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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 32257-s76L; AND APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHT NOS. 32236-C76L; 32237-C76L; AND 32238-C76L BY FRANK POPE	))))))	FINAL ORDER

* * * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision of September 14, 1984 (hereafter, "Proposal") has expired. Two submissions, from Chuck Brasen, and from the Applicant, were received. Having given the matter full consideration, and being fully advised in the premises, the Department of Natural Resources and Conservation (hereafter, the "Department") hereby expressly adopts the Proposal as its Final Order, and incorporates same herein by reference, except as expressly modified below. The Department's response to the submissions immediately follows:

I.

(A) Applicant, by and through counsel of record Sam Haddon, submitted a timely response to the Proposal. Therein, the Applicant suggested Finding of Fact No. 19 should be amended to state that Applicant's claimed current point of diversion for Application No. 32237-c76L is NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana.[1]

[1] Finding No. 19 now describes the diversion point as "NW¼NE¼ of Section 4; Township 19 North, Range 19 West, Lake County, Montana. P. 4, Proposal.

CASE # 32257

Finding of Fact 19 correctly described the "past" point of diversion described in Applicant's Application 32237-c76L, and therefore, that which was published pursuant to § 85-2-307 MCA (1983).

Applicant now states that his original Statement of Claim and Application 32237-c76L were incorrect, and that an amended SB76 Claim was filed. Therefore the additional Findings should be made to correct the inadvertant mistake.

Mr. Brasen also made reference to this diversion point mystery, submitting illegible copies of documents in support thereof. The copy of SB76 Claim form 015152 clearly showed, however, the corrected diversion point, NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19 West. A copy of a map submitted with the Claim shows the diversion point the Applicant now refers to as the correct one. SB76 Claim No. W-015152 also includes the documentation of a copy of Book A, Page 359, as listed on the Application for Change 32237. Obviously, the difficulty is that the Change Application was incompletely, as well as erroneously, filled out. The fact that Mr. Pope intended to change a part of existing Claim No. W-015152 could not have been inferred from the record, as the total volume claimed on the existing right claim (800 acre-feet) does not match the volume claimed on the change application as past use (206 acre-feet).

Nevertheless, the Applicant has in good faith represented that the correct past point of diversion is one which was in fact claimed on the SB76 forms, and the Department sees no reason not to allow the correction at this point.

The Department notes that this would result in the granting of an Application different from that which was published pursuant to § 85-2-307 MCA (1983). The determination of whether such action comports with due process entails resolution of whether the difference between the Application as granted is materially different from that which was published.[2]

If so, additional public notice of the revised Application would be required. It is crucial to the materiality of the difference whether any possible affected persons would be deprived of meaningful notice and opportunity to be heard on the Application as now amended. See, Mullane v. Central Hanover Trust, 339 U.S. 306 (1950); Frates v. Great Falls, 40 St. Rep. 1307 (1983); In the Matter of the Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co., Proposal for Decision, April 4, 1984, Final Order July 25, 1984, (appeal on other grounds pending).

On the record herein, it appears that the past point of diversion as published and the past point of diverison as now "corrected" are not geographically far apart. The new point of diversion was correctly published. Because most, if not all, of the Ashley Creek water users did appear and participate in the hearings and settlement herein, it appears that there are no water users whose rights to notice (of departmental action which

[2] The notice statute requires the publication of "facts pertinent to the application", § 85-2-307 MCA (1983). For the purposes of this discussion "material" and "pertinent" facts are synonymous.

might affect their rights) would be deprived by the correction of the past point of diversion sought to be changed by the Applicant. Such will not, of course, always be the case, emphasizing the importance of careful attention to application filing. Findings of Fact No. 23, 24 are therefore hereby added to read as follows:

23. Mr. Pope's original Application 32237-c76L incorrectly described his current point of diversion. The Applicant has represented to the Department and said representation is supported by the map attached to Mr. Brasen's comments and attached as a supporting exhibit to the pertinent SB76 Claim. The correct past point of diversion sought to be changed is the NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana.

24. The Amendment of Application 32237-c76L to reflect the correct past point of diversion for existing right 015152 is not a material change in the pertinent facts of the Application.

(B) Because of the additional Findings above, related portions of the Proposal must be changed accordingly. As pointed out by Mr. Brasen, Conclusions of Law Numbered 15 and 16 must be modified as follows:

15. The point of diversion, as amended, on Application No. 32237-c76L, is claimed on SB76 Claim No. 015152-76L.

CASE # 32257

16. The Applicant has satisfied his burden of production to show the existence of the underlying rights sought to be changed herein.

(C) The Proposed Order must, accordingly, also be modified. Paragraph B. on P. 16 of the Proposed Order is hereby modified to read as follows:

B. Subject to the terms, conditions, restrictive, limitations, listed in attached exhibit A and made a part hereof by reference, Application for Change of Appropriation Water Right No. 32237-c76L by Frank Pope, as amended, is hereby granted to change the point of diversion from the NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana.

II.

On P. 17 of the Proposal, regarding the amount and purpose of use for Application 32236-c76L, the number "780" gpm should be 1780 gpm. Therefore, the Final Order will read, for Application 32236-c76L, Amount and Purpose of Use: 10 gpm up to 4.5 acre-feet per year for livestock; 1780 gpm up to 400 acre-feet per year for irrigation; 10 gpm up to 1.5 acre-feet per year for domestic use.

CASE # 32257

III.

Both Mr. Brasen and the Applicant questioned the need for the condition entitled ¶ a) in Exhibit A of the Proposed Order. Mr. Brasen questioned the need, and the Applicant intimated simple reference to the Agreement would reduce the risk of future dispute.

Both comments miss the essential fact that the change authorizations are a matter between the Applicant and the Department, while the Settlement Agreement is binding as only among the parties thereto. Paragraph a) of Exhibit "A" relates not to the specifics of construction as agreed to among the parties hereto, but rather to the Department's duty to require adequate appropriative works. The Agreement provisions relating to the cost sharing among the parties are beyond Departmental jurisdiction, as the Department herein may not order the Objectors to do, or refrain from doing, anything.

It is clear from the Agreement that the parties have attempted to use the permit proceeding for the purpose of agreeing on a division of the waters of the source. This is beyond the scope of such a proceeding. If the parties wish to relitigate the Ashley Creek waters, they are, of course, free to bring an appropriate action in District Court.

The Department nevertheless, in view of the Agreement which may be taken as a representation by the Applicant of the specific construction plans intended for use in perfecting the Change Authorization herein, may incorporate into the Authorization some portions of the Agreement regarding diversion works

CASE # 32257

construction. As noted above, the paragraph requiring sufficiency in design and construction is not exactly co-extensive with the specifics of the Agreement. Its retention in the Authorization will not likely result in dispute among the parties hereto, as those parties are not entitled to enforce permit conditions. The construction specifics of the Agreement already are basically required of the Applicant in paragraph B. The Permittee is indebted to the Department to comply with Paragraph B; he is bound to the parties to comply with the Agreement.

IV.

Mr. Brasen points out that the Change Authorizations issued in this basin, as a matter of policy, and until the final court determination of the amount and nature of Reserved Rights of the Confederated Salish and Kootenai Tribes, and their possible exclusive jurisdiction over these waters, include additional conditions reflecting the lack of finality of the Authorization. Those standard conditions are as follows:

> This permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

CASE # 32257

NOTICE: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that economic investments made in reliance upon this permit, do not create in the Permittee any equity or vested right against the Tribes.

Additionally, a standard waiver of liability clause is customarily included in permits, and it has been added in the attached Order.

V.

Further, it could be clarified in the Permit Conditions that the Change Authorizations do not authorize the irrigation of any additional acres, i.e.: the irrigation beyond irrigation of lands historically irrigated with the subject existing rights. Therefore, Paragraph c of the Exhibit A is hereby amended to include,

"The Applicant will not, pursuant to these Change Authorizations, irrigate any acres but those historically irrigated under the existing rights subject to these Change Authorizations."

VI.

The Applicant, in his submission, further informs the Hearing Examiner of a new Change Application having been filed. The parties agreed, inter se, that the thrust of the Application No. 32257-s76L was not to divert an additional amount of water, but rather to utilize water saved or "recaptured" by replacement of a leaky ditch with a more efficient pipe. Further, the irrigation of the increased acreage is possible because of the increased efficiency of a sprinkler irrigation system as opposed to a flood system. That is, although the Applicant intends to increase his irrigated acreage, he does not intend to divert any additional water, as measured at the headgate.

In part because of the withdrawal of the new use applicaiton and the submission of the change application, the objectors withdrew their objections to the instant applications and agreed not to protest the amended or new change application. (See paragraphs 6, 11 of Agreement.) The change in the type of application does not change the nature of the beast for which authorization is sought. And, whether or not any objectors to the change application surface, the Department, prior to granting such authorization, must independently determine whether the change in the burden on the stream attendant to change in return flow pattern, and reduction in volume of return flow from increased upstream efficiency, constitute adverse affect to the right of other persons, or, in the alternative, amount to such a measureable increase in consumption that a change authorization could not be issued. That is, if the net stream depletion

increases as a result of the change, or, if consumptive use of water increases as a result of the change, the increased consumption may necessarily be characterized as a new use, and may not be afforded the luxury of the priority date of the original right.

In other words, without inferring anything about future Departmental action on the pending change application; while Mr. Pope's actions have gained him settlement among neighbors, they have not guaranteed him issuance of the change authorization.

Of course, if the Department were ultimately to deny the change, on the basis that the increase in historic consumption constituted a new use for which an application for beneficial water use permit is needed, and the parties herein were to object and hearing be held, it is not certain that the statutory criteria for that new use could not be shown by substantial credible evidence.

Wherefore, being fully advised in the premises. the Department hereby enters the modifications above and the Proposal, so modified, as the Final Order herein, and makes the following:

ORDER

A. Subject to the terms, conditions, restrictions and limitations listed in attached Exhibit A and made a part hereof by reference, Application for Change of Appropriation Water Right No. 32238-c76L is hereby granted to Frank Pope to change the point of diversion for the following existing water right.

CASE # 32257

Current Use

Source of Supply: Ashley (Dry) Creek

Point of Diversion: SE¼SE¼, Section 33, Township 19 North, Range 19 West, Lake County, Montana.

Amount and Purposes of Use: 10 gpm up to 4.5 acre-feet per year for livestock; 880 gpm up to 200 acre-feet per year for irrigation; 10 gpm up to 1.5 acre-foot per year for domestic; for a total of 900 gpm up to 206 acre-feet per year.

Places of Use: 40 acres in the NW¼NE¼, Section 33, Township 19 North, Range 19 West, Lake County;

40 acres in the NW¼SE¼, Section 33, Township 19 North, Range 19 West, Lake County;

40 acres in the NE¼NW¼, Section 33, Township 19 North, Range 19 West, Lake County

Period of Use: Year-round use for the livestock and domestic use; April 1 to October 31 for the irrigation use.

Changed Use

Point of Diversion: SW¼NW¼SW¼, Section 34, Township 19 North, Range 19 West, Lake County, Montana.

B. Application for Change of Appropriation Water Right No. 32237-c76L by Frank Pope, as amended, is hereby granted to change the point of diversion of the following described existing right from the NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19

CASE # 32257

West, Lake County, Montana to the SW¼NW¼SW¼, Section 34, Township 19 North, Range 19 West, Lake County, Montana This change is subject to the terms listed below in Exhibit "A".

Past Use Of Water

Source: Ashley Creek

Amount of Water Appropriated: 1,125 gallons per minute up to 206 acre-feet.

Diversion Point: NE¼SE¼SE¼, Section 33, Township 19 North, Range 19 West, M.P.M., Lake County

Period of Diversion: January 1 to December 31

Use: 10 gallons per minute up to 4.5 acre-feet (01/01-12/31) for stock

1,105 gallons per minute up to 200 acre-feet (04/01-10/31) for irrigation

10 gallons per minute tup to 1.5 acre-feet (01/01/12/31) for domestic

Place of Use: SE¼SE¼Section 32, Township 19 North, Range 19 West M.P.M. Lake County, for stock, irrigation, & domestic

SW¼SW¼Section 33, Township 19 North, Range 19 West M.P.M., Lake County, for stock, irrigation, & domestic

NW¼NW¼Section 4, Township 18 North, Range 19 West M.P.M., Lake County, for stock, irrigation & domestic

Diversion Means: PAST (DITCH) - PROPOSED (PIPELINE)

CASE # 32257

C. Subject to the terms, conditions, restrictions and conditions listed in attached Exhibit A and made a part hereof by reference, Application for Change of Appropriation Water Right No. 32236-c76L by Frank Pope is hereby granted, to change his point of diversion as follows:

Current Use

Point of Diversion: SE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana.

Amount and Purposes of Use: 10 gpm up to 4.5 acre-feet per year for livestock; 1780 gpm up to 400 acre-feet per year for irrigation; 10 gpm up to 1.5 acre-feet per year for domestic use.

Places of use: 80 acres in the N½SW¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana;

80 Acres in the S½NW¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana;

Period of Use: Year-round for domestic and livstock use; April 1 through October 31 for the irrigation use.

Changed Use

Point of Diversion: SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, Lake County, Montana.

a) This change is subject to the terms, restrictions, limitations and conditions attached hereto as Exhibit A, and made a part hereof by reference.

CASE # 32257

D. Application for Beneficial Water Use Permit No. 32257-s76L by Frank Pope is hereby denied, without prejudice.

EXHIBIT "A"

a. The diversion works must be constructed in a good and sufficient manner and with the supervision of U.S. Soil Conservation Service or a private consulting engineer with a working knowledge of such projects.

b. The diversion pipeline will be no larger than a 12" pipeline for the initial approximately 96 feet of diversion, at which point the diversion line will be reduced to a ten inch line. At a point in the SW¼NE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana, the ten inch line will enter a distribution box and will be divided into two mains and thereafter transported to portions of the Pope land for irrigation and stock watering purposes.

c. At no time will the Applicant divert, pursuant to these change authorizations at a flow rate greater than 2,720 gpm nor divert any more than 818 acre-feet in any one year.

d. These Change Authorizations are subject to subsequent modification by the Water Courts of the State of Montana in the general adjudication proceeding, as well as to any final determination of the reserved and non-reserved federal water rights of the Confederated Salish and Kootenai Tribes by a court of competent jurisdiction, by compact, or by other proper authority.

CASE # 32257

e. This permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

NOTICE: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that economic investments made in reliance upon this permit, do not create in the Permittee any equity or vested right against the Tribes.

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

NOTICE

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

DONE this 3rd day of January, 1985.

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

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE # 32257

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 4, 1985, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Frank Pope, Application No. 32257-s76L, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Sam Haddon, Attorney
Suite 301
Central Square Bldg.
201 W. Main
Missoula, MT 59802

2. C.B. McNeil, Attorney
Box 450
Polson, MT 59860

3. William Jensen
Rt. 1, Box 75
St. Ignatius, MT 59865

4. Therin and Ruth Mahle
RR, Box 209
St. Ignatius, MT 59865

5. George and Irene Marks
Rt. 1, Box 87
St. Ignatius, MT 59865

6. Flathead Irrigation Project
E.M. Axtel
Box G
St. Ignatius, MT 59865

7. E.L. Meredith, USDI
Office of Solicitor
P.O. Box 1538
Billings, MT 59103

8. Clayton Matt
Water Administrator
Box 98
Pablo, MT 59855

9. Montana Power Company
40 East Broadway
Butte, MT 59701

10. Mr. William Devine
USDI Solicitors Office
500 N.E. Multnomah, Room 607
Portland, Oregon 97232

11. Chuck Brasen
Kalispell Field Office
(inter-departmental mail)

12. Sarah A. Bond
Hearing Examiner
(hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

CASE # 32257

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4th day of January, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

CASE # 32257

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 32257-s76L; AND APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHT NOS. 32236-C76L; 32237-C76L; AND 32238-C76L BY FRANK POPE	))))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, and to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") served upon all parties a Notice of Pre-Hearing Conference and Appointment of Hearing Examiner. On September 26, 1983, the Pre-hearing Conference notice was sent, and, on November 2, 1983, the Hearing Examiner sent to all parties a Notice of Hearing. Because of the parties oral requests therefor, the Hearing Examiner noticed an Order for Continuance on January 10, 1984. After settlement discussions between most of the Objectors and the Applicant culminated in the execution of a settlement agreement, the Hearing Examiner sent to all parties a Notice to Cancel Hearing on June 11, 1984. This last notice was to give ample notice to those parties not involved in the settlement agreement that unless a hearing was requested, none would be had. No written responses to the Notice having been filed, the Hearing Examiner has prepared this Proposal for Decision without benefit of hearing, as so requested by most of the parties.

CASE # 32257

I. STATEMENT OF THE CASE

A. Parties

The Applicant, Frank Pope, has duly applied for a Beneficial Water Use Permit, and for Changes of Appropriation Water Rights. (See discussion below.) Mr. Pope is represented by and through counsel Sam Haddon.

The following Objectors to the instant Applications are represented by and through counsel C.B. McNeil, Turnage, McNeil & Mercer: Mrs. William Bristol, Helen Yarbrough, Garr T. Jensen, William Ray Jensen, Denzel Gann, Dale Patrick Marks, Joseph Lee & George Marks.

Objector Flathead Irrigation Project was, early on, apparently "represented" by Project Engineer E. Murl Axtell, but later, it became apparent that Project's legal representation lay with the United States Department of Interior Solicitor's Office, Portland, Oregon. The Hearing Examiner was notified by one Mr. Kuhn at the Solicitor's Office that further correspondence relating to the Project's objection should be addressed to him, but later conversations with other Interior Department personnel have since indicated that a Mr. William Devine is the proper contact person.

The Hearing Examiner was informed by Mr. Kuhn that Project personnel have in the past taken it upon themselves to pursue various strategies without benefit of consulting or informing their counsel, and, apparently upon consultation with counsel regarding this case, they have now decided not to appear at any hearing in this matter.

CASE # 32257

The position of the Flathead Irrigation Project is apparently the same as that of Montana Power Company and the Confederated Salish and Kootenai Tribes: i.e.: each of these entities continues its objection to the Applications, but does not intend to participate if any hearing is held.

B. Case

Mr. Pope has filed 3 Applications for Change of Appropriation Water Right and one Application for Beneficial Water Use Permit. His project, however, may not result in a measurably greater net depletion of water from the source, Ashley Creek, that is, he intends to continue diverting the same amount of water he has historically diverted pursuant to his existing water rights.

The project for which Mr. Pope seeks authorization herein involves changing his historical point of diversion upstream and changing his method of diversion from headgate and ditch to pipeline. By moving his diversion point upstream, he will be able to place a diversion pipe under water in the stream, thus preventing the freeze-up in the winter which has in the past prevented him from exercising his stockwater rights. By replacing his ditch with a pipeline, he will be able to save water otherwise lost to leakage from the ditch. With the elimination of ditch loss and the increased efficiency attendant to changing from flood to sprinkler irrigation, Mr. Pope intends to increase the acreage irrigated by 30 acres.

CASE # 32257

The Objectors are other Ashley Creek water users, the Flathead Irrigation Project and the Confederated Salish and Kootenai Tribes. The Ashley Creek water users objected to the project primarily because they believed the new diversion structure would be impossible to monitor and would allow Mr. Pope to take more than his allotted share of Ashley Creek water.

Historically, the Creek has been split 50-50 at Mr. Pope's present diversion point. If the new structure were to be authorized, the historic means of correcting the Ashley Creek allocation, (simply moving large rocks in the stream to facilitate or impede water flow into various ditches) would no longer be available - the sole means of adjusting the diversion would be by the control valve of Mr. Pope's diversion pipe.

Further, according to a field investigation report by DNRC Kalispell Field Office Water Rights Bureau Field Manager Chuck Brasen, Mrs. Bristol was concerned that Mr. Pope's change in point of diversion would affect her historic supply obtained through Mr. Pope's historic diversion point and present ditch.

The Confederated Salish and Kootenai Tribes object on the basis that the State of Montana, through the Department, has no jurisdiction over the waters arising upon, flowing by, or flowing through the Flathead Indian Reservation.

The Flathead Irrigation Project filed an objection alleging that the proposed change would increase the Applicant's consumptive use of water from Ashley Creek and thereby decrease an already short supply for the Flathead Irrigation and Power Project. This Objector focuses on the allegation of increased

CASE # 32257

net depletion to the stream, rather than the question of the amount actually diverted from the stream at the headgate. That is, although the Applicant proposes to divert the same amount of water from the stream, the net depletion from the stream will be greater under the proposed use, because the consumptive use will be higher. This is because the proposed changes will result in more land being irrigated, so the amount of water consumed by the crops will increase, and the amount of return flow to the creek will be less. The reduction in return flow will also result, in part, from the increased efficiency of the project. Further, the Project does not waive its right to challenge the State's jurisdiction over the matter.

Neither the Project nor the Tribes wish to attend a hearing.

Objectors Theron and Ruth Mahle stated in their objection that they would only agree to permit issuance if Mr. Pope continued to receive his water from his original ditch, because the proposed changes and new use would adversely affect spring flow upon which these Objectors rely. Further, the change application was specifically alleged to dry up the Objector's springs, which are fed (presumably) by seepage from the ditch. The Mahles were served with a copy of the Notice to Cancel Hearing, and although they are not parties to the settlement agreement, it must be assumed that they no longer wish to pursue their objection.[1]

[1] The Mahles did not attend the pre-hearing conference of October 20, 1983, but did receive copies of the notice of the time, date, and place of that pre-hearing conference.

CASE # 32 257

Montana Power Company filed an objection to No. 32257-s76L alleging generally that the proposed appropriation is from Ashley Creek, upstream from Thompson Falls Dam, and that because of insufficient unappropriated waters, the issuance of the Permit would adversely affect the prior appropriative rights of Montana Power. After receiving a Notice of Hearing,[2] however, the Montana Power Company (hereafter, "MPC") filed a letter stating that it would not appear. The objection also stated that no hearing was requested.

II. FINDINGS OF FACT

1. The Department has jurisdiction over the parties and over the subject matter herein.

2. The instant Applications were filed with the Department as follows: No. 32257-s76L on January 9, 1981 at 5:00 p.m.; No. 32236-c76L January 9, 1981 at 5:00 p.m.; No. 32237-c76L on March 9, 1981 at 2:15 p.m.; and No. 32238-c76L on March 9, 1981 at 2:00 p.m..

3. The pertinent facts of the Applications were published as follows: No. 32257-s76L on May 28, June 4, and June 11, 1981; No. 32236-c76L on April 23, 30, and May 7, 1981; No. 32237-c76L on April 23, 30, and May 7, 1981; and No. 32238-c76L on April 30, May 7, and May 14, 1981, all in the Flathead Courier, a newspaper of general circulation in the area of the source.

4. The Applicant seeks to appropriate water as follows:

[2] The letter referred to was in response to an earlier notice of hearing, sent out in 1981.

CASE # 32257

a) No. 32257-s76L; 500 gallons per minute (hereafter, "gpm") up to 165 acre-feet each year, from Ashley Creek, for irrigation use between April 10 and October 20 of each year, the diversion points to be in the SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, and in the NE¼SE¼SE¼ of Section 33, Township 19 North, Range 19 West, all in Lake County, Montana. The places of use are: S½SE¼SE¼ of Section 33, Township 19 North, Range 19 West, 20 acres for new flood irrigation; the S½NW¼NE¼ of Section 33, Township 19 North, Range 19 West, for new sprinkler irrigation of 10 acres; the W½NW¼NE¼ of Section 33, Township 19 North, Range 19 West, for supplemental sprinkler irrigation on 20 acres; the NE¼NW¼ of Section 33, Township 19 North, Range 19 West for supplemental sprinkler irrigation of 25 acres, all in Lake County, Montana.

b) No. 32236-c76L; seeking to change the point of diversion for an 1800 gpm up to 406 acre-feet water right from Ashley Creek, from the SE¼SE¼ of Section 33, Township 19 North, Range 19 West, to the SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, Lake County, the places and purposes of the use of that right are not sought to be changed, except that the means of diversion would change from ditch to pipeline. The uses are: 10 gpm up to 4.5 acre-feet year for year round stock use; 1780 gpm up to 400 acre-feet for irrigation use between April 1 and October 31 of each year; and 10 gpm up to 1.5 acre-feet for year round domestic use. The places of use to be N½SW¼ of Section 33, Township 19 North, Range 19 West (for stock, irrigation and

CASE # 32257

domestic), and the S½NW¼ of Section 33, Township 19 North, Range 19 West, (for stock, irrigation and domestic) all in Lake County, Montana.

c) No. 32237-c76L seeks to change the flow rate, and point of diversion for 1125 gpm up to 206 acre-feet (10 gpm up to 4.5 acre-feet for year-round stock use; 1105 gpm up to 200 acre-feet for irrigation use between April 1 through October 31 of each year, with a year round diversion period; and 10 gpm up to 1.5 acre-feet for year-round domestic use) the point of diversion would be changed from the NW¼NE¼ of Section 4, Township 18 North, Range 19 West to SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, all in Lake County, Montana. The flow rate for the irrigation use would be reduced from 1105 gpm to 480 gpm. The places of use would remain the same: SE¼SE¼ of Section 32, Township 19 North, Range 19 West (for stock, irrigation and domestic use); SW¼SW¼ of Section 33, Township 19 North, Range 19 West (stock, irrigation and domestic use), and the NW¼NW¼ of Section 4, Township 18 North, Range 19 West, all in Lake County.

d) No. 32238-c76L seeks to change the point of diversion for 206 acre-feet of water from SE¼SE¼ of Section 33, Township 19 North, Range 19 West to SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, all in Lake County. The uses are as follows: 10 gpm up to 4.5 acre-feet for year-round use for livestock; 10 gpm up to 1.5 acre-feet for year-round domestic use. The past irrigation use claimed was a year-round diversion

CASE # 32257

for use from April 1 through October 31, with a flow rate of 880 gpm up to 200 acre-feet to irrigate 120 acres. The proposed use is the same except that the flow rate is reduced to 480 gpm.[3]

5. The Objectors Mrs. William Bristol, Helen Yarbrough, Garr T. Jensen, William Ray Jenser, Daniel Gann, Dale Patrick Marks, Joseph Lee, and George Marks, are all users of Ashley Creek water.

6. The Objector Montana Power Company apparently objects on the basis of its hydroelectric power generation facility at Thompson Falls. Whether it comprehends that the Application for new use was intended to use the water "saved" by the other Change Applications, is unclear. MPC only filed an Objection to No. 32257-s76L, the Application for new use.

7. MPC specifically did not request a hearing, and stated if one were held, it would not send representatives.

8. The Confederated Salish & Kootenai Tribes (the Tribes) filed objections to all the Applications. They object to the State's assertion of jurisdiction over waters arising in or flowing through the Reservation. Furthermore, they allege various discrepancies between Mr. Pope's description of past use, and the original notices of appropriation from which the rights stem.

9. The Tribes do not request a hearing.

[3] The Hearing Examiner noted, during her review of the files, that the description of the Applications given in the Notice of Hearing of November 2, 1983, was not entirely accurate. Because of the settlement of the matter herein, no material prejudice to any party occurs.

CASE # 32257

10. The Flathead Irrigation Project (the Project) objected to No. 32257-s76L on the basis that because of the increased acreage sought to be irrigated with the "saved" water, the new system would consume more water than the old use, thus reducing the return flows available for recapture and reuse by the Project and its members.

11. The Project does not seek a hearing in this matter.

12. Objectors Theron and Ruth Mahle object to the proposed use of a pipeline instead of a ditch, because their source of water includes springs apparently fed by seepage from the ditch.

13. The Mahles did not respond, after having been served, to the Notice to Cancel Hearing, i.e.: did not request a hearing.

14. The users of Ashley Creek have withdrawn their objections, stipulating to the existence of the statutory criteria, on the basis of an agreement executed January 3, 1984.

15. The changes in use proposed in Applications No. 32236-c76L, 32237-c76L, 32238-c76L will not result in an increased diversion from Ashley Creek.

16. The changes proposed by the Applications referred to above will have no adverse affect on any Objector.

17. The use proposed by Application 32257-s76L may or may not result in a greater net depletion to the Ashley Creek basin, but will not result in an increase in amount of water diverted from the Creek.

CASE # 32257

18. The Applicant's intent in filing No. 32257-s76L was to allow an increase in irrigated acres over his historically irrigated land using the water saved by diverting through a pipeline instead of a ditch, and by applying less water per acre through a spinkler system than was necessary to apply for effective flood irrigation.

19. In Application No. 32237-c76L the Applicant claims his current point of diversion is in the NW¼NE¼ of Section 4, Township 19 North, Range 19 West, Lake County, Montana.

20. A search of the DNRC computer records of the Statements of Claim of Existing Water Rights for the Water Courts of the State of Montana (hereafter "SB76" claims) discloses that Mr. Pope did not claim the point of diversion of paragraph 19 above, as an existing point of diversion for an existing water right.

21. Some of the terms of the settlement agreement attached hereto as Exhibit A, are beyond the authority of the Department to attach and enforce as permit conditions. Whether the terms are enforceable by a court of competent jurisdiction is not for the Department's determination.

22. Mr. Pope has represented, through paragraph 11. in the attached "Agreement" his intent either to withdraw his Application No. 32257-s76L, or to amend it to reflect its character as an Application for Change of Appropriation Water Right.

Wherefore, based on the record herein, the Hearing Examiner makes the following Proposed:

CASE # 32257

III. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and over the subject matter herein §§ 85-2-301 et. seq. MCA (1983).

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

3. § 85-2-311 MCA (1983) directs the Department to issue a permit,

"if the applicant proves by substantial credible evidence that the following criteria are met:
(a) there are unappropriated waters in the source of supply:
(i) at times when the water can be put to the use proposed by the applicant;
(ii) in the amount the applicant seeks to appropriate; and
(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
(b) the water rights of prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial use;
(e) the proposed use, will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved."

4. The Department may not issue a beneficial use permit where the applicant has no bona fide intent to appropriate. See, §85-2-310(3) MCA 1983; Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Tockey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). Further, the Department may not issue a permit for more water than is requested. §85-2-312(1) MCA 1983. Hence, because of the applicants expressed intent to terminate Application No. 32257-s76L, the Department cannot grant that Application or issue a permit therefore.

CASE # 32257

5. § 85-2-402(1) MCA 1983 provides, "An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the Department."

6. § 85-2-402 applies to existing water rights acquired prior to the effective date of the Water Use Act. Manuel Castillo, Debra Castillo, Gary Cotant, Sharyl Cotant v. Delbert B. Kunneman, ____Mont. ___, 39 St. Rep. 460 (March 3, 1992).

7. § 85-2-402(2) requires the Department to give notice of the proposed change if it determines that the change might adversely affect the rights of other persons. If valid objections are filed,* the Department must hold a hearing thereon prior to the approval or denial of the changes.

8. "The Department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators." § 85-2-402(4) MCA (1983).

9. The necessity for a hearing in the instant Applications has been obviated by the settlement reached by the parties who had requested that a hearing be held. The agreement implicitly stipulates to the existence of the statutory criteria, i.e.: that the requested changes will have no adverse affect on their rights.

* Further, the Department has the discretion to determine if the objection states a valid objection, thereby requiring hearing thereon.

CASE # 32257

10. Those parties who have not withdrawn their objections have requested no hearing be held.

11. An appropriator may not change a greater right than he possesses. To the extent that a proposed change will increase the amount of water diverted, for example, by increasing the period of use, the increased use amounts, pro tanto, to a new right. Featherman v. Hennessey, 43 Mont. 310, 115 P. 985 (1911).

12. An appropriator may not increase the burden on the stream to the injury of other appropriators. Thompson v. Harvey, 164 Mont. 133, 579 P.2d 963 (1974).

13. Appropriators do not have the right to insistence of maintenance of conditions of stream occurrence if they may reasonably exercise their rights under the changed conditions. Quigley v McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); § 85-2-401(1) MCA 1983.

14. On the record herein, it is impossible to determine whether the proposed changes will measureably increase the burden on Ashley Creek to the injury of other appropriators. Because of the agreement reached among parties outside of this administrative process, and the lack of evidence put forth by the Project, the Tribes and MPC, it must be assumed that, by virtue of the Objectors' settlement, the Applicant has satisfied his burden of proof on the issue of no adverse affect.

15. The point of diversion claimed as a current use on Application No. 32237-c76L, is not claimed on any SB76 claim as an existing point of diversion for Mr. Pope. Because a change cannot be granted for a right which does not exist, the

CASE # 32257

Department, absent further proof by Applicant of his existing right to the point of diversion claimed as current on this Application, cannot grant the change requested therein.

16. The Applicant satisfied his burden of production to show the existence of the underlying rights, except that claimed in Application 32237-c76L, by virtue of having filed SB76 claims thereon.

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

PROPOSED ORDER

A. Subject to the terms, conditions, restrictions and limitations listed in attached Exhibit A and made a part hereof by reference, Application for Change of Appropriation Water Right No. 32238-c76L is hereby granted to Frank Pope to change the point of diversion for the following existing water right.

Current Use

Source of Supply: Ashley (Dry) Creek

Point of Diversion: SE¼SE¼, Section 33, Township 19 North, Range 19 West, Lake County, Montana.

Amount and Purposes of Use: 10 gpm up to 4.5 acre-feet per year for livestock; 880 gpm up to 200 acre-feet per year for irrigation; 10 gpm up to 1.5 acre-foot per year for domestic; for a total of 900 gpm up to 206 acre-feet per year.

CASE # 32257

Places of Use: 40 acres in the NW¼NE¼, Section 33, Township 19 North, Range 19 West, Lake County;

40 acres in the NW¼SE¼, Section 33, Township 19 North, Range 19 West, Lake County;

40 acres in the NE¼NW¼, Section 33, Township 19 North, Range 19 West, Lake County

Period of Use: Year-round use for the livestock and domestic use; April 1 to October 31 for the irrigation use.

Changed Use

Point of Diversion: SW¼NW¼SW¼, Section 34, Township 19 North, Range 19 West, Lake County, Montana.

B. Application for Change of Appropriation Water Right No. 32237-c76L by Frank Pope is hereby denied.

C. Subject to the terms, conditions, restrictions and conditions listed in attached Exhibit A and made a part hereof by reference, Application for Change of Appropriation Water Right No. 32236-c76L by Frank Pope is hereby granted, to change his point of diversion as follows:

Current Use

Point of Diversion: SE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana.

CASE # 32257

Amount and Purposes of Use: 10 gpm up to 4.5 acre-feet per year for livestock; 780 gpm up to 400 acre-feet per year for irrigation; 10 gpm up to 1.5 acre-feet per year for domestic use.

Places of use: 80 acres in the N½SW¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana;

80 Acres in the S½NW¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana;

Period of Use: Year-round for domestic and livstock use; April 1 through October 31 for the irrigation use.

Changed Use

Point of Diversion: SW¼NW¼SW¼ of Section 34, Township 19 North, Range 19 West, Lake County, Montana.

a) This change is subject to the terms, restrictions, limitations and conditions attached hereto as Exhibit A, and made a part hereof by reference.

D. Application for Beneficial Water Use Permit No. 32257-s76L by Frank Pope is hereby denied, without prejudice.

EXHIBIT "A"

a. The diversion works must be constructed in a good and sufficient manner and with the supervision of U.S. Soil Conservation Service or a private consulting engineer with a working knowledge of such projects.

CASE # 32257

b. The diversion pipeline will be no larger than a 12" pipeline for the initial approximately 96 feet of diversion, at which point the diversion line will be reduced to a ten inch line. At a point in the SW¼NE¼SE¼ of Section 33, Township 19 North, Range 19 West, Lake County, Montana, the ten inch line will enter a distribution box and will be divided into two mains and thereafter transported to portions of the Pope land for irrigation and stock watering purposes.

c. At no time will the Applicant divert, pursuant to these change authorizations at a flow rate greater than 2,720 gpm nor divert any more than 818 acre-feet in any one year.

d. These Change Authorizations are subject to subsequent modification by the Water Courts of the State of Montana in the general adjudication proceeding, as well as to any final determination of the reserved and non-reserved federal water rights of the Confederated Salish and Kootenai Tribes by a court of competent jurisdiction, by compact, or by other proper authority.

MEMORANDUM

This case is particularly troubling in that while allegations have been made regarding the validity or lack thereof, of the rights sought to be changed, no proof of these allegations has been offered. This situation of uncertainty is exacerbated because of the jurisdictional morass wherein the Department, State of Montana Water Courts, the Confederated Salish and Kootenai Tribes, and the various interested United States agencies all make various jurisdictional

CASE # 32257

claims over the land and water in question. Some Objectors herein have raised objections for which they offer no proof. The Department is thereby placed in the awkward position of determining the scope of the rights sought to be changed based on the Department files and public records.

Although the Applications allow a period of diversion year-round, the period of use for all but the domestic use is claimed as April 1 through October 31. No record of any storage facility currently exists, however, and so the Hearing Examiner has corrected the Change Authorizations to allow for the Permittee's diversion only during the claimed periods of use. Further, because the point of diversion claimed as the current point of diversion in Application No. 32237-c76L (NW¼NE¼ Section 4, Township 18 North, Range 19 West, Lake County, Montana, is not claimed in any SB76 filing, the Hearing Examiner has recommended denial of that Application.

The Hearing Examiner has attempted to grant those Applications for Change in the matter which are within the Department authority to grant, consistent with the agreement among the parties hereto. That is, only those rights for which Mr. Pope has filed an SB76 claim can be considered as shown to be existing, and therefore, it is only those rights which can be changed. Clearly the settlement agreement terms go beyond those which may be included in the Change Authorization.

In the agreement, Mr. Pope agreed to withdraw or amend his new permit application, but as of the date of this Proposal, has not done so. Withholding Department action based on the private agreement among the parties is not within Department authority.

CASE # 32257

Hence, this Proposal simply denies that Application, based on the agreement of Mr. Pope to withdraw or terminate same.

The Department can require that Mr. Pope divert no more water under authority of the Change Authorizations than he diverted under authority of his claimed existing rights. The allocation among the parties, and the agreement to apportion costs among same cannot be a part of the Change Authorization, and the Department cannot attempt to enforce these provisions.

DONE this 14th day of September, 1984.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal. Such exceptions must be filed (received) with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. All parties are urged carefully to review the terms of the proposed permit, especially checking the legal land descriptions, for correctness. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception relies. Further, aggrieved parties have the right to file briefs and have oral argument before the Water Resources Administrator, Gary Fritz, if those procedures are requested in writing within the time period for filing exceptions.

CASE # 32257