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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 18845-s76LJ AND NO. 18846-s76LJ)
BY EVERETT G. AND ANNA C. OREM)

* * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. A timely exception was received from Objector Donald Brabham. For the reasons stated below, and after having given the objection full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the August 8, 1984 Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTION

The Department hereby responds to the exception made by Objector Donald Brabham, and comments by the Kalispell Field Manager, to the Proposal for Decision in this matter.

Objector's Exception is based on the lack of a recent geohydrology study of the area. Mr. Brabham alleges that Department geohydrologist Paul Lemire stated at the hearing that

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the Objector's water source "could come as far as five miles...."(There is) no true way of telling where our water source is coming from unless there was dye to put into Morning Slough".

It is unfortunate that complete and current geohydrology records are not available for this area, as well as the rest of Montana. However, in the absence of such records, it is necessary to base decisions on water use rights on the information which is available. The geohydrology information available in the present matter is the November 2, 1983 report prepared by Paul Lemire, and the testimony which was presented at the hearing.

As the Proposal for Decision discusses, the source of the water which the Applicant proposes to divert is a shallow lacustrine aquifer. (See Findings of Fact 6-9). Objector Brabham should not be adversely affected by withdrawals of water from this aquifer for at least two reasons, according to the record in this matter: The Brabhams have a well which is located in a deeper aquifer than, and separated by intervening clay layers from, the shallow lacustrine aquifer (See Findings of Fact 10, 13); and even in the eventuality that there is some nominal connection between the aquifers, the Brabham well is located outside of the limits of the cones of depression which would be created by Applicant's pumping at the proposed points of diversion. (See Findings of Fact 13, 15).

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As to Objector Brabham's statement that Paul Lemire testified that the Brabham water source could come from as far away as five miles, what Mr. Lemire actually stated was that the recharge area for the deep aquifer (which the Brabham well taps) has not been pinpointed, but probably extends to the fringe of the mountains to the north and northwest of the area and those surrounding the valley.

This testimony indeed supports the suggestion that the Brabham water supply may come from some fairly large, though undetermined area, but does not imply that the water the Applicant proposes to appropriate is part of the water supply for the Brabham well. As stated above, Applicant's proposed water source and the Brabham well appear to be located in two distinct, separated aquifers. Neither Objector Brabham nor any other party to the hearing presented any evidence suggesting that the deep wells in the area are hydrologically connected to the shallow lacustrine aquifer from which the Applicant intends to appropriate.

In reference to Objector Brabham's mention of Morning Slough, Mr. Lemire's testimony indicates that Morning Slough apparently is not connected either to the Brabham well, which taps a deeper aquifer, nor to the lakes from which the Applicant proposes to divert. The lakes and Morning Slough are all located in the same shallow aquifer, but Morning Slough is outside of the

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likely extent of the cone of depression. (See findings of Fact 11, 12, 15). Since there is no evidence in the record in this matter to suggest there is any hydrological connection between the Applicant's proposed source of water and Morning Slough, or between Morning Slough and the Brabham well, Mr. Brabham's implied chain of adverse effect is unfounded.

Department Comment: In a written comment on the Proposal for Decision, Kalispell Water Rights Bureau Field Manager Chuck Brasen asked about the possibility of suggesting that the Objectors in this matter who have shallow wells should monitor and record their own static water levels and note water use problems.

The Department's jurisdiction in the present matter does not entitle it to, in effect, modify the Objectors' water use rights by requiring the Objectors to monitor and record data, where their water use permits do not already require such efforts. However, the Department notes that any information which can be compiled on water availability will be useful for future reference, should the Objectors decide to file a complaint with reference to this or any other permit, or an objection to a future application for permit.

As Objector Brabham and other parties have noted, there is no current or comprehensive geohydrological study of the area available. Therefore, it is to everyone's benefit to develop as

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much information as possible on such aspects of water availability as recharge, fluctuation, and well and surface water use interference and interaction. Therefore, the Department strongly suggests that the owners of water use rights in the area take measurements of the static water levels in their wells prior to the Applicant's initial irrigation pursuant to the present permit, and at intervals thereafter, and record such information for future reference.

Based upon the Findings of Fact and Conclusions of Law, and all files and records in this matter, the Department makes the following:

FINAL ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 18845-s76LJ is hereby granted to Everett G. and Anna C. Orem to appropriate 760 gallons per minute (gpm) up to 201.00 acre-feet per annum out of Deep Lake. Of the total amount, 750 gpm up to 200.00 acre-feet is to be used for sprinkler irrigation of 80 acres; 60 acres in the NE¼ of Section 34 and 20 acres in the SE¼ of Section 27, all in Township 30 North, Range 20 West, Flathead County, Montana. The period of use for the purpose of irrigation is May 1 to October 1, inclusive, of each year. The remaining 10 gpm up to 1.00 acre-feet per annum will be used for

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stockwatering purposes year-round. The source of supply is surface water, to be diverted from Deep Lake by means of a pump located in the SE¼SE¼SW¼ of Section 27, Township 30 North, Range 20 West, Flathead County, Montana. The priority date for this permit shall be 2:00 p.m., May 8, 1978.

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 18846-s76LJ is hereby granted to Everett G. and Anna C. Orem to appropriate 510 gpm up to 126.00 acre-feet per annum out of Hall Lake. Of the total amount, 500 gpm up to 125.00 acre-feet is to be used for sprinkler irrigation of 50 acres of land located in the NW¼ of Section 34, Township 30 North, Range 20 West, Flathead County, Montana. The period of use for the purpose of irrigation is May 1 to October 1, inclusive, of each year. The remaining 10 gpm up to 1.00 acre-foot per annum will be used for stockwatering purposes year-round. The source of supply is surface water, to be diverted from Hall Lake by means of a pump located in the NE¼NE¼NW¼ of Section 34, Township 30 North, Range 20 West, Flathead County, Montana. The priority date of this permit shall be 2:00 p.m., May 8, 1978.

These permits are issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidenced by these permits are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

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B. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of these permits. Nor does the Department, in issuing these permits, acknowledge any liability for damages caused by the exercise of these permits, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

D. The Permittees shall install flow meters on their pumps, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to these permits. They shall make these records available to the Department upon request.

E. If, at any time after these permits are issued, a written complaint is received by the Department alleging that withdrawals by the Permittees from the water source are adversely affecting a prior water right to the extent it cannot reasonably be exercised, the Department may make a field investigation of the project. If the field investigation yields sufficient evidence to support the allegation, the Department may conduct a hearing in the matter, allowing the Permittees opportunity to show cause why the permits should not be modified or revoked. The Department may then modify or revoke the Permits, or may allow the Permits to continue if the Hearings Officer determines that no existing water rights are being adversely affected to the extent they cannot reasonably be exercised.

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F. In the event that any of the water use rights which have been applied for in this matter are duplications of water use rights which have been claimed under the adjudication process, these permits will automatically be revoked to the extent the final decree duplicates the rights granted herein.

NOTICE

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

DONE this 14th day of September, 1984.

Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

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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. 18845-s76LJ AND NO. 18846-S76LJ)
BY EVERETT G. AND ANNA C. OREM)

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held on January 19, 1984 in Columbia Falls, Montana.

Everett and Anna Orem, the Applicants in this matter, appeared personally.

Objector Henry Burns appeared personally.

Objector Griffin Matthieson appeared personally

Lenore Brabham appeared for Objector Donald Brabham.

Objector David Pier appeared personally.

Lester and Phyllis Reynolds appeared at the hearing to voice concerns about the effect that granting the application in this matter might have on the ponds they use to water livestock.

Chuck Brasen, Area Office Supervisor of the Kalispell Water Rights Bureau Field Office, and Paul Lemire, Department of Natural Resources and Conservation geohydrologist, appeared as staff experts for the Department of Natural Resources and Conservation (hereafter, the "Department").

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STATEMENT OF CASE

On May 8, 1978, the Applicants filed an Application for Beneficial Water Use Permit seeking to appropriate 760 gallons per minute (gpm) up to 201 acre-feet per year from Deep Lake; 10 gpm up to 1 acre-feet for stockwater, 750 gpm up to 200 acre-feet for new sprinkler irrigation on 80 acres; 60 acres located in the NE¼ of Section 34, Township 30 North, Range 20 West, and 20 acres located in the SE¼ of Section 27, Township 30 North, Range 20 West, all in Flathead County, Montana. The water is to be diverted by means of a pump located in the SE¼SE¼SW¼ of Section 27, Township 30 North, Range 20 West, Flathead County, for all-year stockwatering and irrigation between May 1 and October 1 of each year.

On May 8, 1978, the Applicants also filed an Application for Beneficial Water Use Permit seeking to appropriate 510 gpm up to 126 acre-feet per annum from Hall Lake for new sprinkler irrigation and stockwater. The Application requests 10 gpm up to 1 acre-foot year-round for stockwatering purposes, and 500 gpm up to 125 acre-feet per year to be used between May 1 and October 1 for irrigation on 50 acres in the NW¼ of Section 34, Township 30 North, Range 20 West, Flathead County, Montana. The water is to be diverted by means of a pump located in the NE¼NE¼NW¼ of Section 34, Township 30 North, Range 20 West, Flathead County, Montana.

The pertinent portions of the Applications were published in the Kalispell Daily Inter Lake, a newspaper of general

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circulation in the area of the water sources, on October 4, 11, and 18, 1978.

Timely objections were filed to Application No. 18845-s76LJ on Deep Lake by 16 objectors: Montana Power Company, Gene L. Skramstad, Martin L. Blum, Donald R. Brabham, Raymon Bouchey, Doyle and Helen Sampson, Andy Sampson, Mr. and Mrs. Larry McCauley, Ida E. Johnson, John T. and Shirley Struble, Phyllis M. Robinson, W.A. Blood, John B. Pettit, Henry and Irene Burns, David E. Pier, and Griffin and Evelyn Mattheison. All of these objectors, other than David Pier and the Mattheisons, also objected to Application No. 18846-s76LJ on Hall Lake.

Montana Power Company objected on the basis that the two sources are tributary to Flathead River which is a tributary to the Clark Fork River, and that MPC's downstream water rights for power generation therefore would be adversely affected. The remainder of the objections alleged generally that the proposed appropriations would affect the surrounding groundwater aquifer that is the source for the area's wells, and Mooring (Morning) Slough and Creek and also small lakes in the area which are sources for domestic water and stockwater. Mr. Blood, the McCauleys, and the Mattheisons also stated their concerns on the potential impacts to wild bird and game habitat; a concern voiced as well by Henry and Irene Burns in conjunction with their objection to the possible impact the proposed appropriations

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might have on Burns Lake, which adjoins Deep Lake and provides stockwater.

Staff memoranda which were prepared by hydrologist Larry L. Brown for inclusion in the Department's contested case file on the applications in this matter were stricken from the record, since Mr. Brown was not available for cross-examination pursuant to Montana Administrative Procedures Act § 2-4-612(5). Department geohydrologist Paul Lemire prepared a new geohydrology report, dated November 2, 1983, which was sent to all parties in this matter and is part of the record.

PARTIES

Parties in this matter are the Applicants, Henry and Irene Burns, Griffin and Evelyn Mattheison, Donald Brabham, and David Pier. All of the other individuals who filed timely objections failed to appear at the hearing, and therefore are in default pursuant to Administrative Rule of Montana § 36-12-208.

EXHIBITS

The Applicants, Everett and Anna Orem, submitted one exhibit in support of their Application in the above-entitled matter:

Applicants' Exhibit 1 is a document prepared by the Applicants which gives written responses to all of the questions posed in the pre-hearing information which the Department sends

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to parties to elicit full and complete answers to the MCA § 85-2-311 criteria. Attached to the Applicants' responses is a computer printout with information on the proposed irrigation system, two photographs depicting the pump sites and set-up, a copy of a Cooperative Extension Service bulletin on Irrigation Scheduling in Montana, and a copy of an aerial photograph of the area marked with names of the landowners.

Applicants' Exhibit 1 was accepted into the record without objection.

The Objectors did not submit any exhibits for inclusion in the record.

The geohydrology report prepared by Paul Lemire is part of the record in this matter. In addition, the Department submitted two exhibits for inclusion in the record:

Department Exhibit 1 is a checklist of irrigation requirements for the proposed appropriation from Deep Lake, Application No. 18845-s76LJ, dated June 30, 1978.

Department Exhibit 2 is a checklist of irrigation requirements for the proposed appropriation from Hall Lake, Application No. 18846-s76LJ, dated June 30, 1978.

The Department's Exhibits 1 and 2 were accepted into the record without objection.

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

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the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Applications in this matter were duly filed with the Department of Natural Resources and Conservation on May 8, 1978 at 2:00 p.m.

3. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and are not attempting to speculate in the water resource.

4. The Applicants intend to use the water for irrigation; a beneficial use.

5. Applicants' proposed means of diversion, construction, and operation of their appropriation works are adequate.

6. The source of supply for Application No. 18845-s76LJ is Deep Lake, a small lake situated in a shallow lacustrine aquifer, whose sediments are composed of sand and silt which exhibit "relatively low permeability". (Geohydrology Report p. 4).

8. The source of supply for Application No. 18846-s76LJ is Hall Lake, a small lake near Deep Lake and situated in the same lacustrine aquifer.

9. The two lakes involved in this matter receive all of

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their water from the shallow lacustrine aquifer and from direct precipitation.

10. The shallow lacustrine aquifer is up to several hundred feet thick, and is separated from deeper aquifers by intervening clay layers.

11. A more permeable aquifer, composed of bedded sand and gravel, is located to the east of Morning (Mooring) Slough, which lies approximately 3/4 of a mile south of Deep and Hall Lakes.

12. Morning Creek and its headwaters, Morning Slough, are not directly connected to Deep Lake or Hall Lake. They gain water from the shallow lacustrine aquifer in which the lakes are located, and also from the sand and gravel aquifer to the east.

13. Objectors Griffin and Evelyn Mattheison have a deep well to the east of Morning Slough, approximately one mile south of the Applicants' points of diversion. Objector Donald Brabham has a deep well to the east of Morning Creek, while David Pier has shallow wells to the east of Morning Creek; the Brabham and Pier wells are approximately two miles south of the Applicant's proposed points of diversion.

14. Burns Lake (Burns/White Lake), which adjoins Deep Lake and is also close to Hall Lake, is a source of stockwater and subirrigation for Objectors Henry and Irene Burns.

15. The cone of depression caused by pumping at a high rate from the shallow lacustrine aquifer tends to be deep at the pumping point, but not extensive in diameter due to the

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relatively low transmissivity of the sands and silts which comprise the shallow aquifer. (Geohydrology Report. p. 6). The cone of depression should extend less than 3/4 of a mile (Id.); possible only 1/4 to 1/2 mile. (Testimony of Paul Lemire). The area of the aquifer within the cone of depression will contribute an undetermined amount of water to the lakes, since the aquifer is unconfined.

16. Administrative Rule of Montana § 36.12.208 states, "A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the hearing examiner. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to him. An applicant shall not be relieved of the duty to present evidence to satisfy his substantive burden of proof when all objectors to a proceeding default."

17. Those parties who failed to appear at the hearing in this matter are: Montana Power Company, Gene L. Skramstad, Martin L. Blum, Raymon Bouchey, Doyle and Helen Sampson, Andy Sampson, Mr. and Mrs. Larry McCauley, Ida E. Johnson, John T. and Shirley Struble, Phyllis M. Robinson, W.A. Blood, and John B. Pettit.

18. John Pettit alleged in his Objection in this matter that "there are at least 6 more shallow wells supplying homes and

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gardens" in his immediate vicinity. No one from this area filed an objection or appeared at the hearing in this matter.

19. Griffin Mattheison alleged at the hearing in this matter that several people have shallow wells north of Morning Slough. No one in this vicinity filed an objection or appeared at the hearing in this matter.

20. A search of the water use rights which have been recorded did not reveal the existence of any other water use permits within the previously-discussed cone of depression.

Because the filing of Statements of Claim for Existing Water Rights for domestic and stockwater uses which pre-date 1973 is voluntary, and because no water use permit is required for a groundwater appropriation of less than 100 gpm, no search of Departmental records can reveal any information concerning such appropriators.

21. Both Deep Lake and Hall Lake are located entirely on property owned by the Applicants.

22. Applicant testified that he measured Deep Lake with the help of Soil Conservation Service personnel, and that the lake averages 29 feet in depth and covers approximately 8 acres (for a total volume of approximately 232 acre-feet).

23. Objectors Henry Burns and Griffin Mattheison testified that an earlier attempt to irrigate from Deep Lake, probably in the 1930's, failed for lack of water.

24. Applicant testified that, in the 1950's, the Hall brothers had irrigated the same 50 acres with water from Hall

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Lake that Applicants propose to irrigate with an appropriation from Hall Lake.

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.

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

3. Objectors Montana Power Company, Skramstad, Blum, Bouchey, Sampson, McCauley, Johnson, Struble, Robinson, Blood, and Pettit, having failed to appear at the hearing, are in default pursuant to Administrative Rule of Montana § 36.12.208.

4. No adverse affect will accrue to whatever interests the defaulting objectors possess in this matter, since the geohydrology report indicates that the water uses which they claim will not be affected by the proposed appropriation.

5. The concerns expressed by Objectors Mattheison, McCauley, and Blood on potential impacts of the proposed appropriation on game and wild bird habitat have been noted. However, the water

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rights appropriation process would appear to be the wrong forum for presentation of these concerns. The Department previously has found that injuries to the vested water rights of other appropriators are the only types of injuries which can be raised to defeat an appropriation/change. In the Matter of the Application for Change of Appropriation Water Right No. W 138008 by Delbert Kunneman, Proposal for Decision, citing Miles v. Butte Electric and Power Company, 32 Mont. 56 (1904), which discusses adverse affect with respect to a new appropriation. See M.C.A. § 85-2-308.

6. It is only possible to make a general response to the allegations made by Objectors Mattheison and Pettit that there are owners of other shallow wells north of Morning Slough and in the vicinity of the Pettit well who will be affected. The Department sends notices to all persons of whom it has knowledge within the immediate vicinity of a proposed appropriation. People who live outside of the immediate vicinity, or those who have no recorded water right, are placed on notice by the publication of information on the proposed appropriation in the local newspaper. Although the Department attempts to safeguard the water use rights of prior appropriators, as a practical matter it is impossible to do so in the case of unidentified, unlocated appropriators whose existence has only been alleged.

7. The Department must issue a permit if the Applicant proves by substantial credible evidence:

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(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant.

(ii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial one;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

8. The uses proposed by the Applicants, irrigation and stockwatering, are beneficial uses of water.

9. The amount of water proposed for irrigation is a reasonable one, and will not result in the waste of the water source.

10. The amount of water proposed for stockwatering is a reasonable one, and will not result in the waste of the water source.

11. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

12. Currently, there are unappropriated waters in the source of supply, at times when the water can be put to the uses proposed by Applicants.

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13. It is more likely than not that the amount of water which Applicants seek to appropriate is available, throughout the period during which the Applicant seeks to appropriate.

14. The Objectors whose water use rights have priority dates senior to those of the Applicants' applications in this matter have the right to make reasonable use of their rights without adverse affect from the Applicant. These rights are protected to the extent that the water is being beneficially used and the means of diversion are reasonable and adequate, taking into account the customary means of diversion and water uses in the area. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939), Worden v. Alexander, 108 Mont. 208 (1939).

15. The Objectors' prior water rights do not entitle them to prevent all changes in the condition of water occurrence in the source: " Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions." M.C.A. § 85-2-401(1).

16. There is substantial evidence to indicate that the rights of the Objectors will not be adversely affected by Applicants' proposed appropriation to the extent that they cannot

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reasonably use their water rights under the changed conditions.

The geohydrology report in this matter indicates that no one who has a well in the "deep" aquifer or who has a shallow well outside of the 3/4 mile maximum cone of depression should experience any impact from the proposed pumping from the lakes. The Mattheison and Brabham wells are wells in the deep aquifer. The Pier wells, although in the shallow aquifer where the proposed diversions are located, are located outside of the maximum cone of depression.

The Objectors most likely to be affected are Henry and Irene Burns, who claim beneficial use rights for subirrigation and stockwatering from a small lake (designated as "Burns Lake" in the geohydrology report) approximately 1/4 mile west of Deep Lake. The geohydrology report indicates that the level of Burns Lake definitely will be affected by pumping from Deep Lake or Hall Lake.

While a subirrigator does have a water use right, the extent of that right is the volume of water. The means of diversion, subirrigation, is unreasonable and will not be protected; a water user is not entitled to continue receiving the volume by means of subirrigation. However, in the present situation the matter need not be addressed. The Burns have not filed a Statement of Claim for Existing Water Right on their irrigation use, and therefore

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it is conclusively presumed to have been abandoned. M.C.A. § 85-2-212(1).

Claims for stockwater uses are exempt from the filing requirements, however. Therefore, Henry and Irene Burns are entitled to enough water from Burns Lake to provide stockwater for 50 head of cattle, assuming that these are not the same cattle which are being watered out of the Burns domestic well: the Burns have a Certificate of Water Right for domestic purposes, including "up to .53 acre-feet per annum for stockwatering purposes." (Certificate of Water Right No. 14731).

Since stockwater for 50 head, allowing the accepted rate of 15 gallons per animal per day, amounts to .84 acre-feet per annum, it seems unlikely that drawdown by the proposed pumping would make stockwatering unachieveable by reasonable exercise of the Burns water right.

However, if the Burns cannot reasonably exercise their stockwatering rights (for example, if the water in Burns Lake for all intents and purposes becomes inaccessible), an agreement will need to be reached by the Applicants and Mr. and Mrs. Burns or the permits will need to be modified in order to allow the necessary stockwatering to take place.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

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PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 18845-s76LJ is hereby granted to Everett G. and Anna C. Orem to appropriate 760 gallons per minute (gpm) up to 201.00 acre-feet per annum out of Deep Lake. Of the total amount, 750 gpm up to 200.00 acre-feet is to be used for sprinkler irrigation of 80 acres; 60 acres in the NE¼ of Section 34 and 20 acres in the SE¼ of Section 27, all in Township 30 North, Range 20 West, Flathead County, Montana. The period of use for the purpose of irrigation is May 1 to October 1, inclusive, of each year. The remaining 10 gpm up to 1.00 acre-feet per annum will be used for stockwatering purposes year-round. The source of supply is surface water, to be diverted from Deep Lake by means of a pump located in the SE¼SE¼SW¼ of Section 27, Township 30 North, Range 20 West, Flathead County, Montana. The priority date for this permit shall be 2:00 p.m., May 8, 1978.

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 18846-s76LJ is hereby granted to Everett G. and Anna C. Orem to appropriate 510 gpm up to 126.00 acre-feet per annum out of Hall Lake. Of the total amount, 500 gpm up to 125.00 acre-feet is to be used for sprinkler irrigation of 50 acres of land located in the NW¼ of Section 34, Township 30 North, Range

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20 West, Flathead County, Montana. The period of use for the purpose of irrigation is May 1 to October 1, inclusive, of each year. The remaining 10 gpm up to 1.00 acre-foot per annum will be used for stockwatering purposes year-round. The source of supply is surface water, to be diverted from Hall Lake by means of a pump located in the NE¼NE¼NW¼ of Section 34, Township 30 North, Range 20 West, Flathead County, Montana. The priority date of this permit shall be 2:00 p.m., May 8, 1978.

These permits are issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidenced by these permits are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of these permits. Nor does the Department, in issuing these permits, acknowledge any liability for damages caused by the exercise of these permits, even if such damage is a necesary and unavoidable consequence of the same.

C. The Permittees shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of the

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quantity reasonably required for the purposes provided for herein.

D. The Permittees shall install flow meters on their pumps, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to these permits. They shall make these records available to the Department upon request.

E. If, at any time after these permits are issued, a written complaint is received by the Department alleging that withdrawals by the Permittees from the water source are adversely affecting a prior water right to the extent it cannot reasonably be exercised, the Department may make a field investigation of the project. If the field investigation yields sufficient evidence to support the allegation, the Department may conduct a hearing in the matter, allowing the Permittees opportunity to show cause why the permits should not be modified or revoked. The Department may then modify or revoke the Permits, or may allow the Permits to continue if the Hearings Officer determines that no existing water rights are being adversely affected to the extent they cannot reasonably be exercised.

F. In the event that any of the water use rights which have been applied for in this matter are duplications of water use rights which have been claimed under the adjudication process, these permits will automatically be revoked to the extent the

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final decree duplicates the rights granted herein.

DONE this 8th day of August, 1984.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before August 31, 1984.

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