 and showed no interference from the permitted well.

Objector Esther Hogue owns Certificate of Water Right 59337-g76LJ for a domestic and lawn and garden well completed at a depth of 709 feet which is located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18.

Objector Elk Glen Elk Ranch owns Certificate of Water Right 68901-g76LJ for a domestic and stock water well completed at a depth of 565 feet in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18.

Anne Tippett has filed Statement of Claim W0001967-76LJ for a domestic well located in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18. This well was completed at a depth of 536 feet. (Department records.)

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Mont. Code Ann. Title 85, chapter 2, part 3.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 2 and 3.

3. The Department must issue an Authorization to Change if the Applicant proves by substantial credible evidence that the following criteria, set forth in Mont. Code Ann. § 85-2-402(2) (1991) are 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) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, 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 is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

4. The proposed use of water, multiple domestic, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2) (1991). Applicant has provided substantial credible evidence that use of the water will be beneficial to Ridgewood Estates. The flow rate and volumes are within the guidelines identified by regulating agencies, are within the identified needs of the proposed use and therefore are not wasteful. See Findings of Fact 4 and 12.

5. Applicant has provided substantial credible evidence the proposed appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 5, and 6.

6. Applicant has provided substantial credible evidence it 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. See Finding of Fact 13.

7. Applicant has not provided substantial credible evidence there will be no adverse effect to the water rights of other persons nor have the objectors provided substantial credible evidence there will be an adverse effect. See Findings of Fact 7, 8, 9, 10, and 11. There is evidence in the record that the proposed appropriation will most likely not adversely affect the water rights of other persons; however, without data from a

properly conducted aquifer test, that must remain speculative. It appears that distance of a well from another well is not a factor in determining adverse effect by one well on the other in a fracture aquifer, rather whether a specific well is located in the same fracture set as the pumping well. See Finding of Fact 10.

8. The extent of a water right is determined by the actual use. An applicant for change is not allowed to create a greater demand on the source of supply, at any given time, than existed as a consequence of its previous usage of water. In re Application G45422-76M by Hanson. Since Applicant has appropriated water from the certified well for use on only 16 lots at 35 gpm, the extent of that water right is 35 gpm up to 24.00 acre-feet per year. See Finding of Fact 12. The notice of completion of groundwater development (notice) should not have been submitted to the Department until all the lots had been sold and the water put to the maximum beneficial use on all the lots. Mont. Code Ann. § 85-2-306(1) (1991). However, the notice was submitted and a use of 35 gpm up to 24.00 acre-feet has been shown, thus that is the extent of the water right for Certificate of Water Right 010517-g76LJ. Applicant's proposal to replace the certified well with two wells could be approved if the criteria for issuance of an authorization to change were met; however, the total flow rate of both wells could not exceed 35 gpm and the total volume of water pumped from both wells could not exceed 24.00 acre-feet of water per year.

9. There is substantial evidence that the criteria for an authorization will be met with the exception of possible adverse effect. However, the only way to determine whether there will be an adverse effect to other water rights is through a testing period and monitoring of certain wells. See Findings of Fact 7, 8, 9, and 10.

10. The Department has the authority to issue an Interim Permit authorizing an applicant to begin appropriating water immediately upon receipt of an application for an interim permit. Mont. Admin. R. 36.12.104 (1991).

11. The purpose of an Interim Permit is to allow the Applicant to begin a testing period. Because of the uncertainty regarding the adverse effect in the fracture aquifer, the grant of an Interim Permit is appropriate. The Applicant is thereby authorized to gather the data, which is unobtainable by any other means, necessary for it to show the statutory criteria for issuance of an Authorization to Change Appropriation Water Right (Authorization) have been met.

12. The issuance of an Interim Permit does not entitle the Applicant to an Authorization. To be entitled to an Authorization, Applicant is still under a duty to show that which remains uncertain: the change will not adversely affect the water rights of other water right owners.

13. Board Rule 36.12.103(c) requires a fee of \$10.00 before the issuance of an Interim Permit, in addition to the regular filing fee.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

INTERLOCUTORY ORDER

Subject to the terms, conditions, restrictions, and limitations listed below and upon receipt of an application for interim permit and the filing fee of \$10.00, an Interim Permit is hereby granted to Landfall Company for Application to Change Appropriation Water Right G(C)010517-g76LJ. Failure to submit an application for interim permit and the \$10.00 filing fee will cause the above-entitled Application to be denied.

A. The Permittee shall submit a testing program for both wells 1B and 2B to the Department's Kalispell Water Resources Regional Office for approval within 30 days after receipt of this Order. After Departmental approval of the program, the Applicant shall make the necessary arrangements for a pump test subject to the approval of the aforementioned Department personnel. Failure to submit the testing program in the aforementioned time period, will cause the above-entitled Application to be denied.

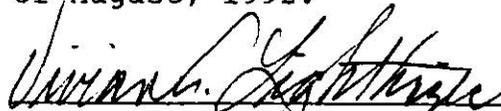
B. This Interim Permit is subject to Mont. Code Ann. § 85-2-505 (1991) requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use.

C. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Interim Permit, nor does the Department in issuing the Interim Permit in any way, acknowledge liability for damage caused by the Permittee's exercise of this Interim Permit.

D. This Interim Permit shall be valid through December 31, 1992, for purposes of testing to determine the effect of Landfall Company's pumping from the proposed replacement wells at a flow rate of 35 gpm on other water right owners.

E. Within 30 days after expiration of this Interim Permit, the Applicant shall present the data to the Hearing Examiner and shall serve copies on the Kalispell Water Resources Regional Office, Objectors William Bush, Anne Tippett, Elk Glen Elk Ranch, and Claude R. and Esther L. Hogue. All the aforementioned persons will then be allowed to comment on the data within 30 days after the service date of said data. After presentation of evidence and timely comments by the aforementioned persons, the Hearing Examiner will prepare a Proposal for Decision to which all parties will have an opportunity to present exceptions and request further oral argument before a final decision is issued by the Department.

Dated this 7<sup>th</sup> day of August, 1992.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Interlocutory Order was duly served upon all parties of record at their address or addresses this 7<sup>th</sup> day of August 1992, as follows:

Landfall Company  
% Steve Felt  
P.O. Box 960  
Bigfork, MT 59911

Tom Pettigrew  
P.O. Box 147  
Miles City, MT 59301

Claude R. Hogue  
Esther L. Hogue  
P.O. Box 526  
Bigfork, MT 59911

Charles A. Benjamin  
1308 University St.  
Helena, MT 59601

William H. Bush  
Clarice F. Bush  
Sylvan Drive  
Bigfork, MT 59911

Anne K. Tippett  
East Lakeshore  
Bigfork, MT 59911

Roman J. Hanasz  
Helen A. Hanasz  
Sylvan Drive  
Bigfork, MT 59911

Elk Glen Elk Ranch  
% Ray Schenck, Gen. Partner  
East Lakeshore  
Bigfork, MT 59911

M. Dean Jellison, Attorney  
431 First Ave. W.  
Kalispell, MT 59901

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(Via Electronic Mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary