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

* * * * * * * *

IN THE MATTERS OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ BY MEADOW LAKE COUNTRY CLUB ESTATES; AND IN THE MATTERS OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. 26719-c76LJ and 26720-c76LJ BY MEADOW LAKE COUNTRY CLUB ESTATES.	FINAL ORDER

* * * * * * * *

The Department has received objections on behalf of Oren Reed to the Proposal for Decision entered in this matter. However, the assertions contained therein must be rejected.

The Proposal for Decision answers to the substance of all the claims renewed herein by this Objector. An additional measuring device downstream from Applicant's points of diversion would serve no apparent purpose as regards the Applicant's diversions beyond those measuring devices already required of the Applicant.

As fleshed out in the Proposal for Decision, the "practical problems" associated with demand exceeding supply at various times are a necessary incident to development of the state's water resources. Priority, or "first in time, first in right," means nothing if there are never instances where claims to water in fact exceed supply. These practical problems must be tolerated until the advent of water commissioners. See MCA 85-2-406 (1979). It is enough to say on this record that

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Applicant's proposed diversions will not necessarily or in substantially every year adversely affect the water use of this Objector.

WHEREFORE, the following final order is hereby issued.

1. Application for Beneficial Water Use Permit No. 26722-s76LJ by Meadow Lake Country Club Estates is hereby ordered denied and dismissed in its entirety.

2. Application for Beneficial Water Use Permit No. 26723-s76LJ is hereby granted to Meadow Lake Country Club Estates to appropriate 560 gallons per minute up to 16.5 acre-feet per year for irrigation of its golf course located and comprised of 20 acres more or less in the NE1/4 and 20 acres more or less in the NW1/4 and 20 acres more or less in the SW1/4 and 23 acres more or less in the SE 1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. These waters shall be diverted from the source of supply Garnier Creek, also known as Ganger or Lost Creek, only from April 1 to June 1, inclusive, of each year. The point of diversion shall be located in the SW1/4 SE1/4 SW1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County. The Applicant may further store these waters by filling, refilling and otherwise successively filling a storage structure with a capacity of approximately 16 acre-feet. The Applicant may store such waters continuously throughout each year, but may only divert out of storage for the irrigation of its golf course from April 1 to October 31, inclusive, of each year. Any waters remaining in the storage structure on November 1 of any year or at such earlier time as

Applicant ceases diversions from storage for irrigation of its golf course, shall be designated as carry-over storage, and may be retained in storage for use in subsequent years.

3. Application for Beneficial Water Use Permit No. 26718-s76LJ is hereby granted to Meadow Lake Country Club Estates to appropriate 200 gallons per minute up to 33 acre-feet per year for the irrigation of its golf course which is located and comprised of 20 acres more or less in the NE1/4 and 20 acres more or less in the NW1/4 and 20 acres more or less in the SW1/4 and 23 acres more or less in the SE 1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The source of supply shall be waste water or sewage effluent from a neighboring subdivision, and the Applicant by virtue of this permit may store such waters continuously throughout the year, and may fill, refill and otherwise successively fill the storage structure with a capacity of approximately 16 acre-feet so as to capture the above-described quantities of water. Applicant may divert from such storage structures for irrigation of its golf course from May 1 to October 31, inclusive, of each year. On November 1 of any year, or at such earlier time as Applicant ceases diversions from storage for irrigation of its golf course, the amount of water remaining in the storage structure shall be designated as carry-over waters, and may be retained in storage for use in subsequent years. The point of diversion of these waters shall be in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

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4. To give effect to the two (2) independent permits contemplated in these matters for the same storage structure, the amount in storage in any given year on April 1 shall be estimated and shall be charged 1/3 to Permit No. 26719-c76LJ and 2/3 to Permit No. 26718-s76LJ, those being the proportions that each permit bears to the total storage contemplated by the single reservoir structures. These amounts shall be part and parcel of that particular year's appropriative limit with respect to each individual permit.

5. Application for Change of Appropriation Water Right No. 26720-c76LJ by Meadow Lake Country Club Estates is hereby ordered denied and dismissed in its entirety.

6. Application for Change of Appropriation Water Right No. 26719-c76LJ by Meadow Lake Country Club Estates is hereby granted in part and denied in part. Meadow Lake Country Club Estates is hereby authorized to divert 561 gallons per minute up to 105 acre-feet per year from a point in the SW1/4 SE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. Meadow Lake is also hereby authorized to use the aforesaid quantity of water in the E1/2 W1/2 and the W1/2 E1/2 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The additional change of use of 20 acre-feet per year is hereby denied.

These Permits and Authorization to Change are granted subject to the following express conditions, limitations, and restrictions.

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A. Any rights reflected or evidenced herein are subject to all prior and existing water rights, and any final determination of existing rights as provided by Montana Law. Nothing herein shall be construed to authorize the diversion or use of water to the detriment to any degree of any senior appropriator.

B. Measuring devices meeting the reasonable standards of the Department shall be placed in Garnier Creek, also known as Ganger or Lost Creek, at a point where the said creek enters and leaves Meadow Lake Country Club Estates property with records of the volume of flow being kept and submitted to the Department upon request.

Records shall be kept of all pumping times and amounts pumped and these records shall be sent to the Department upon its request.

C. Meadow Lakes Country Club Estates, its agents and/or employees shall not use more water than is reasonably required for the irrigation of the lands described herein.

D. Failure to abide by the terms and conditions delineated herein may result in the revocation of the Permits involved herein and/or the revocation of the Authorization to Change involved herein.

E. Applicant shall proceed with reasonable diligence in the completion of the appropriations reflected herein and in the completion of all things necessary to effectuate the change described herein.

F. The granting of any of these applications does not relieve Meadow Lake Country Club Estates from any liability for

any damage caused by the exercise of such permits or authorizations, nor does the Department in issuing the same acknowledge any such liability, even if said damage is the necessary and unavoidable consequence of diversions pursuant to these permits and/or authorizations.

DONE this 6th day of October, 1981.

Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing
Helena, MT 59620
(406) 449-3692

Gary Fritz, Administrator
Water Resources
Department of Natural Resources
and Conservation
32 S. Ewing
Helena, MT 59620
(406) 449-2872

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

* * * * * * * * * * *

IN THE MATTERS OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ BY MEADOW LAKE COUNTRY CLUB ESTATES; AND IN THE MATTERS OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. 26719-c76LJ and 26720-c76LJ BY MEADOW LAKE COUNTRY CLUB ESTATES	PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, after notice required by law, a hearing on the above-entitled matters was held in Columbia Falls, Montana, on April 2, 1981. The Applicant appeared by Tom Fallows, Project Director for Meadow Lake Country Club Estates, and it was represented by Counsel Hugh Brown. Appearing as objectors were Orin Reed by his attorney Leonard Kaufman; Dick Sape on behalf of the Dick-Char Corporation; Mr. Matt Koskela personally; Mr. Richard Walch personally; Debora Louckes personally; and Russell Warner personally. The Department of Natural Resources and Conservation was represented at the hearing by Chuck Brasen, Area Office Supervisor for the Kalispell Field Office, and Jim Rehbein, an employee of that office.

The hearings in the above-entitled matters were consolidated upon the order of this Hearing Examiner because from the face of the applications it appeared that the rights requested therein involved a single water system, and because there were common

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objectors to all the applications. However, each application in these matters stands on its own merits. For the purposes of this order, each application will be dealt with as involving separate and distinct claims.

PRELIMINARY MATTERS

The Montana Power Company filed timely objections to each of the applications in these matters. The objections to the applications for beneficial water use permits allege generally that the proposed appropriations are from sources upstream from the Montana Power Company's Kerr and Thompson Falls plants, and that there is insufficient unappropriated water available for the proposed uses without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators. The objections to Applicant's request for authorizations to change its water rights allege generally that said requests involve an extension of historic beneficial use, and that therefore they cannot be granted without adversely affecting prior appropriators. Montana Power Company did not appear at the hearing in these matters.

However, Montana Power Company by letter has indicated that although it does not withdraw its objections, and while it reserves all rights it may have in law or equity, it acquiesces to the granting of these particular water right applications so long as the following conditions are appended thereto and made part thereof:

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1. Subject to all prior and existing water rights in the source of supply;

2. Subject to the final determination of water rights in the source of supply as provided by Montana law;

3. Subject to the installation of meters on each pump to record the gallons per minute being pumped and the acre-foot that has been pumped;

4. Subject to records being kept of all pumping times and amounts pumped, and these records (sic) be sent to the Department at the end of each season; and

5. Subject to a measuring device being placed in Garnier Creek at a point where the stream enters and leaves Meadow Lakes property with records kept and submitted to the Department each year, or upon request.

The Applicant represented at the outset of this hearing that the contents of the letters as referenced above reflect its understanding and agreement with Montana Power Company. That is, Applicant does not object to the aforesaid conditions for the granting of the applications in these matters.

EXHIBITS

The Applicant offered the following exhibits into evidence, to-wit:

APPLICANT'S EXHIBIT A: A copy of a portion of a United States Geological Survey map upon which has been depicted in green the property claimed by the Applicant herein. Also referenced in red therein is an impoundment known as "Meadow Lake", and an impoundment referred to as a sewage lagoon.

APPLICANT'S EXHIBIT B: A copy of an aerial photograph depicting in green the property claimed by the Applicant herein. The portions in red depict Garnier Creek and an impoundment known as "Meadow Lake." Also referenced in red is what is referred to as a sewage lagoon.

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APPLICANT'S EXHIBIT C: A composite of United States Geological Survey Maps upon which is depicted in yellow the property claimed by Meadow Lake's Country Club Estates. The blue line running through the same represents Garnier Creek. The remaining colored portions purport to designate the properties owned or claimed by the objectors to this matter. However, Applicant professes no knowledge as to whether these accurately depict such properties. Apparently, this exhibit was prepared by the Department.

APPLICANT'S EXHIBIT D: A copy of a Water Resources Survey map depicting the source of supply, and purporting to show the irrigated acreage as of the time of the survey.

APPLICANT'S EXHIBIT E: A copy of a Water Resources Survey map upon which is depicted in green the property owned or claimed by the Applicant in this matter. The impoundment known as "Meadow Lake" and the impoundment referred to as a sewage lagoon are depicted in red, as is the source of supply, Garnier Creek.

APPLICANT'S EXHIBIT F: A large map entitled "Master Development Plan" for Meadow Lakes Country Club Estates depicting Applicant's golf course and subdivision project. Located thereon are the source of supply, Garnier Creek, and the structure known as "Meadow Lake." The impoundment referred to in this proceeding as the sewage lagoon is referenced thereon as an "existing irrigation pond."

APPLICANT'S EXHIBIT G: A diagram depicting Applicant's proposed means of conveying the water to actual application upon the golf course. The solid lines apparently represent pipelines. The diagram is indexed on the left-hand portion thereof.

APPLICANT'S EXHIBIT H: A diagram of the plans for what has been referred to as the sewage lagoon, together with a frame of reference map located on the left-hand portion thereof.

APPLICANT'S EXHIBIT I: A United States Geological Survey map, the dark green portion of which borders the property owned or claimed by the Applicant to this matter. The blue line within this boundry represents the source of supply, Garnier Creek, and the blue shaded portion at the southern boundry indicates the impoundment known as "Meadow Lake."

APPLICANT'S EXHIBIT J: A copy of a "Declaration of Vested Groundwater Rights" purported to be executed by

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one Clarence Firestone on December 30, 1963. Applicant claims to be the successor in interest to the water right purportedly evidenced by this filing.

All of Applicant's exhibits were duly received into evidence.

The Objector Reed offered into evidence the following exhibits, to-wit:

OBJECTOR'S EXHIBIT 1 (Reed): A copy of a Notice of Water Right apparently executed by one William Berne. Objector Reed claims to be a successor in interest to the rights purported to be evidence by this filing.

OBJECTOR'S EXHIBIT 2 (Reed): A copy of a Notice of Appropriation of Water Right apparently executed by one Norman Borgen. The Objector Reed claims to be a successor in interest to the water right purportedly evidenced by this filing.

OBJECTOR'S EXHIBIT 3 (Reed): A letter with attachment from the Flathead Electric Cooperative, Inc. to Objector Oren Reed, purporting to show that electrical service was supplied for irrigation purposes to Objector Reed's predecessors in interest and presently to Objector Reed himself.

All of Objector Reed's exhibits were duly received into evidence.

Objector Dick-Char Corp. offered into evidence one (1) exhibit, to-wit:

OBJECTOR'S EXHIBIT 4 (Dick-Char Corp.): The first two pages of this exhibit depict in green the alleged place of use, the rights claimed by the Dick-Char Corp., together with the location of the source of supply. The third and fourth pages of this exhibit purport to be copies of Notice of Water Rights which purportedly evidence rights now claimed by Objector Dick-Char Corp. The fifth page of this exhibit purports to be a Notice of Appropriation of Water Right, but the contents

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thereof are so illegible as to make this portion of the exhibit without any probative value.

All of Objector Dick-Char Corp.'s exhibits were received into evidence.

The Department of Ntural Resources and Conservation offered into evidence five (5) exhibits, to-wit:

DEPARTMENT'S EXHIBIT 1: A three-page memorandum prepared by Charles Brasen of the Department, reflecting his examination of Application No. 26722.

DEPARTMENT'S EXHIBIT 2: A two-page memorandum executed and prepared by Jim Rehbein of the Department, reflecting the results of his investigation into the matters involved in this proceeding.

DEPARTMENT'S EXHIBIT 3: A ten-page compilation submitted by Mr. Brasen of the Department containing data and reports bearing on the factual issues of the matters involved in this proceeding.

DEPARTMENT'S EXHIBIT 4: A memorandum consisting of four pages which represents the result of Mr. Brasen's investigation into the factual issues generated by the request for an Authorization to Change an Appropriation Water Right No. 26719.

DEPARTMENT'S EXHIBIT 5: Copies of four pages of a water resources survey conducted by the State of Montana, which purports to characterize the nature and location of those rights for which the Applicant requests authorizations for changes.

All of the Department's exhibits were duly received into the record.

The Hearing Examiner, after consideration of the evidence in these matters, and now being fully advised in the premises, does hereby make the following proposed findings of fact, conclusions of law, and order.

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FINDINGS OF FACT

APPLICATION NO. 27622

1. On May 13, 1980, Application for Beneficial Water Use Permit No. 26722-s76LJ was filed with the Department of Natural Resources and Conservation by Meadow Lake Country Club Estates. This Application seeks ten (10) cubic feet per second up to 2,717 acre-feet per year for recreational purposes from March 1 to July 15, inclusive, of each year, and three (3) cubic feet per second not to exceed 1,357 acre-feet per year for recreational use from July 15 to March 1, inclusive, of each year. The total appropriative claim is for ten (10) cubic feet per second not to exceed 4,074 acre-feet per year. The source of supply is claimed to be Granier Creek at a point in the NE1/4 NE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The place of use is alleged to be in the E1/2 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

2. A timely objection was filed by the Dick-Char Corp. This objection alleges that said corporation owns water rights in and to Garnier Creek which have not been satisfied in prior years, and that therefore any additional uses will work injury to Objector's rights.

3. A timely objection was also filed with the Department of Natural Resources and Conservation by Mabel M. and Matt W. Koskela. These Objectors claim generally that they have prior

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existing water rights in the source of supply which may be affected by Applicant's proposed diversion.

4. A timely objection was also filed with the Department by Oren Reed. Mr. Reed claims an existing right in the source of supply, and alleges that historically there has been insufficient amounts of water to fulfill his claim upon the source of supply.

5. A timely objection by Mr. and Mrs. Richard P. Walch was also filed with the Department of Natural Resources and Conservation. These Objectors allege that they have prior existing water rights to the source of supply which may be affected by the granting of this application.

6. A timely objection to the granting of this Application was also filed by Russell C. Warner. Mr. Warner alleges that historically Garnier Creek has an insufficient supply to satisfy this Objector's alleged water rights in a dry year. However, Mr. Warner appears to withdraw his objection to the granting of this application so long as a certain division of the water in the source of supply near the center of Section 31, Township 31 North, Range 20 West remains as it has historically been. The division in the source of supply that Mr. Warner speaks of in his pleadings is graphically depicted in Applicant's Exhibit C. This point lies upstream from the property owned or claimed by the Applicant in this matter, and is illustrated on the exhibit by the confluence of a solid blue line and a dotted blue line in a purple shaded area. The evidence propounded at the hearing by the Applicant demonstrates that there is no intention upon the part of Meadow Lakes Country Club Estates by virtue of this

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Application to in any way modify or otherwise interfere with this historic division of the source of supply. Nothing in this order shall be interpreted to recognize or grant any such authority. Therefore, Mr. Warner's objection and allegations therein are now moot.

7. A timely objection to the granting of this Application was also filed by a Dan Sherod. This objector claims generally that he owns certain rights to water from the source of supply which may be affected by the granting of this application. Mr. Sherod did not appear either personally or by representative at the hearing in this matter.

8. The record reflects that the pertinent portions of the Application in this matter were duly published for three (3) successive weeks in the Hungry Horse, a newspaper of general circulation printed and published at Columbia Falls, Montana, and in the Daily Inter Lake, a newspaper of general circulation printed and published at Kalispell, Montana.

9. Applicant intends by virtue of this Application to in effect reroute the source of supply Granier Creek. The evidence shows that Granier Creek has historically been known as Gangner Creek or Lost Creek. However, for the purposes of clarity in this Order, this particular stream will be referred to as Granier Creek. The evidence discloses that Applicant's purpose is to modify the historic direction and flow of this Creek by constructing an alternate path or stream bed immediately adjacent to the historic location such that the waters in this source of supply will now meander through Applicant's property at a more

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leisurely pace due to the construction of a number of new bends for the stream channel. At the conclusion of Applicant's evidence in this regard, no objector indicated that they would persist in their objections to the granting of an application in this matter so long as the historic quantity of flow in Granier Creek is not decreased by Applicant's proposed modifications to the stream channel. The evidence in fact shows that no such depletions will occur as a result of Applicant's proposed channel modifications. Indeed, the evidence suggests that the source of supply will be augmented by Applicant's changes. The new route of Granier Creek will be some 1,000 feet longer than the historic pattern of flow. The increased evaporation generated by this additional distance has been estimated by Mr. Brasen of the Department to be approximately .36 gallons per minute for the average irrigating season running from May through September. However, it appears from the evidence that this minor depletion will be more than offset by the additional accumulation of spring waters in the new channel. Applicant proposes to route Granier Creek through two small ponds not involved in this proceeding. The evidence indicates that these small ponds enjoy substantial accretions from various springs. Moreover, the new channel of Granier creek is to be lined with a semi-permeable material which will inhibit seepage that would otherwise have historically occurred through the old channel.

10. The evidence does not support a finding that the Applicant has a bona fide intent to appropriate water. The most that appears from the evidence is that Applicant is desirous of

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draining the waters that flow across its lands in a particular fashion. This does not in and of itself reflect that fixed and singular purpose to use water for a beneficial purpose that is the talisman of an appropriation.

The testimony of Mr. Fallows and the representations of Meadow Lakes Country Club Estates' counsel demonstrate conclusively that the Applicant claims no minimum flows in Granier Creek pursuant to this application, and thus it asserts no claim to the use of water flowing in this source of supply by virtue of this application. A mere change in the character or course of a stream does not amount to an appropriation. There is no intent to actually use the water contained in the source of supply for some described beneficial purpose.

The volumetric descriptions and the flow rate descriptions of water quantity as stated in the Application were predicated on the Applicant's estimate of the largest flow in Granier Creek throughout the various times of any given year. This claim is consistent with Applicant's intention as disclosed in the evidence merely to change the channel of the source of supply. Indeed, Applicant apparently claims no protection for this quantity of water against the actions of subsequent appropriators. Although the Application alleges that the use of the water is to be recreational, nothing in the evidence propounded by the Applicant details or suggests the manner of recreational use of the water resource itself. At most, one can infer that the new channel will yield some aesthetic benefit to the Applicant in the operation of its golf course. Assuming

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without deciding that such aesthetic derivatives belong to the class of uses that can be described as beneficial, nothing in the evidence demonstrates or indicates why a lesser quantity of water would not meet these same ends. Moreover, nothing in this record supports a characterization of Applicant's claim as involving a beneficial use in that there is no evidence demonstrating that Applicant in fact intends to use the water at all.

11. The evidence supports a finding that the Department of Natural Resources and Conservation is without jurisdiction over the claims involved in this Application. Nothing in this record indicates that Applicant is seeking an appropriation, nor does anything in the evidence suggest that Applicant proposes to construct any diversion works for the purposes of making such an appropriation.

12. The Department has jurisdiction over all the parties hereto, whether they have appeared or not.

CONCLUSIONS OF LAW

1. The Hearing Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

(1) There are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

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

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

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) 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;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

2. The Hearing Examiner finds and concludes that the Department is without subject matter jurisdiction over the Application filed in this matter in that nothing in the record reflects that the Applicant in fact seeks to appropriate any water. Rather, the record merely reflects that the Applicant seeks an administrative imprimatur for altering the historic manner in which the waters of Granier Creek drain across its lands. Ditch rights are separate and distinct from water rights, and the Department has no authority over the former in this context. See generally, Smith v. Krutar, 153 Mont. 325, 457 P.2d 459 (1969).

The bare-boned aspects of an appropriation at common law were defined and limited by the appropriator's use and need for a quantity of water. Indeed, the concept of beneficial use was central to the acquisition and preservation of a water right.

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See, Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949), Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897), Miles v. Butte Electric and Power Co., 32 Mont. 56, 79 P. 549 (1905), Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924). A water right confers no privileges by way of ownership of the corpus of the water claim, but rather merely recognizes the right of an appropriator to use the water countenanced by the right for some defined useful purpose. See, Holmstrom Land Co. v. Ward Paper Box Co., 36 St. Rep. 1403, _____ Mont. _____, _____ P.2d _____ (1980). Since Applicant posits no evidence for the use of the water claimed, it cannot find itself within the purview of an appropriation.

Nothing in the Montana Water Use Act can be read as abrogating these established principles. Although MCA 85-2-102(1) (1979) defines an "appropriation" generally in terms of a withdrawal or diversion, it is clear from the remainder of the Act's emphasis on beneficial use that no change in the common law notion of appropriation was intended. See MCA 85-2-101(1) (1979) ("A person may only appropriate water for a beneficial use."); MCA 85-2-310(1) (1979) ("The Department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application").

The jurisdictional framework for the permitting process implicitly reaffirms this time-worn concept of appropriation.

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"... a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the department." (emphasis added) MCA 85-2-302 (1979).

Incidental alterations or modifications of stream banks or stream flows are thus not bootstrapped into appropriations by the permitting process itself. It is true that such practices may ultimately affect water rights by reducing the quantity of water available in the source of supply at the historic time and place of need of a prior appropriator. However, the pivotal issue herein is not whether the Department should be accorded the authority to assess such impacts , but rather whether in fact the legislature has delegated such power. Administrative agencies have only that authority expressly or by necessary implication granted to them. State ex rel Andeson v. State Board of Equalization, 133 Mont. 8, 319 P.2d 221 (1958), State ex rel Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936). The permitting process represents a statutory procedure whereby preliminary or "first looks" may be made of prospective appropriations of the state's water resources. It is in addition to, and not in lieu of, a water user's historical remedies in the judicial form. Thus, while applicant's proposals as reflected in this application do not amount to a claim for an appropriative right, persons potentially affected or aggrieved may vindicate their interest in the district courts. See MCA 85-2-406 (1979).

14. The Department has jurisdiction over all the parties hereto, whether they have appeared or not.

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15. The Applicant has no intent to appropriate a portion of this state's water resources. Such an intention is a prerequisite for an appropriative claim. See Toohey v. Campbell, 24 Mont. 13, 60 P. 296 (1900), Miles v. Butte Electric and Power Co., 32 Mont. 56, 79 P. 549 (1905). The record divulges that Applicant seeks only an administrative imprimatur for its proposed channel change. Nothing in the record indicates that Applicant seeks a designated quantity of water for a defined beneficial purpose. See also MCA 85-2-310(3) (1979) ("The Department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use.") Applicant's desire to re-route the entire flow of Granier Creek through a new channel does not in and of itself establish the requisite claim to a portion of the water resources so as to constitute a valid appropriation.

16. The Applicant has failed to show that the total amount of its appropriative claim can and will be beneficially used. Although the application in this matter recites the water is to be used for recreational purposes, nothing in the record indicates what recreational benefits may accrue through the rechannelization of Granier Creek. Assuming without deciding that the mere aesthetic appeal of the new route of the source of supply belongs to the class of uses that might be described as beneficial, nothing in the record indicates why a lesser quantity than that claimed by the Applicant here is required for such

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purposes. Moreover, Applicant's claim to merely recast the character and flow of Granier Creek does not amount to a claim for the use of water, and therefore it does not comport with the usufructory dimensions of the definition of beneficial use as provided for in MCA 85-2-102(2) (1979).

APPLICATION No. 26718

FINDINGS OF FACT

1. On November 13, 1979, an Application for Beneficial Water Use Permit was received by the Department of Natural Resources and Conservation on behalf of Meadow Lake Country Club Estates. This Application claims 200 gallons per minute up to 33 acre-feet for supplemental sprinkler irrigation on new land from May 1 to October 31, inclusive, of each year. The Application also claims the right to store the aforesaid quantity of water continuously throughout each year. The place of use is claimed to be comprised of 28 acres, more or less, in the NE1/4 of Section 6, Township 30 North, Range 20 West; 20 acres, more or less in the NW14 of Section 6, Township 30 North, Range 20 West; 20 acres, more or less, in the SW1/4 of Section 6, Township 30 North, Range 20 West; and 23 acres, more or less, in the SE1/4 of Section 6, Township 30 North, Range 20 West. The Application claims that the proposed point of diversion is located in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The capacity of the proposed reservoir is alleged to be 16.5 acre feet.

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2. The only timely objection to the granting of this application was filed on behalf of the Montana Power Company. That objection as previously noted has been disposed of by agreement of the Objector Montana Power Company and the Applicant. However, Oren Reed, by his attorney, Leonard Kaufman, expressly moved to intervene in these proceedings as an objector. This Objector, along with other objectors to other matters consolidated in this hearing, all presented proof with reference to this particular Application. However, at the conclusion of the evidence, no objector appeared to persist in any objections to the granting of a permit in this matter. Therefore, no prejudice accrued to the Applicant by this procedure.

3. The Applicant intends by virtue of this appropriation to impound various waste waters or sewage effluent from a neighboring subdivision in a reservoir with an existing capacity of approximately 16 acre feet. The Applicant then intends to divert the waters from this lagoon at a rate not to exceed 200 gallons per minute for the purposes of irrigating its golf course.

Applicant's claim for storage will necessarily involve more than one filling of its reservoir. Indeed, the storage of the total appropriative claim of 33 acre-feet will involve approximately two fillings of the sewage lagoon. However, the evidence does not in fact support Applicant's claim for a total storage of 33 acre-feet. Some of the water to be diverted by the pump located in the reservoir will necessarily divert some waste waters that are merely flowing through the reservoir impoundment.

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To the extent that such waters are immediately applied to beneficial use, the evidence shows that Applicant in fact desires a direct flow permit. No intent to store water for later beneficial use is countenanced by such diversions. However, the amount of water to be so applied by direct flow cannot be quantified based on the present state of the record. Nothing indicates the total quantity to be applied for immediate beneficial use, nor does anything in the evidence indicate the rate or quantity of flow of the waste water or sewage effluent. This inability to accurately or precisely identify the total storage component of the Application is not prejudicial in the present circumstances, however.

4. Applicant intends to divert water through the pumping mechanism from the storage lagoon for application on its golf course from May 1 to October 31, inclusive, of each year. Throughout this period, Applicant intends to use up to 33 acre feet for supplemental irrigation of its 83 acres more or less of grasses. The Applicant's intent in this regard is bona fide and it is not attempting to speculate in the water resource.

Applicant also intends to store the waters accumulating in its reservoir impoundment up to 33 acre-feet per year to facilitate the aforesaid irrigation. The application also implicitly claims a quantity of water for carry-over storage purposes. That is, since Applicant claims the right to store the water year-round, it inferentially claims a right to carry over any amount of water up to 33 acre-feet per year not used in a current year into subsequent irrigating seasons for use therein.

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Indeed, reprsentations by Applicant's counsel of record indicate that these are at least in part "insurance" waters.

5. The evidence supports a finding that the Applicant can beneficially use up to 33 acre-feet per year for the irrigation of its golf course. The use of water in such a fashion would materially benefit the Applicant, and the operation of the golf course without such waters would not be feasible. So much of the 33 acre-feet per year that is not reasonably required to be used in any single irrigating season is also to be beneficially used through the process of carry-over storage. Although as a practical matter, the waste water or sewage effluent supply for the reservoir will probably be stable from year to year, this does not indicate that the Applicant may not find its other rights dry in any particular year. Indeed, the evidence indicates that Applicant's rights are of relatively late priority, and therefore may find themselves out of priority in dry years.

The ultimate source of supply for all of the Applicant's water is the surface flow of Granier crek or wells penetrating the alluvium thereof. The evidence shows that in a typical year Granier Creek experiences high flows due to snow melt runoff, but thereafter tapers off into more minimal quantities of water. The record further shows that even during such average years, appropriators senior to any of Applicant's rights have difficulty in claiming the full amount of their appropriations. Therefore, under all the circumstances, Applicant's need for carry-over storage is evident.

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It appears by the evidence that in most years most of the 33 acre-foot appropriation will be utilized in any single irrigation season. The Department through Mr. Brasen has indicated that the irrigation season requirements of Applicant's 83 acre golf course will probably be in the order of 215 acre-feet per season. This figure is premised on soil conditions extrapolated from the Irrigation Guide for Montana, and on the consumptive use rate that is typical for alfalfa. Although the Hearing Examiner can officially note that alfalfa is amongst the highest consumers of the water resource, the Hearing Examiner finds the estimate to be reasonable in that more surface area is devoted to plant growth for grasses than would otherwise be true for the cultivation of alfalfa. At any rate, Mr. Fallows testified that based on his experiences 33 acre-feet is required pursuant to this application for the proper irrigation of the golf course. Under all the circumstances, Applicant has shown that 200 gallons per minute not to exceed 33 acre-feet per year is a reasonable estimate of the quantity of water that can be beneficially used for the irrigation of its golf course.

6. The evidence supports a finding that Applicant's means of diversion are adequate. Applicant proposes to pump the 33 acre-feet from the sewage lagoon, thence through a series of pipelines to be finally applied on the course by a system of sprinklers. Applicant's Exhibit G amply illustrates the proposed diversion works. The Hearing Examiner can officially note that such sprinkler irrigation methods are among the most efficient means

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of applying water for irrigation purposes, and notes from the evidence that little water will be lost in conveyance.

7. The Applicant is not seeking more than the volumetric amount of 10,000 acre feet a year or more than 15 cubic feet per second as a rate of flow.

8. The Department has jurisdiction over the subject matter herein, and has jurisdiction over the parties hereto, whether they have appeared or not.

9. The diversion of the waters countenanced herein will not adversely affect prior appropriators. The record does not disclose the method of the historical return of the waste water sewage effluent. That is, it is not clear from the record whether such waters in the past have flowed to Granier Creek in some sort of tail ditch structure. It is clear, however, that such waters in the most recent past, have been impounded by the Applicant in its sewage lagoon. This lagoon is lined with clay and sealed with an impermeable substance known as bentonite. The evidence also indicates that the geological substratum in this area is characteristically a highly permeable glacial till material consisting mostly of gravel. Indeed, the Applicant testified that it was forced to secure topsoil in order to develop its golf course. Thus, Applicant has by the impoundment of these waters precluded potentially high seepage return of these waters to the alluvium. Moreover, by the nature of sprinkler irrigation, little seepage can be expected to occur by the subsequent application of these waters on the golf course.

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Any adverse affect to other appropriators by this change is entirely speculative, however. The evidence indicates that the source of supply appears to be an effluent stream during the spring and early summer months. That is, it appears from the evidence that Granier Creek discharges into the surrounding alluvial aquifer. During the latter part of the summer, it also appears that this situation typically reverses. That is, Granier Creek becomes an influent stream drawing some of its source of supply from groundwaters.

Although this phenomenon was attributed to "bank storage" at the hearing, the evidence does not in fact indicate that this is the sole cause of this condition. That is, it is probable that returns from the alluvium that augment the source of supply in the late summer months are not solely attributable to the seepage engendered from the source of supply from the high flows of the early spring months. Indeed, the relatively substantial character of this recharge indicates that it is caused at least in part by increases in the water table level in the surrounding alluvial aquifer in the late summer months. Such increases may be readily attributable to irrigation seepage, and since water inevitably seeks its own level, such accretions would increase the gradient to the stream of Granier Creek, and thereby induce the augmentation of the source of supply.

Thus, whether or not the waste waters from the subdivision involved herein would ever reach the source of supply historically would in part depend on the level or intensity of irrigation in the surrounding area. Even if, however, such

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augmentations or accretions in the late summer months are solely attributable to bank storage, it is still speculative and unlikely that such seepage waters would ever reach prior appropriators at their time and place of need. All of the Objectors in these matters testified generally to the use of water for irrigation purposes, and indicated that depletions occur to their detriment commencing in the middle of the summer. Indeed, the evidence establishes that the stream Granier Creek characteristically runs dry in or about the location of the county airport during the middle of the summer in a typical year. This indicates that the stream is discharging at such times through the surrounding alluvial aquifer. Thus, it is unlikely that seepage waters historically accruing from the sewage effluent would ever recharge the source of supply at such times. Moreover, if and when conditions change such that these alluvial waters begin to recharge the stream, it is entirely speculative and unlikely that these subdivision waste waters would have historically arrived in the source of supply at such times that the prior appropriators might make use of them. Under these circumstances, the Applicant has demonstrated that it is unlikely that its diversion of the sewage effluent would ever adversely affect prior appropriators.

10. The evidence demonstrates that it is more likely than not that there are unappropriated waters available in the source of supply. The evidence referenced above also indicates that the waters claimed by the Applicant herein are not required to

fulfill other water demands on the source of supply, and therefore are available for the Applicant to appropriate.

11. In light of the evidence reflected herein, it is more likely than not that Applicant's diversions will not interfere unreasonably with other planned developments for which a permit has been issued or for which water has been reserved.

12. The place of use for the water claimed herein will be 83 acres, more or less, located in Section 6, Township 30 North, Range 20 West, all in Flathead County.

13. The point of diversion of the waste waters claimed herein will be located in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

14. The Application was duly filed with the Department of Natural Resources on November 13, 1979, at 2:01 p.m.

CONCLUSIONS OF LAW

1. The Hearing Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

"(1) There are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the Applicant;

(b) in the amount the Applicant seeks to appropriate; and

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

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

(3) the proposed means of diversion or construction are adequate;

(4) The proposed use of water is a beneficial use;

(5) 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;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected." MCA 85-2-311 (1979)

2. Pursuant to this section, the Department has jurisdiction over the subject matter herein and has jurisdiction over the parties hereto, whether they have appeared or not.

3. The use of the waters in the manner contemplated by the Application in this matter will materially benefit the Applicant, and the recreational derivatives therefrom will be a substantial benefit to the public. Therefore, the proposed use finds itself within the class of uses that can be described as beneficial. See MCA 85-2-102(2) (1979). Moreover, the storage and subsequent beneficial use of up to 33 acre-feet per year cannot be said under all the circumstances to be an unreasonable amount of water for the intended purposes. The volumetric limitation of 33 acre-feet per year and the flow ceiling of 200 gallons per minute cannot be said to result in the waste of the water resource. See

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generally, Worden v. Alexander, 108 Mont. 208, 90 p.2d 160 (1939), Sayer v. Johnson, 33 Mont. 15, 81 P.389 (1905).

The pivotal issue, however, as regards the Applicant's claim to store is whether or not an appropriator is entitled to more than one fill of a single storage structure. In Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941), the court adopted the following language from a Colorado case.

> "These provisions (referring to statutes on reservoir appropriations) mean that to each reservoir shall be decreed its respective priority, and this priority entitles the owner to fill the same once buring any one year, up to its capacity, and restricts the right, upon one appropriation, to a single filling for any one year. A double filling in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation, which is impossible in fact and in law, and, if allowed, would violate the fundamental doctrine of the law of appropriation--he who is first in time is first in right--by making a junior superior to a senior reservoir appropriator. Necessarily the capacity of a reservoir, which the statute expressly says is the extent of its appropriation, is what the reservoir will hold at one time, not what can be stored in it by successive fillings; otherwise the capacity would vary, depending not on what the reservoir will hold, but on how many times it can be filled in one year. When we speak of the capacity of a barrel or bottle, we mean the number of gallons or ounces it will hold when filled once, not many times."' 112 Mont. 445 (citing Windsor Reservoir and Cannal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 729 (1908)."

Although the evidence does not support the claim that the total 33 acre-feet will in fact be stored in that some of the waters accruing to the impoundment will be immediately diverted for the irrigation of the golf course, it nonetheless appears that the Applicant will be unable to store even a substantial part of the total 33 acre-foot claim in the sewage lagoon with a capacity of approximately 16 acre-feet without refillings.

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Nothing in the Montana statutes however, dictate that the measure of such storage appropriations is the capacity of the impounding structure. Windsor, cited by the court in Federal Land Bank, is therefore inapposite insofar as that decision relied on Colorado statutes as bespeaking a "one-fill" limitation. Montana in juxtaposition has long held that the measure of an appropriation is a product of the intention of the apporpriator and his need for the water resource. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Gwynn v. City of Philipsburg, 156 Mont. 194, 478 P.2d 855 (1971).

Federal Land Bank cannot be read as altering such rell-established principles. Nothing in that case disclosed a circumstance whereby any appropriator in fact intended or claimed the right to fill and refill his storage structure during any single irrigating season. Rather, the reference to the Windsor language related to the court's discussion of carry-over storage. It is undoubtedly true in this connection that an appropriator may not drain-off such carry-over in any given year and then re-fill to the full amount of his appropriation. Such a practice amount to a new and greater demand on the source of supply, and reflects an intention to make a new and independent appropriation to the extent of the additional quantity of water actually stored for later beneficial use. See generally, Whitcomb v. City of Helena, supra.

Moreover, the purpose of such carry-over storage is not impeded or otherwise obstructed by such an application of the

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one-fill rule. Carry-over allows the appropriator to balance out the lean and the fat years. That is, it contemplates that waters collected and stored in wet years may be preserved for use in subsequent dry years. Such intentions are not frustrated by charging to the storage reservoir the amount of water carried over from preceding years at the time such appropriators begin their diversions for storage and subsequent use in the current year. Water is a fungible commodity, and an appropriator has no reason for complaint to the extent that his declared intentions as reflected in his appropriation are satisfied in any given year. Storage appropriators, like their direct flow counterparts, are in all events limited by their actual need for the water [illegible] circ

It is true that the Windsor case went further, and apparently promulgated a substantive rule limiting storage appropriations to one annual fill. However, as indicated above, nothing in Federal Land Bank discloses that the foregoing limitation was intended to apply to appropriators in this state outside the confines of carry-over storage. Such a reading is buttressed by reference to the recent decision in Whitcomb v. City of Helena, supra. Therein, the defendent City attempted to refill its storage works at such times that junior direct flow claimants were in need of that supply. The court characterized such a practice as an extension of the historic use that quantified the right, and thus such additional usage was not protected by the original priority. See also, Featherman v. Hennessy, 43 Mont. 310, 115 P.983 (1911). No mention of Federal Land Bank's "one fill rule" was made in the

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disposition of that controversy. Rather, since the additional fill was not shown to be part and parcel of the City's original appropriation, the new priority as to the additional quantity claimed could not hold sway over intervening appropriators.

A mechanistic application of the one-fill limitation would engender considerable economic waste. In effect, such a rule would require the construction of expansive reservoir impoundments merely to facilitate a water use program that would be more conveniently and expeditiously provided for by multiple fillings of a smaller storage structure. Such an anachronistic result is further evidence that such a limitation was never intended to apply in toto to storage claimants.

Nor is such a rule warranted by the application of the notion that the measure of a direct flow appropriation is limited by the capacity of the ditch. See generally, Bailey v. Tintinger, supra, Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914), Wheat v. Cameron, 64 Mont. 494, 210 P. 7761 (1922). It is obvious that such a claimant cannot beneficially apply more water than his ditch can carry, and therefore the capacity of the conveyance structure sets the uppermost limit on the extent of beneficial use. Such a concept is inapposite in the storage context where water is diverted or captured for subsequent beneficial use. In such circumtances, the size of the diversion works bears no necessary correlation to the extent of beneficial use.

The most cogent argument that can be marshalled in support of the "one-fill" limitation can be gleaned from the seminal case of Windsor, supra. Therein, the court focused on the fundamental

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distinction between direct flow and storage claimants as regards the source of supply.

> "An appropriation awarded to a ditch may be limited not only as to volume by its carrying capacity, but also by time--that is, the use of water through it is limited by its carrying capacity, and as to duration by the necessity of the use--and it may also be restricted to some particular season or time of year. All these characteristics do not apply to an appropriation for storing water in a reservoir." 98 P. at 733.

Since storage appropriators do not divert from the ultimate source of supply at times that parallel their time of need, subsequent or prospective direct flow users from the same source of supply may be handicapped in forcasting precisely when and how much water will be available for their respective uses. The one-fill rule in this context encourages in a general way reservoir diversions during high flow spring run-off periods and concomitantly discourages and often times prohibits such diversions during the latter part of irrigating seasons when the source of supply runs low. See generally, Gwynn v. Phillipsburg, supra. Thus, this limitation incidentally works to promote the maximum use of the water resource while minimizing disputes between storage and direct flow claimants.

However, these concerns can now be addressed on an individual basis through the permitting process, a luxury the Colorado system does not have. An application for a water use permit can be modified, restricted and otherwise limited to protect the rights of other appropriators. MCA 85-2-312(1) (1979), see also MCA 85-2-311(2) (1979). Moreover, the intention of the appropriator can be specifically defined and documented as to the

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timing of diversions for storage such that prospective appropriators have some reasonably certain basis for evaluating potential water availability. See generally, MCA 85-2-302 (1979). Thus, veiwed from every vantage point, the one-fill rule simply fails to hold water, and it therefore does not apply to Applicant herein except insofar as it prohibits an extension of use by "crediting" to the annual storage appropriation the amount of carry-over extent during any given year. When the reason for a rule evaporates, so should the rule itself. MCA 1-3-201 (1979).

The application of these principles to the instant matter yields the following results. The Applicant intends to use up to 33 acre-feet per irrigating season on its golf course and to carry-over any of this amount unused in any particular year into subsequent irrigating seasons. The Applicant also implicitly intends to capture these waste waters virtually year-round. This is evident from its claim for year-round storage and the inevitably regular and relatively constant return flows that may be anticipated from wastewater accretions from residential use. Thus, on October 31 of any given year, (that being the latest date in any circumstance that the Applicant intends to divert water from storage for application on its golf course), or at such earlier time as the Applicant in fact ceases such diversions, the amount remaining in storage shall be deducted from the next ensuing year's appropriation. That is, if 10 cubic feet is left in storage pursuant to this application, the Applicant is entitled to capture only the remaining 23 acre-feet

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to fulfill its annual appropriative claim. Furthermore, since the amount of an appropriation is measured at the diversion works, the evaporative losses accruing from the impoundment after the initiation of diversions for storage are chargeable to that year's appropriative limits. An appropriator must make allowance for such "conveyance" losses. Wheat v. Cameron, 64 Mont. 494, 210 P.761 (1922).

4. There are unappropriated waters available in the source of supply in the amount the Applicant seeks to appropriate, during the periods for which Applicant seeks use of the water. The source of supply is sewage effulent from the neighboring subdivision, and it appears that it more likely than not that such waters are sufficient to fulfill the total of Applicant's claim as delineated herein. Moreover, it is more likely than not that such waters even if not collected in Applicant's diversion facilities would not augment the source of supply at the time and place of need of any of the objectors to this matter.

5. It is more likely than not that no injury will accrue to prior appropriators by the diversion of these waters. It is unlikely that such waters would historically have ever arrived at the time and place of need of prior appropriators. For these reasons, this Application will also not interfere unreasonably with other planned uses for which a permit has already been issued.

6. The Applicant is a person entitled to appropriate water. MCA 85-2-102(10) (1979).

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7. The diversion works and facilities designed by the Applicant to capture, store and subsequently divert for application to its golf course are adequate. It appears from the evidence that they are sufficient for the intended purposes, and little water will be lost in conveyance. Indeed, this Hearing Examiner can officially not that sprinkler irrigation systems are among the most efficient means of applying water to agricultural-type purpsoes.

8. The priority date for this permit is the date of the filing of the Application in this matter, to-wit: November 13, 1979, at 2:01 p.m. MCA 85-2-401(2) (1979).

9. The place of use of the waters claimed herein will be 83 acres more or less in Section 6, Township 30 North, and Range 20 West, all in flathead County.

10. The point of diversion for the waters claimed herein will be in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

APPLICATION NO. 26723

FINDINGS OF FACT

1. On January 2, 1980, at 2:00 p.m., an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation on behalf of Meadow Lake Country Club Estates. The application seeks 560 gallons per minute up to 16.5 acre-feet per year for supplemental sprinkler irrigation of Applicant's golf course. The alleged place of use

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is claimed to be 20 acres in the NE1/4, 20 acres in the NW1/4, 20 acres in the SW1/4, and 23 acres in the SE1/4 of Section 6, Township 30 North, Range 20 West; all of which comprises 83 acres more or less. The Applicant claims the right by virtue of this application to divert the aforesaid quantity of water from Granier Creek from April 1 to June 1, inclusive, of each year. Said water is to be stored in a reservoir impoundment of an alleged capacity of 16.5 acre-feet year round. Diversions from the storage for the application to the golf course of proposed to occur from April 1 to October 31, inclusive, of each year. The point of diversion is alleged to be in the SW1/4 SE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

2. On October 1 of 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by Russell C. Warner. The objection alleges generally that Garnier Creek has an insufficient supply to fulfill both Meadow Lake's claim and those of Objector Warner's. However, Mr. Warner by separate document and by representation at the hearing in this matter appears to withdraw his objection so long as a certain division of the water near the center of Section 31, Township 31 North, Range 20 West, remains as it has historically been. The division point referred to by this Objector is upstream from the Applicant's property and proposed diversion points, and the evidence shows that Applicant has no intention to alter or otherwise modify this historic division of the waters of the source of supply. Nothing in this

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order shall be read or construed as recognizing or granting any such authority. Therefore Objector Russell Warner's allegations are now moot.

3. On October 2 of 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by Oren Reed. Mr. Reed alleges generally that there are insufficient waters available in the source of supply for Applicant's intended use without working injury to his prior rights.

4. On September 25 of 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by Mable M. and Matt W. Koskela. The objection implicitly alleges that diversions pursuant to Applicant's claims would work injury to Objector's prior water rights.

5. On September 25 of 1980, an objection to the granting of this application was filed by a Mr. and Mrs. Richard Walch. This Objection alleges by implication that diversions pursuant to Applicant's claims would work injury to Objector's prior water rights.

6. On September 30 of 1980, an objection to the granting of this Application was also filed with the Department of Natural Resources and Conservation on behalf of Dick-Char Corporation. This objection sets forth and claims existance of water rights owned by the Objector and further alleges that these rights would be adversely affected by Applicant's intended appropriation.

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7. The Application filed in this matter was duly published for three successive weeks in the Hungry Horse News, a newspaper of general circulation printed and published in Columbia Falls, Montana, the Daily Inter Lake, a newspaper of general circulation printed and published in Kalispell, Montana.

8. Objectors to other matters involved in these consolidated proceedings were also allowed to testify in regards to this particular application. In light of the disposition of this matter, no prejudice accrued to Applicant by virtue of such testimony.

9. The Applicant Meadow Lake Country Club Estates has a fixed and definite plan to appropriate water, and is not attempting to speculate in the water resources. The Applicant intends to divert water from the source of supply Granier Creek during the relatively high flow periods from April 1 to June 1, inclusive, of each year. Applicant intends to divert 560 gallons per minute up to 16.5 acre feet per year during such periods. The water thus diverted from Granier Creek will then be stored in an existing impoundment of an approximately 16 acre-foot capacity on a year round basis. Diversions from the storage structure for irrigation of Applicant's golf course are intended to occur from April 1 to October 31, inclusive, of each year. Applicant implicitly claims a right to carry over into subsequent irrigating seasons any of the 16.5 acre-feet not applied for the irrigation of its golf course in any current year. Such a claim is evident from the intended year-round storage.

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10. Storage of 16.5 acre-feet per year will involve more than one filling of the reservoir impoundment. Although the capacity off this impoundment is approximately 16 acre-feet, this diversion work also will store the 33 acre-feet contemplated in Application No. 26718. Since the diversion for storage pursuant to the Applications will be taking place simultaneously, more than one fill of this storage structure will be required to store the total 16.5 acre-feet of water pursuant to this application.

11. The Applicant intends to use the waters thus diverted for irrigation of a golf course it claims ownership to. Such a use is a beneficial one. The use of water in this fashion will be of material benefit to the Applicant, and there will be recreational derivitives to the public generally. It is clear from the evidence that such an enterprise cannot be conducted without the use of irrigation water. It is also clear from the evidence that the 560 gallons per minute up to 16.5 acre-feet is not an unreasonable quantity of water for the intended purposes. The 16.5 acre-feet is to be used conjunctively with other water rights owned or claimed by the Applicant in order to irrigate its entire 83 acres, more or less, of golf course. It sufficiently appears from the evidence that the Applicant is in need of this additional acre-foot quantity in order to properly irrigate its holdings in any given year. The Department has estimated that the irrigation requirements of Applicant's golf course are approximately 215 acre-feet per irrigation season. From an inspection of all the rights owned or claimed by the Applicant, the Department has also estimated that pursuant to these claims a

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total of approximately 220 acre-feet per year is potentially available. This equates to some 2.6 acre-feet per acre. The Department's estimates as to the duty of water were predicated on soil conditions in and about the area garnered by interpolation from the irrigation guide for Montana. The estimate also assumes a consumptive use akin to alfalfa. While the Hearing Examiner can note that a consumptive use of water by alfalfa is amongst the highest of all crops, said estimate is nonetheless reasonable in that more of the land area irrigated is devoted to the grass development contemplated herein. In any event, Applicant admits that these waters are in part "insurance" for dry years. The evidence shows the Applicant's water rights are of relatively recent vintage. Since the flow of the source of supply appears to be highly variable, it is reasonable to assume that some or all of Applicant's rights may find themselves out of priority at certain times in some years. The storage of these high flow waters would thus insure against curtailment of other diversions during the source of supply's low flow season, and through carry-over facilitate the irrigation of the golf course even in completely dry years. The amount of water claimed herein is reasonable for all these purposes.

12. The evidence shows that the Applicant is not attempting to divert more than 15 cubic feet per second, nor is it intending to appropriate more than 10,000 acre-feet per year either through this application considered individually or when all the applications consolidated in this matter are considered collectively.

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13. The filing date of this application is as it appears on the front page of the document, to-wit: January 2, 1980, at 2:00 p.m.

14. There are unappropriated waters in the source of supply in the amount the Applicant seeks and at those times that the Applicant desires to divert the same. Garnier Creek exhibits considerable variations in its flows. Generally during early spring months it characteristically runs at high volumes due to snow melt run-off. Thereafter it tapers off and characteristically becomes a dry spring in and about the county airport being in Seciton 36, Township 30 North, Range 20 West.

There is also substantial evidence in the record reflecting the groundwater-surface water interaction between the surface flow of Granier Creek and the surrounding aquifers. The record shows that during spring flows Granier Creek contributes to or augments the surrounding or alluvial acquifer. During the latter part of the irrigation season, typically this pattern reverses itself such that Garnier Creek becomes an influent stream, gaining water from this same alluvial groundwater storage. Applicant's diversions pursuant to this permit will take place at such times that Garnier Creek is in its effluent stage.

The evidence shows that the Objectors to this matter have suffered insufficient water for their needs only on extremely rare and sporadic occasions during the times Applicant proposes to divert the waters to Granier Creek to storage. Therefore, there is unappropriated water available to the Applicant in the amounts it seeks and during the time it wishes to divert the

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same. The evidence asserting that all the flow of Granier Creek is required to push water down to the furthest downstream appropriators is discounted. This evidence is derived from a report prepared in another matter by a former Department employee now. He was not available at the hearing for cross examination purposes. Moreover, such a proposition is unlikely from its face. Although velocity of surface water is a factor governing infiltration rates into the groundwater resource, it is not the most important or determinative one. Rather, the perosity in the permeability of the geologic underlay is a most substantial factor in determining such percolation rate. This condition can be roughly analyized to the conveyance capacity of a ditch thus limiting the amount of water it can carry. Nothing in Applicant's application will disturb this geological underlay. Moreover, it is doubtful that the disturbances made by Applicant's diversions in high water periods can have a significant impact in water velocity insofar as that condition governs infiltration. Indeed, the diversions of water from the source will at least to some extent reduce the wetted perimeter of the stream bed and thus retard such percolation.

15. It is more likely than not that diversions pursuant to this application will not work injury to prior appropriators. It is not necessary for present purposes to extensively describe or otherwise define the character or extent of objector's water rights hereto. Mr. Oren Reed, who has historically irrigated 148 acres more or less downstream from the applicant's proposed point of diversion, does not recollect making any diversions pursuant

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to his right in the month of April. Furthermore, in his 22 years experience with the source of supply, he recollects that only on two occasions were diversions for the irrigation of his property made in May. Similarly, Objector Walch, who historically has irrigated approximately 60 acres downstream from the Applicant's property, characterized any diversions made in May for use on his land as being unusual or the exceptional case. Normally, Mr. Walch begins his diversions around the first of June. Dick-Char Corporation has historically irrigated some 200 acres also located downstream of Applicant's project. However, no water depletions to these agricultural uses occur except in July and August. Mr. Reese, testifying on behalf of Objector Loucks, attested to this characteristic reduction of flows in July and August.

Taken together, the evidence shows that the objectors to this matter only occasionally or unusually make diversions pursuant to their respective uses during those months which Applicant intends to divert the water from the source of supply for storage. Moreover, it is not until the months of July and August that any of these Objectors have historically suffered depletions in this source of supply that interfere with their water requirements. Characteristically, it appears that the months during which the Applicant intends to divert pursuant to this permit are relatively high flow periods. Indeed, water commonly backs up at a bridge culvert located approximately at the confluence of Trumble Creek and Granier Creek. It is unlikely that any diversions made during these periods will in any way contribute

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or cause additional depletions during the months of July and August. Such waters cannot be said on this record to so markedly or substantially aggravate or contribute to groundwater infiltration that the subsequent influent stage of Garnier Creek will be reduced in character. Mr. Reeves also testified to significant ground disturbances that were or are occuring on property occupied by Objector Louckes. The evidence suggests that such effects are products of groundwater surface water interchanges in the area. Assuming that such disturbances is an injury material to this proceeding, the record in no way suggests that Applicant's diversions will aggravate this condition.

16. The Applicant's means of diversions are adequate. Applicant proposes to pump the water from Granier Creek through a pipe and into a lagoon lined with bentonite and impermeable clay materials. From this storage structure, waters will be diverted for irrigation of a golf course by a complex system of pipes defining a sprinkler irrigation system. Little water will be lost in conveyance.

17. The place of use is as recited in the Application filed in this matter, to-wit: 20 acres in the NE1/4 and 20 acres in the NW1/4 and 20 acres in the SW 1/4 and 20 acres in the SW1/4 and 23 acres, more or less, in the SE1/4 of Section 6, Township 30 North, Range 20 West.

18. The point of diversion from the source of supply will be in the SW1/4 SE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

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19. Diversions pursuant to the Application as delineated herein will not interfere unreasonably with other planned uses for which a permit has been issued. The Hearing Examiner has officially noticed that provisional permit No. 13021-g76LJ has previously been issued to Dick-Char Corporation. This permit authorizes the diversion of 1.32 cubic feet per second not to exceed 112.5 acre-feet per year from a groundwater pit during the time period extending form May 1 to September 1, inclusive, of each year. The evidence shows that Applicant's diversions will not interfere with the exercise of this permit.

CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part that the departent shall issue a permit if:

> 1. There are unappropriated waters in the source of supply:
>
> > a. at times when the water can be put to the use proposed by the applicant;
> >
> > b. in the amount the applicant seeks to appropriate; and
> >
> > c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;
>
> 2. The rights of a prior appropriator will not be adversely affected;
>
> 3. The proposed means of diversion or construction are adequate;
>
> 4. The proposed use of water is a beneficial use;
>
> 5. The proposed use will not interfere unreasonably with other planned uses or developments for which a

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permit has been issued or for which water has been reserved.

2. Pursuant to this section, the Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not.

3. The Applicant does not intend to appropriate more than 10,000 cubic feet per year nor more than 15 cubic feet per second either pursuant to this application or all the applications consolidated for hearing in this matter. Therefore, it is not incumbent upon the Applicant to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected. However, Applicant must show that it is more likely than not that the remaining statutory criteria exists. Such an allocation of the burden of proof is implicit in the above-cited section, and is consistent with the general rule that the proponent of a rule or order has the burden of proving all facts necessary to support it.

4. Applicant's proposed use of water is a beneficial one. The use of the waters in the manner contemplated in the application will materially benefit the applicant, and the recreational derivitives therefrom will be a substantial benefit to the public. Therefore, the proposed use finds itself in the class of uses that can be described as beneficial. See MCA 85-2-102(2) (1979). Although some objectors apparently regard or argue that waters for the irrigation of a golf course amount to a luxury use of the water resource as compared to the irrigation of the commercial crops, nothing in the Montana statutes sets forth

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any peferences for the various classes or types of use of water. Instead, the orientation of the act is to allow the private market system to reallocate water uses to more productive enterprises. See generally, MCA 85-2-402, 403 (1979).

5. Five hundred sixty (560) gallons per minute up to 16.5 acre-feet per year is a reasonable estimate of that quantity of water that can be applied to a beneficial use by the applicant. The use of this amount will not result in the waste of the water resource. See generally, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1930); Sayer v. Johnson, 33 Mont. 15, 81 P.389 (1905). Authorizing the Applicant to carry-over into succeeding years any amount diverted and stored and not actually applied to the golf course during the current year is also a reasonable use. Applicant's junior rights out of a source of supply with such variable flows portend that in some dry years it will be unable to divert water pursuant to those rights. Therefore, it is reasonable to allow the applicant to carry over such waters from wet years for use in such dry years. In keeping with the reasoning adopted elsewhere herein, Applicant is also permitted to fill, refill and otherwise successively fill the storage structure to obtain the full 16.5 acre-foot appropriation. However, any amount carried over into succeeding year is part and parcel of that year's annual appropriation.

6. The Applicant has a bona fide intent to appropriate water and is not attempting to speculate in the water resource. Applicant intends to divert water from the source of supply from April 1 to June 1, inclusive, of each year, and then to store the

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amount so diverted continuously throughout each year. Water will be withdrawn for application on the golf course form April 1 to October 31, inclusive, of each year. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P.396 (1900).

7. There are unappropriated waters in the amount the Appliccant seeks, and throughout the period in which the Applicant desires to divert the same. The months of April and May are typically high flow months in Granier Creek, and nothing in the evidence suggests that other appropriators are suffering depletions in the source of supply that interfere with the full extent of their claims. Nor does the record justify a conclusion that the waters diverted in the aforesaid months could cause depletion in late summer months.

8. There therefore remains surplus waters available for Applicant's needs. Diversions pursuant to this application will not work injury to prior appropriators. Although the record reflects that other appropriators in fact make some diversons on irregular and sporadic occasions during the months the Applicant seeks to appropriate water, this does not alone indicate injury, even in those dry years where there will be an insufficient supply of water to provide both for the Applicant and other appropriators. The fundamental rule is "first in time, first in right". MCA 85-2-401 (1979). Those first applying water to beneficial use are entitled to protection of that use as against all subsequent appropriators.

> Alternatively, another may appropriate without regard to the consent of the prior appropriator. Subject to the rule of priority, later comers may make appropriations,

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> each in succession being required to respect the appropriation of all who came before him. Later approriations may be made of the surplus over what has been appropriated by prior appropriators, or of any use that does not materially interfere with prior appropriators,... Custer v. Missoula Public Service Co., 91 Mont. 136, 143-145, 6 P.2d 132 (1931).

A reading of "injury" that precludes even the possibility of interference between a permittee and other appropriators proves too much. In effect, it argues that water availability for new uses be predicated on the driest years of record. Such a procedure inevitably mandates and encourages the waste of vast quantities of this state's water resources contrary to the explicit policies of the Montana Water Use Act. See generally MCA 85-2-101 (1979). It is true that authorizing new water uses where possibilities exist for interferences with prior rights will impose some sort of regulatory burden on other water users. However, this is a necessary incident to development of the state's water resources.

> One should not be permitted to play the dog in the manger with water he does not or cannot use for beneficial purposes when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated. Allen v. Petrick, 69 Mont. 373, 379, 222 P.451 (1922).

In McIntosh v. Graveley, 159 Mont. 172, 495 P.2d 186 (1972), Plaintiffs asserted that Defendant's change in point of diversion saddled them with a proportionate share of an expense of a water commissioner to distribute the waters in accordance with the parties respective rights. The court did not characterize such costs as injury. Moreover, since water commissioners are subject to human error, it necessarily follows that even the burden of

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judicially rectifying those errors is not injury. See also, Quigley v. McIntosh, 88 Mont. 103, 290 P.266 (1930).

However, the Department does have authority to "require modifications of plans and specifications for the appropriation or related diversion and construction" and the Department "may issue a permit subject to terms, conditions, restrictions, and limitations it consideres necessary to protect the rights of other appropriators". MCA 85-2-312 (1979). Pursuant to this section, the Department may facilitate the regulation of various water uses by insisting upon adequate measuring devices for those junior permittees who may in some years interfere with other appropriators. However, the Applicant has already agreed to install suitable measuring devices on Granier Creek at the point in which it enters the property and the point at which it leaves its property. Thus, at any given time the impact of the Applicant's diversion will be readily ascertainable. The claim of Objector Reed for another measuring device downstream at the county bridge is rejected. No apparent purpose would be served by such a device, and under the circumstances herein, it is superfluous. The Applicant is only responsible for the effects of its own diversions. Moreover, the Objector Reed is obviously capable of noting depletions affecting his water right without the aid of any measuring unit.

8. Applicant's diversions will not interfere unreasonably with other planned developments for which a permit has been issued.

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9. The Applicant is a person entitled to appropriate water. MCA 85-2-102(10) (1979).

10. Applicant's means of diversion are adequate. The Applicant is not commanding an unreasonable quantity of water merely to extract a smaller portion thereof. Applicant's system is customary for its intended purposes, and it will not result in the waste of water resources. See, State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

11. The place of use for the waters applied for herein will be 20 acres in the NE1/4 and 20 acres in the NW1/4 and 20 acres in the SW1/4 and 12 acres, more or less, in the SE1/4 of Section 6, Township 30 North, Range 20 West.

12. The point of diversion from the source of supply Granier Creek will be located in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

13. The priority date for this permit is January 2, 1980, at 2:00 p.m. MCA 85-2-401(2) (1979).

FINDINGS OF FACT

APPLICATION NO. 26720-c76LJ

On November 13, 1979, an Application for Change of Appropriation Water Right was filed with the Department of Natural Resources and Conservation on behalf of Meadow Lake Country Club Estate. The Application alleges that the past use of the water has been 20 gallons per minute up to 20 acre-feet per year from April 1 to October 31 of each year. It further

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alleges that the source of supply is groundwater, diverted at a well located in the SW1/4 NW1/4 NE1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County. The place of use is alleged to be historically located in the NW1/4 NE1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County. The application seeks an alternate point of diversion in the SW1/4 SE1/4 SW1/4 Section 6, Township 30 North, Range 20 West. It also seeks to change the place of use to 83 acres located in the E1/2 W1/2 and the W1/2 E1/2 Section 6, Township 30 North, Range 20 West, all in Flathead County.

1. On October 14, 1980, an objection to the granting of this Request for Change was filed with the Department by Deborah Loucks. This objection alleges generally that this source of supply Granier Creek is overappropriated, and implicitly alleges that the change of use as countenanced in the application would work injury to Objector's rights.

2. No other timely objections were filed to the granting of this application. Oren Reed by his attorney Leonard Kaufman, however, expressly moved to intervene in these proceedings. Moreover, since this proceeding was consolidated with other matters pending on behalf of Meadow Lake Country Club Estates, all objectors testified generally to each and all of the applications. In light of the disposition of this particular matter, no prejudice accrued to the Applicant by virtue of this procedure.

3. The Application was duly published for three successive weeks in the Hungry Horse News, a newspaper of general

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circulation printed and published in Columbia Falls, Montana, and in the Daily Inter Lake, a newspaper of general circulation printed and published in Kalispell, Montana.

4. The evidence does not support a finding that the Applicant herein has any water right capable of being changed. The evidence wholly fails to support the existance and character of any extant right to use water.

5. The change in the manner of use proposed by the Applicant, coupled with the change in the place of use, has not been shown to not involve an enlargement of the historic existing water use.

6. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not.

CONCLUSIONS OF LAW

1. MCA 85-2-402(1) (1979) provides generally that "an appropriator may not change the place of diversion, place of use, or place of storage except as permitted under this section and approved by the Department." Subsection two (2) of this provision further directs the Department to "approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons."

2. Pursuant to this section, the Department has jurisdiction over the subject matter herein. By the filing of objections in this matter, or by actually appearing at the hearings in these

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matters, the Department also has jurisdiction over all the persons hereto, whether they have appeared or not.

3. The burden of proof as to positive injury of a particular right lies on the one who claims that his right is or may be affected by the proposed changes. In Hansen v. Larsen, 44 Mont. 350, 120 P. 229 (1911), the court read the statutory precursor to the present change provision as positing injury to other water rights as a matter of defense to an attempted change of an appropriation and as not otherwise affecting the validity of the original appropriation. Thus, the burden of proving injury fell to other appropriators on the source of supply. See also McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (19913).

Cogent arguments can be made that such an allocation of the burden of proof was implicitly changed by the adoption of the Montana Water Use Act. See MCA 85-2-101, et. seq. (1979). The modern statutory provision governing changes of water rights provides explicitly that an appropriator desiring a change in the character of his water right must affirmatively seek an authorization for such a change from the Department of Natural Resources and Conservation. MCA 85-2-402(1) (1979). Indeed, MCA 85-2-122 (1979) provides that it is a misdemeanor to willfully proceed with such a change absent prior administrative approval. The historical statutory counterpart to this change provision as construed in Hanson did not mandate such a threshold or initial imprimatur. Since the new procedure makes a determination of no adverse effect a condition precedent to the authorization for a

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change of a water right and thus markedly changes the former construction of the change of water right process, it is reasonable that an applicant for such a change now finds himself within the well-settled rule that the proponent of an order has the burden of establishing all those necessary to support such an order.

The statutory language directing the Department upon the filing of a valid objection to "hold a hearing thereon" does not reaffirm the objector's burden of proof. The use of "thereon" in this context merely refers to the dispute defined by the objection. Similar verbiage is used in connection with the new water permit statutes (See MCA 85-2-309 (1979)), and it is clear in that context that the burden of proof is on the Applicant. Compare MCA 85-2-311(6) with MCA 85-2-311(2) (1979), see also MCA 895-2-311(7) (1981 amend.)

Perhaps the best approach is reflected in Salt Lake City v. Boundary Springs Water Users Assn., 2 Utah (2d) 141, 270 P.2d 453 (1954). Therein, the court allocated to the petitioner for a change the burden of establishing a prima facie case to the effect that no impairment to vested rights will result from the change. Persons opposing such applications must demonstrate that their rights will be impaired. Thus, applicants bear the burden of producing sufficient evidence such that reasonable minds might differ as to whether the proposed change will work injury, while objectors upon fulfillment of this burden remain with the duty of proving by a preponderance that their respective appropriations will be abridged by the proposals of the applicant. This

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mitigates against the harshness of requiring appropriators seeking changes to prove a negative in a situation where the facts potentially establishing its absence are in the peculiar province of the objecting appropriator. Moreover, it allocates to the applicant only the general duty of establishing that his proposed changes will not create a greater demand on the source of supply than what was extant as a consequence of his former water usage. Changes to newer and more beneficial uses of water are thus not unduly fettered, while the statutory aim of preventing injury to other appropriators is encouraged.

Whatever the precise description of the evidentiary burden, if it falls on the applicant the present Request for Authorization to Change an Appropriation Water Right must fail. The record is barren as to the characteristics of the former water usage, and therefore no assessments can be made concerning any increased demand on the source of supply by virtue of the change. Indeed, if anything, the Applicant's own evidence tends to establish injury. If one can presume from the alleged vintage of the extant right and its relatively modest proportions that the water therefrom was used by way of flood irrigation, one can also assume that in keeping with such flood irrigation practices some of the water thus diverted was returned either through percolation or otherwise to the source of supply. Flood irrigation requires an additional quantity of water to "push" the water actually required by the plants across the irrigated place of use. Diverting the same quantity by Applicant's proposed sprinkler irrigation method will dry up these returns due to the

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more efficient nature of sprinkler application. Thus, downstream water users, who in the present matters have demonstrated an inability to secure their water needs as early as July, are deprived of waters that have been historically available to them. See Creek v. Bozeman Water Work Co., 15 Mont. 121, 38 P. 459 (1894).

Even if, however, the burden of proof is totally assigned to the only timely objector herein, and even if, without deciding the matter, the evidence is insufficient to establish injury to that objector's claimed water rights, Applicant's petition in this matter must nonetheless be denied for reasons detailed elsewhere herein.

4. The Applicant has failed to demonstrate the existence of any water right that is capable of being changed. There is no room for argument that such a showing is a prerequisite for an authorization to change. The statutes governing such change proceedings implicitly require that an Applicant make some showing of the subject matter of the proceeding.

Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructary interest only, and accords the appropriator no privileges by way of ownership of the corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some

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specified purpose. See Holmstrom Land Co., Inc. v. Ward Paper Box Co., 36 St. Rep. 1403, _____ Mont. _____, _____ P.2d _____ (1979). A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings.

Moreover, proof of the existence of a water right in change proceedings is necessary to give effect to the legislative intention disclosed by the permitting process for new water uses. See MCA 85-2-301 (1979) et. seq. Therein, the legislature has mandated that prospective appropriators demonstrate and establish the existence of specifically detailed criteria in order to initiate a new appropriation. MCA 85-2-311 (1979), see also MCA 85-2-311 (1981 amend.). At least some of those criteria clearly go beyond a simple finding of "no adverse affect to the rights of other persons" and the legislative intent reflected in these additional criteria cannot be circumvented by enlargement of existing uses through the change proceedings.

An appropriator can change only that which he has. New uses cannot be bootstrapped into old priorities by an imaginative use of the change of water of water right notion.

> This was a change in the original use and resulted in a consumption of the quantity so diverted to the new use, and therefore amounted pro tanto to a new appropriation. Such being the case, under the rule above stated, the court reached the proper conclusion, to-wit, that the right to use this amount for this purpose must bear the date at which the change was made. Featherman v. Hennessy, 43 Mont. 310, 317, 115 P. 983 (1911)

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It is settled law in this state that an appropriator may change the place of diversion and change the use of the water (Thomas v. Ball, 66 Mont. 161, 213 Pac. 597), but such change cannot be made to the prejudice of subsequent appropriators (Head v. Hale, 38 Mont. 302, 100 Pac. 222; Carlson v. City of Helena, supra; Lokowich v. City of Helena, supra). But an appropriator cannot be permitted to use the water for the purpose for which it is appropriated, and then, in the interims when not continually used by him, sell the same for use by other persons. The supreme court of Montana, in considering this question, used this language: 'It has been held that an appropriator of water may change the use of his appropriation from one purpose to another, (Meagher v. Hardenbrook, 11 Mont. (385) 381, 28 Pac. 451, and cases cited), but it has never been held in this state (nor are we cited to like holding elsewhere) that after an appropriator has used the water sufficiently to answer the purpose of his appropriation, he might take the waters of the stream remaining, which he could not use for the purpose of his appropriation, and sell it to other parties, thereby depriving subsequent appropriators of their right to use the same.' Creek v. Bozeman Waterworks Co., 15 Mont. 121, 131, 38 Pac. 459; see also, Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 Pac. 11.) Galiger v. Mcnulty 80 Mont. 339, 260 P.401 (1927);

Since an appropriator cannot in the normal course of exercising his appropriative right expand or otherwise enlarge his historic beneficial use by virtue of his original appropriation, it is clear that the same cannot be done under the guise of a change proceeding. See also, Gans & Hein Investment Co. v. Sanford, 91 Mont. 512, 8 P.2d 808 (1932). Therefore, the petitioner must adduce proof of the extent and character of the right that forms the subject of the change proceeding. The Department is not compelled in this regard to accept the allegations contained in the Application for Change as true. It could not have been the legislative intent to have the Department form abstract and hypothetical opinions as to the potential

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adverse affects occurring from changes of water rights that may or may not exist. Such a gleam-in-the-eye philosophy is utterly at odds with the fundamental tenets that describe an appropriative right.

It is true that the Department has no authority or power to adjudicate water rights. That task is left to the courts by virtue of MCA 85-2-211 (1979) et. seq. However, determining the character of an existing right for the purposes of implementing the change statute has nothing to do with such a determination for purposes of adjudicating that right. The character of the proceedings are fundamentally of different orientations. A finding of no extant water right pursuant to a change proceeding merely determines that an applicant has not shown himself to be entitled to a change pursuant to the statutory provisions detailing the method and manner of making such changes.

If and when the court adjudicates the petitioner's right, the water right holder can then reapply with the Department for a change with such a decree evidencing the scope and character of his existing right. Moreover, a change of a water right that is subsequently adjudicated in a greater amount merely reflects that no all of the previously existing right has been devoted to the changed purposes. On the other hand, if the Department should authorize the change of a water right for a greater quantity of water than is subsequently recognized in the adjudication process, the change inevitably must be pro tanto reduced in conformity with the decree. The dual purposes and characteristics of these types of proceedings are further

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evidenced by the differing sorts of proof that are called for in each. Change proceedings, for example, will involve little in the way of issues of priorities except insofar as these questions arguable bear on the injury question. Priority is only tangentially concerned with the issue of whether a water right exists at all. It is, however, central to the adjudication process as it provides the framwork for subsequent regulation of the source of supply. See MCA 85-2-234(1) (1979). Similarly, depending on the sort of change requested, precise delineations of the place of use or points of diversion are largely immaterial to change proceedings. Compare MCA 85-2-234(a) & (e).

Proof of a water right in a change proceeding must, however, answer to the concerns delineated herein, and must encompass those things that go to the existence of the right itself as opposed to those features that merely provide a basis for the regulation of that right. It is not odd that judicial and administrative tribunals find themselves charged with related tasks. Indeed, the doctrine of primary jurisdiction has evolved to omeliorate the potential difficulties that may arise from such division of labors. See generally, FMB v. Isbrandtsen Co., 356 U.S. 481, (1958); Best v. Humboldt Mining Co., 371 U.S. 334 (1963).

The evidence of an existing right as reflected in the present record is practically non-existant. In support of his claim for an extant right, the Applicant submitted a "Declaration of Vested Groundwater Rights" bearing the signature of one Clairance Firestone. The document bears the reference of the Applicant's

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Exhibit No. J, and claims by its terms to be executed by virtue and under Chapter 237 of Montana Section Laws of 1961. Subsection (H) of that provision provided generally that persons who have put groundwater to a beneficial use prior to January 1, 1962, may file a declaration to that effect in the office of the county clerk in the county in which the claimed right is situated. The statute then sets forth with particularity the sorts of information to be contained therein. Finally, the provision provides that "(t)he Declaration of Vested Groundwater Rights herein provided for shall be taken and received in all courts of this state as prima facie of the statements therein contained." For purposes of analysis herein, it will be assumed that the Applicant is a successor in interest to Clairance Firestone and that the above-referenced document was filed with the Clerk of Flathead County, Montana, by January 1, 1964. It will also be assumed that because this document purports to evidence an existing right at the time of its filing, Applicant is not required to prove the beneficial use of the water claimed over a reasonable period of time despite the filing. Holmstrom Land Co. v. Ward Paper Box Co., supra. Even given these basics, however, the document does little in the way of establishing a water right for the purposes of this change proceeding. Compliance with these statutory requirements so that the filings assume a status of prima facie evidence of the statements contained therein has been strictly construed due to the self-serving character of the contents of any such filings. See Musselshell Valley Farming and Livestock Co. v. Couley, 86 Mont.

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276, 283 P. 213 (1929); Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103 (1964), Gallahan v. Lewis, 105 Mont. 294, 72 P.2d 1018 (1937). It is not necessary to decide whether the repeal of these filing statutes has ended the evidentary benefits of such a filing. In these particular circumstances, the document executed by Clairance Firestone does not rigorously meet the statutory requirements. The statements contained therein are perfunctory at best, and do not therefore meet the statutorily described matter that such statements or filings must reflect. Moreover, even if the statements are given prima facie evidentary effect, the filing itself claims that only one acre-foot of water was withdrawn pursuant to this right annually. The filing does contain a notation that this amount will be increased to 40 acre-feet per year, but this does not comport with the statutory requirements, and moreover, such a claim requires proof of subsequent beneficial use. Holmstrom, supra. Moreover, such a one acre-foot measurement is totally at odds with Applicant's claims herein.

The record also reflects a copy of an aerial photograph upon which is reflected a lighter shaded area which may indicate a cleared portion of the land. However, it would require quite a leap of faith to accept Applicant's allegations as to the past character of the water right it seeks to change based solely on this. Also reflected in the record is a copy of a water resources survey conducted by the State of Montana. Therein, an apparent employee of the former State Engineer's Office, apparently found water being used from a certain well for stock

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purposes. This survey further remarks that most of the land was timber and "what is partly cleared is rough and full of stumps." It therefore does not appear, at least as of the approximate date of the survey being June of 1964, that any irrigation was taking place pursuant to Applicant's claimed right.

The foregoing is the most descriptive portion of the evidence Applicant offered to establish an existing right to the use of water. Nothing therein reflects the amount historically used, nor does anything therein reflect the amount of lands historically irrigated. Indeed, Applicant is unsure of the historical location of the well, and merely dug his present well to an approximate depth of thirty (30) feet somewhere in the vicinity of the land formerly owned by Clairance Firestone. All of the foregoing falls short of demonstrating any existing right to the use of water.

APPLICATION NO. 26719

FINDINGS OF FACT

1. On November 13, 1979, and Application for Change of Appropriation Water Right was filed with the Department of Natural Resources and Conservation on behalf of Meadow Lake Country Club Estates. The Application alleges that the past use of the water has been in the amount of 1.25 cubic feet per second up to 125 acre-feet per year out of Granier Creek. The application further alleges that such water has been used historically from May 1 to September 30, inclusive, of each year,

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for the irrigation of approximately 52 acres, 42 of which are now devoted to a golf course. The present points of diversion are alleged to be located in the SE1/4 SE1/4 NW1/4, and SW1/4 SE1/4 SW1/4, all in Section 6, Township 30 North, Range 20 West. The present place of used is claimed to be in the E1/2 SW1/4 and in the W1/2 SW1/4 of Section 6, Township 30 North, Range 20 West. The Applicant proposes to change the point of diversion to a point in the SW1/4 SE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, and further petitions for the authorization to use the water heretofore described in the E1/2 W1/2 and in the W1/2 E1/2 of Section 6, Township 30 North, Range 20 West. The Applicant also seeks to change part of the water historically used for the irrigation of a hay meadow to the irrigation of its golf course.

2. The application was duly published for three successive weeks in the Hungry Horse News, a newspaper of general circulation printed and published in Columbia Falls, Montana, and in the Daily Inter Lake, a newspaper of general circulation printed and published in Kalispell, Montana.

3. On September 29, 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation on behalf of Dick-Char Corporation. The objection alleges generally that the objector has certain water rights in the same source of supply, and inferentially claims that approval of the application will work injury to these rights.

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4. On September 25, 1980, an objection to the granting of this application was filed by Mable M. and Matt W. Koskela. These objectors allege generally that they have prior existing water rights in the source of supply, and inferentially allege that the approval of the application will work injury to these rights.

5. On September 25, 1980, an objection to the granting of this application was filed with the Department by Mr. and Mrs. Richard Walch. This objection alleges generally that the objectors have prior existing water rights in the source of supply and inferentially alleges that the granting of the application will work injury to these rights.

6. Oren Reed, by his attorney Leonard Kaufman expressly moved to intervene in this proceeding and alleges generally that he is the owner of certain existing rights in the source of supply that may be injured by the granting of this application. Indeed, because the hearing in this matter was consolidated with all matters pending on behalf of Meadow Lake's Country Club Estates, all objectors to all of these matters presented evidence generally. In light of the disposition to be made of this application, no prejudice accrued to the Applicant by virtue of this procedure.

7. Part of the waters requested to be changed herein have in turn been the subject of a change of water right proceeding. That is, the application in this matter seeks to change in part previously changed waters. Pursuant to Authorization to Change No. 13917-c76LJ issued by the Department of Natural Resources and

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Conservation on February 16, 1979, the Applicant herein was authorized to use 561 gallons per minute up to 105 acre-feet per year to be diverted at a point in the SE1/4 SE1/4 SW1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County, and to use the above-referenced water to irrigate a total of 42 acres, more or less, located in the W1/2 SE1/4 and the E1/2 SW1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County. The Applicant now desires to change his point of diversion to a point in the SW1/4 SE1/4 SW1/4 and to use the above-referenced quantity of water on 83 acre, more or less, in conjunction with other rights on the E1/2 W1/2 and W1/2 E1/2 Section 6.

8. No claim was made herein that any of the noticed procedures pursuant to Applicationfor Change of Appropriation Water Right No. 13917-c76LJ were defective. The authorization to change pursuant to that application is now final insofar as the Department of Natural Resources and Conservation is concerned.

9. The change of the 561 gallons per minute up to 105 acre-feet per year countenanced by the previous authorization to change to the above-described new point of diversion and new place of use will not work injury to other appropriators. No substantial accretions to the source of supply are reflected by the record between the old point of diversion and the new point of diversion, and no intervening diversion points of other appropriators exist. Moreover, the inclusions of new lands to be irrigated will not work injury to other appropriators so long as no more than 561 gallons per minute up to 105 acre-feet per year

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is diverted from the source of supply. The Applicant testified through its project director that the aforesaid quantity of water is presently and has been historically used for sprinkle irrigation of 42 acres more or less of its golf course. Applicant now desires to expand the place of use to a total of 83 acres more or less and use the 561 gallons per minute up to 105 acre-feet per year for the irrigation, in conjunction with other rights, of its golf course. Since sprinkler irrigation methods create miniscule amounts of seepage, irrigation at a further distance from the source of supply will not affect the timing or rate of flow of that source of supply.

10. The Applicant also desires to change an additional 20 acre-feet formerly used for the flood irrigation of a certain hay meadow to the above referenced place of use from the above-referenced new point of diversion for the sprinkler irrigation of its golf course. The applicant has failed to demonstrate the character or extent of the source of this existing right.

11. The evidence fails to show that the transfer of the water alleged to be used to irrigate the hay meadow will not work an enlargement of that historic use.

CONCLUSIONS OF LAW

1. MCA 85-2-402 (1979) provides that (a)n appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this seciton and approved by the Department. Subsection (2) thereof directs the

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Department to "approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons." The burden of proof of injury to a particular right is on the objector claiming the same. See discussion, infra.

2. The transfer of 561 gallons per minute up to 105 acre-feet per year to be diverted in a point in the SW1/4 SE1/4 SW1/4 Section 6, Township 30 North, Range 20 West, will not work injury to other persons. Equally, using the said quantity on 83 acres more or less in the E1/2 W1/2 and the W1/2 E1/2 Section 6, Township 30 North, Range 20 West, will not work injury to other appropriators. Sprinkler irrigation methods will not create seepage under proper management. As concluded elsewhere herein, the total amount of Applicant's water is reasonable for Applicant's purposes. At any rate, objectors have no vested right to the maintenance of wasteful conditions, and nothing herein shall be construed to purport to authorize such wasteful practices.

3. The Applicant has failed to show an existing right so that an additional 20 acre-feet may be transferred to the new place of use from the new point of diversion. The requirement of such a showing is discussed elsewhere herein. The Applicant has done virtually nothing to establish the existence of a prior right. Although the Application claims that the right is evidenced by a notice of appropriation, that notice was not introduced into the record, and the copy otherwise in possession of the Department is illegible. Assuming that such a filing met all the statutory requirements insofar as they apply in order to

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give such a document prima facia evidentiary effect, Applicant must nonetheless prove a beneficial use of the amount claimed over reasonable period of time. Holmstrom, supra. The only evidence bearing even marginally on the existence of a prior right stems from a water resources survey conducted by the State of Montana. That survey reflects the self-serving statements of purported appropriator Henry Larkin, and also references that in and about the time of the survey being June of 1964, no irrigation was being conducted out of this right. Indeed, the project director of Meadow Lakes, the Applicant's only witness, has admitted that he knows nothing of the character or extent of the supposedly prior existing right.

4. The Department has jurisdiction over the parties hereto, and pursuant to the above-cited statutory provision, has jurisdiction over the subject matter herein.

WHEREFORE, based on the Findings of Fact, Conclusions of Law, the following proposed Orders are hereby issued.

1. Application for Beneficial Water Use Permit No. 26722-s76LJ by Meadow Lake Country Club Estates is hereby ordered denied and dismissed in its entirety.

2. Application for Beneficial Water Use Permit No. 26723-s76LJ is hereby granted to Meadow Lake Country Club Estates to appropriate 560 gallons per minute up to 16.5 acre-feet per year for irrigation of its golf course located and comprised of 20 acres more or less in the NE1/4 and 20 acres more or less in the NW1/4 and 20 acres more or less in the SW1/4 and 23 acres more or less in the SE1/4 of Section 6, Township 30 North, Range 20 West,

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all in Flathead County. These waters shall be diverted from the source of supply Granier Creek, also known as Gagner or Lost Creek, only from April 1 to June 1, inclusive, of each year. The point of diversion shall be located in the SW1/4 SE1/4 SW1/4 Section 6, Township 30 North, Range 20 West, all in Flathead County. The Applicant may further store these waters by filling, refilling, and otherwise successively filling a storage structure with a capacity of approximately 16 acre feet. The Applicant may store such waters continuously throughout each year, but may only divert out of storage for the irrigation of its golf course from April 1 to October 31, inclusive, of each year. Any waters remaining in the storage structure on November 1 of any year or at such earlier time as Applicant ceases diversions from storage for irrigation of its golf course, shall be designated as carry-over storage, and may be retained in storage for use in subsequent years.

3. Application for Beneficial Water Use Permit No. 26718-s76LJ is hereby granted to Meadow Lake Country Club Estates to appropriate 200 gallons per minute up to 33 acre-feet per year for the irrigation of its golf course which is located and comprised of 20 acres more or less NE1/4 and 20 acres more or less in the NW1/4 and 20 acres more or less in the SW1/4 and 23 acres more or less in the SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The source of supply shall be waste water or sewage effluent from a neighboring subdivision, and the Applicant by virtue of this permit may store such waters continuously throughout the year, and may fill,

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refill, and otherwise successively fill the storage structure with a capacity of approximately 16 acre feet so as to capture the above-described quantities of water. Applicant may divert from such storage structures for irrigation of its golf course from May 1 to October 31, inclusive, of each year. On November 1 of any year, or at such earlier time as Applicant ceases diversions from storage for irrigation of its golf course, the amount of water remaining in the storage structure shall be designated as carry-over waters, and may be retained in storage for use in subsequent years. The point of diversion of these waters shall be in the SW1/4 SW1/4 SE1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County.

4. To give effect to the two (2) independent permits contemplated in these matters for the same storage structure, the amount in storage in any given year on April 1 shall be estimated and shall be charged 1/3 to Permit No. 26719-c76LJ and 2/3 to Permit No. 26718-s76LJ, those being the proportions that each permit bears to the total storage contemplated by the single reservoir structures. These amounts shall be part and parcel of that particular year's appropriative limit with respect to each individual permit.

5. Application for Change of Appropriation Water Right No. 26720-c76LJ by Meadow Lake Country Club Estate is hereby ordered denied and dismissed in its entirety.

6. Application for Change of Appropriation Water Right No. 26719-c76LJ by Meadow Lake Country Club Estates is hereby granted in part and denied in part. Meadow Lake Country Club Estates is

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hereby authorized to divert 561 gallons per minute up to 105 acre-feet per year from a point in the SW1/4 SE1/4 SW1/4 of Section 6, Township 30 North, Range 20 West, all in Flathead County. Meadow Lake is also hereby authorized to use the aforesaid quantity of water in the E1/2 W1/2 and the W1/2 E1/2 of Section 6, Township 30 North, Range 20 West, all in Flathead County. The additional change of use of 20 acre-feet per year is hereby denied.

These Permits and Authorization to Change are granted subject to the following express conditions, limitations, and restrictions.

A. Any rights reflected or evidenced herein are subject to all prior and existing water rights, and any final determination of existing rights as provided by Montana Law. Nothing herein shall be construed to authorize the diversion or use of water to the detriment to any degree of any senior appropriator.

B. Measuring devices meeting the reasonable standards of the Department shall be placed in Garnier Creek, also known as Gangner or Lost Creek, at a point where the said creek enters and leaves Meadow Lake Country Club Estates property with records of the volume of flow being kept and submitted to the Department upon request.

Record shall be kept of all pumping times and amounts pumped and these records shall be sent to the Department upon its request.

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C. Meadow Lakes Country Club Estates, its agents and/or employees shall not use more water than is reasonably required for the irrigation of the lands described herein.

D. Failure to abide by the terms and conditions delineated herein may result in the revocation of the Permits involved herein and/or the revocation of the Authorization to Change involved herein.

E. Applicant shall proceed with reasonable diligence in the completion of the appropriations reflected herein and in the completion of all things necessary to effectuate the change described herein.

F. Meadow Lake Country Club Estates is hereby accorded an opportunity to petition the Department to hear further evidence as to the existence and scope of any existing rights the Applicant may own or claim that were the subject matter of the Applications for Change of Water Right involved herein. Said petition, if any, shall set forth the character of any such evidence to be adduced, and shall be filed with the Department by the time limits set forth herein for any exceptions or objections to this Proposal for Decision.

purposes.

G. The granting of any of these applications does not relieve Meadow Lake Country Club Estates from any liability for any damage caused by the exercise of such permits or authorizations, nor does the Department in issuing the same acknowledge any such liability, even if said damage is the

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necessary and unavoidable consequences of diversions pursuant to these permits and/or authorizations.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. All objections and exceptions must be filed with and received by this Department on or before September 18, 1981.

DONE this 25th day of August, 1981.

Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59601
(406) 449-3962

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