

file

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 43104-S76D BY ALLEN H. AND)
BETTY F. GARRISON)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of December 16, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

That subject to the following terms, conditions, restrictions, and limitations, Application for Beneficial Water Use Permit No. 43104-s76D is granted to Allen H. and Betty F. Garrison to appropriate water from Tetrault Lake at a rate of 875 gpm up to 200 acre-feet per annum between May 1 and October 15, inclusive, of each year by means of siphon, sump and electric pumps located in the

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NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 37 North, Range 27 West, Lincoln County, Montana. The diverted water will be used for sprinkler irrigation of 100 acres described as follows: 40 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; 10 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; 10 acres located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; and 40 acres located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, all in Township 37 West, Range 27 West, Lincoln County, Montana. The priority date is December 8, 1981 at 2:35 p.m.

This Permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The Permittee shall proceed with reasonable diligence in completing the appropriation provided for herein by actually applying the water provided for herein to the named beneficial use.

E. This permit is issued in conjunction with Permit No. 1523-s76D for a combined flow rate not to exceed 1000 gpm.

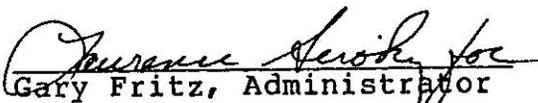
F. Permittee shall install adequate flow metering devices. Permittee shall keep a written record of the flow rate of all water diverted hereunder, including the dates and hours during which water is diverted, and shall provide said record to the Department on request.

G. Permittee shall not move, relocate or otherwise alter the placement of the siphon which is his present means of diversion without first notifying the Department. Permittee is expressly prohibited from setting the siphon at a lower elevation than that of its location as of April 28, 1987, or placing any diversion facility in Tetrault Lake which is set at an elevation lower than the siphon was set as of said date.

NOTICE

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

DONE this 14 day of January, 1988.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the FINAL ORDER was served by mail upon all parties of record at their address or addresses this 15th day of January, 1988, as follows:

Allen and Betty Garrison
Box 72
Eureka, MT 59917

Dr. and Mrs. H. D. Smiley
Route 1, Box 96D
Eureka, MT 59917

Derek Bridges
P O Box 22
Eureka, MT 59917

Joyce Poniecki
3031 Underhill Drive
Calgary, Alberta, Canada
T2N4E4

Thomas and Lillian Dick
1504 Scotland Street, SW
Calgary, Alberta, Canada
T3L2L5

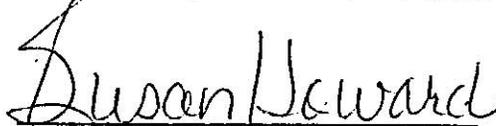
James Karamanos
71366 Biskra Road
Rancho Mirage, CA 92270

Frank H. Leonard
Box 348
Eureka, MT 59917

Dale McGarvey
745 South Main Street
Kalispell, MT 59901

Eveline E. Curtis
Route 1, Box 96H
Eureka, MT 59917

Chuck Brasen
Kalispell Field Office
Kalispell, MT
(inter-departmental mail)


Susan Howard
Hearings Reporter

file

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 43104-s76D BY ALLEN H. AND)
BETTY F. GARRISON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in this matter was held in Kalispell, Montana, before Kent Roberts, Hearing Examiner, on May 11, 1983. On July 14, 1983, an Interim Permit to appropriate water was issued, allowing Applicant to make the requested appropriation for a period of three years under certain conditions and with the proviso that a "contested case hearing be held to determine whether a regular permit (85-2-311, MCA) should be granted", if objectors or the interim permittees requested it on or before September 1, 1986. If no request was timely received, a regular permit was to issue "subject to MCA §85-2-311 and 85-2-312(1)." A decision whether to grant or deny a regular permit was expressly postponed until September 1, 1986. See Department File: Order Granting Interim Permit, July 1, 1983.

No request for hearing was timely received. However, a regular permit could not issue because the findings which had been prepared by Mr. Roberts were insufficient to allow conclusions to be drawn regarding fulfillment of the criteria stated in MCA §85-2-311 and 312.

On December 30, 1986, because Mr. Roberts had since left the Department, the present Examiner was appointed. The present

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Examiner asked all parties to stipulate to his reading the existing hearing record that he might make findings of fact based thereon. See MCA §2-4-622, Notice and Order of December 31, 1986. All parties did not so stipulate. Therefore, the original hearing record was declared void and a rehearing scheduled for, and conducted on, May 8, 1987 in Eureka, Montana.

At the end of the rehearing, the rehearing record was left open for submission of legal briefs. Briefs were timely submitted by Objectors Derek Bridges, Frank Morrison, Sr. (attorney for H. D. Smiley, Mrs. H. D. Smiley, James Karamanos, Bill Mehring, Helen Ann Plunkett and Betty Bergquist), and by Marshall Myers (attorney for Applicants), and the record was closed on June 25, 1987.

Appearances

Applicants Allen H. & Betty F. Garrison (hereafter, "Applicant") appeared personally and by and through counsel, Marshall Myers, attorney at law.

Bill Kowalski appeared as witness for the Applicant.

Objectors Dr. & Mrs. H.D. Smiley were represented by Mrs. H.D. Smiley, who appeared by and through counsel, Frank Morrison, Sr., attorney at law.

Objector James Karamanos (also erroneously referred to in the department file as "James Karamanlis") appeared in person and by and through counsel, Frank Morrison, Sr., attorney at law.

Objector Derek Bridges appeared pro se.

Objectors Thomas & Lillian Dick appeared in person and were represented by Thomas Dick.

Objectors Stephen and Joyce Poniacki did not appear in person. However, Thomas S. Dick, an attorney from Alberta, Canada, purported to be acting as their legal counsel. If Mr. Dick is licensed to practice law in the State of Montana, the Poniacki appearance is valid. If not, the Poniackis are considered not to have appeared.

Untimely Objector Frank Morrison Sr. appeared pro se.

Untimely Objectors George A. & Lee Curtis appeared pro se.

Untimely Objectors Daniel L. & Lynda Young appeared pro se.

Untimely Objector Bryan L. Rork appeared pro se.

Untimely Objector John J. & Alma L. Foss appeared pro se.

Untimely Objector Betty Bergquist appeared by and through counsel, Frank Morrison, Sr., attorney at law.

Untimely Objector Helen Ann Plunkett appeared by and through counsel, Frank Morrison, Sr., attorney at law.

Untimely Objector Bill Mehring appeared by and through counsel, Frank Morrison, Sr., attorney at law.

Untimely Objector Ramona C. Humphreys did not appear, but registered her untimely objection by a letter presented at the hearing.

Objector Frank Leonard did not appear personally or by representative.

Chuck Brasen, Field Manager of the Kalispell Field Office of the Department of Natural Resources and Conservation (hereafter "department" or "DNRC"), appeared as department staff witness.

Preliminary Matters

Although Applicant objected to inclusion of several untimely

Objectors in the proceedings, the Hearing Examiner overruled and hereby overrules the objection.

Participation by untimely Objectors is expressly authorized under (ARM) 36.12.219 at the Hearing Examiner's discretion, and the Hearing Examiner in this case does not find that their participation per se would prejudice the Applicant's case.¹ Therefore, the appearances of Frank Morrison, Sr., pro se, George A. & Lee Curtis, Daniel L. & Lynda Young, Bryan L. Rork, John J. & Alma L. Foss, Betty Bergquist, Helen Ann Plunkett and Bill Mehring are noted and the same duly recorded as untimely Objectors to the Application.

Exhibits

The Applicant presented four exhibits for inclusion in the record.

Applicant Exhibit 1 (a two-page document entitled "Hydrologic Studies") was admitted without objection.

Applicant Exhibit 2 (a photocopy of a "Vicinity Map" of the proposed project area) was admitted without objection.

Applicant Exhibit 3 (a photocopy of a topographic map marked in red to show the water conveyancy system and in yellow to show the purported area of water use) was admitted without objection, but subject to Applicant's clarification that the yellow marking was erroneous in that it showed too great an area of water use.

¹Of course, Applicant retained the right to object to the admission of any evidence submitted by those untimely Objectors who did not file written objections with the Department, or did not file written objections in time for Applicant to be adequately advised of the nature of the objection prior to the hearing.

Applicant Exhibit 4 (a four-page document entitled "Application No. 43104-s76D" describing "the proposed irrigation" and "source of diversion") was admitted without objection.

Objector Karamanos and Objectors Smiley jointly presented 12 exhibits for the record. (The actual exhibits are physically labeled "Smiley", "Karamanos/Smiley", or "Karamanos," followed by a number. However, each exhibit, 1 through 12, was presented as a "Karamanos/Smiley" exhibit and will be referred to as such infra regardless of incomplete labeling.)

Objector Karamanos/Smiley (hereafter "K/S") Exhibit 1 (a photocopy of a 16-page document entitled "Order and Post Order Correspondence; 9-10-86") was admitted without objection.

Objector K/S Exhibit 2 (a five-page document entitled "Carpenter Lake T 37N, R27 W, Sec. 27, 28; 'Rite in the Rain') was admitted without objection.

Objector K/S Exhibit 3 (a photograph purporting to show Tetrault Lake between 1977 and 1979 in its "full" condition) and Objector K/S Exhibit 4 (a photograph purporting to show Tetrault Lake in a "lowered" condition) were introduced.

Applicant objected to admission of Objector K/S Exhibits 3 and 4 on the grounds that the person who took the photographs (a Mrs. Leonard) was not present for questioning and because the exact date that the photos were taken had not been established. The objections were taken under advisement.

After due consideration, the Hearing Examiner admits both photographs for the limited purpose of illustrating that the level of Tetrault Lake has indeed varied. However, as no exact date of exposure was attributed to either photograph, they cannot be viewed

as evidence of any particular timing of the fluctuation in lake level; i.e., the photos as presented are in no way relevant to the alleged connection between Applicant's pumping from Tetrault Lake and a lowering of its level.

Objector K/S Exhibit 5 (photocopies of pages 559 through 577, inclusive, of Book 26, Lincoln County, Montana Records, entitled "Carpenter (Tetrault) Lake Lots (Amended) Declaration of Covenants, Conditions, and Restrictions") was admitted without objection.

Objection K/S Exhibit 6 (a three-page document entitled "State of Montana Dept. of Health & Environmental Sciences Certificate of Subdivision Plat Approval") was admitted without objection.

Objection K/S/ Exhibit 7 (a photocopy of a Certificate of Water Right issued to Dale McGarvey dated August 2, 1983) was admitted without objection.

Objector K/S Exhibit 8 (photocopies of pages 960 through 981, inclusive, of Book 85, Lincoln County, Montana, Records - Declaration of Covenants, Conditions and Restrictions, Carpenter (Tetrault) Lake Subdivision Unit 2) was admitted without objection.

Objector K/S Exhibit 9 (a photocopy of a Certificate of Water Right issued to Dale McGarvey dated November 18, 1983) was admitted without objection.

Objector K/S Exhibit 10 (two photocopied pages: 1983 Lincoln County Real Property Assessment Notices) was introduced and received objection from the Applicant as irrelevant. Objection is hereby overruled and the exhibit admitted as evidence that a subdivision exists near Carpenter Lake.

Objector K/S Proposed Exhibit 11 (a booklet entitled "Specifications for Water System for Carpenter Lake Subdivision Unit #2") was introduced and received objection from the Applicant as irrelevant. Objection is hereby sustained and exhibit is excluded from the record.

Said exhibit was apparently entered for the purpose of showing that Carpenter Lake Subdivision relies on well water. However, all the exhibit purports to show is that specifications for a water system were at one time drawn up; it does not show that the system was ever built. Further, the record does not otherwise reflect whether the system was constructed or not. In sum, the relevancy of the exhibit was not established.

Objector K/S Exhibit 12 (nine plat sheets showing details of Carpenter Lake Subdivision Unit No. 2) was admitted without objection.

The Department witness presented one exhibit for the record.

Department Exhibit 1 (containing a one-page memo dated April 30, 1987; a photocopy of a USGS topographic map showing Section 27, T37N, R27W; 8 pages containing 12 photographs taken April 28, 1987; a sketch diagraming the Garrison diversion sump; a contour map of Carpenter (Tetrault) Lake, subsurface; a one-page (both sides) photocopy of Department water rights records; two photocopied pages of the Kootenai Drainage Temporary Preliminary Decree; two photocopied pages of a document entitled "Irrigation Requirements--Garrison") was admitted without objection.

There was no objection to any of the contents of the Department file. It will therefore be considered in its entirety.

MOTION

At the close of the hearing, Objector Frank Morrison moved for summary denial of the Application because Applicant failed to comply with the terms of the Interim Permit. The Motion is hereby denied.

ARM 36.12.104(2) declares that an interim permit is subject to revocation by the department in accordance with MCA §85-2-314, which states ". . . if the permit is . . . not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit." The foregoing, read in conjunction with its referent, ARM 36.12.104(2), allows the department discretion to revoke an interim permit. However, nothing in statute or rule authorizes dismissal or summary denial of the underlying application for a regular permit based solely upon an applicant's failure to obey the terms of the interim permit.

An interim permit is granted for the narrow purpose of collecting certain data, otherwise unobtainable, which should allow a specific fact to be found, the finding of which fact would allow a conclusion to be drawn regarding the fulfillment of specific permit criteria. Thus, in the order granting the interim permit, all facts which can be found from data already part of the record should be set forth, so that conclusions may be drawn as to which of the criteria stated in MCA §85-2-311 have already been satisfied, and which criteria will be satisfied when the interim data is examined. See ARM 36.12.104(1)(b). Grant of the interim permit holds the record in the matter of the application open for the receipt of, and only of, the data collected pursuant to the interim permit.

Upon termination (expiration or revocation) of the interim permit, information collected via operation of the appropriation works under the interim permit is presented for the record. Subsequently, a decision is rendered based upon the original findings and conclusions (which should have been set forth in the order granting the interim permit), together with findings and conclusions based on the new data. If the Applicant has no new data to present, summary denial will normally lie, for without the new data there would be no genuine issue as to any material fact remaining to be decided; i.e., whatever fact applicant sought to prove by presentation of the interim data could not in its absence be proved, and thus as a matter of law the permit must be denied.

In the instant case, the department did not revoke the Interim Permit, but allowed it to expire of its own terms. Normally, upon expiration, any data collected under the Interim Permit would have been reduced to findings and conclusions and these, together with the original findings and conclusions, would form the basis for decision. Here, however, because the Hearing Examiner who granted the Interim Permit failed to make findings pertinent to the permanent permit from the record of the original hearing, because this oversight was no fault of the Applicant, because due process consideration will not allow the oversight to work to the detriment of the Applicant, and because all parties did not stipulate to this Examiner's review of the taped record of the original hearing, the entire record of the original hearing was discarded and a fresh hearing record compiled. (See Notice and Order of December 31, 1986).

Although there was evidently an unavoidable deficiency of

evidence in the record of the initial hearing in this matter necessitating collection of further evidence via the Interim Permit for proof of some criterion, or criteria, not identified by the original Examiner, the freshly compiled record may not be similarly deficient; i.e., the fresh record could intra se contain sufficient evidence to prove all the necessary criteria. Because recompilation of the hearing record has redefined the factual basis for decision, summary disposition will not lie premised solely upon the absence of evidence which was to have been obtained by means of the Interim Permit.

Based on the department file, department records, the above-described Exhibits, and the taped record of the rehearing conducted on May 8, 1987, the Hearing Examiner makes the following:

Findings of Fact

1. Section 85-2-302 MCA (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in §85-2-306 (1985), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal or distribution works therefor except by applying for and receiving a permit from the department." The requested appropriation does not fall under the exception described in MCA §85-2-306 (1985).
2. The Application in this matter was regularly filed with the DNRC on December 8, 1981 at 2:35 p.m.
3. By this Application, Applicant seeks to divert 875 gallons per minute (gpm) up to 200 acre feet per annum from Tetrault Lake

between May 1 and October 15, inclusive, each year by means of two 60 h.p. electric pumps located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 37 North, Range 27 West, Lincoln County, Montana.

The diverted water would be used for sprinkler irrigation of 100 acres described as follows: 40.00 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; 10.00 acres located in E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; 10.00 acres located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; and 40.00 acres located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, all in Township 37 North, Range 27 West, Lincoln County, Montana.

4. Applicant presently possesses Permit No. 1523-s76D which authorizes appropriation of 1000 gpm up to 300 acre-feet per annum from Tetrault Lake utilizing the means of diversion herein described for irrigation of 150 acres of land other than the place of use described herein. Applicant does not intend to divert more than 1000 gpm even when simultaneously diverting pursuant to Permit No. 1523-s76D and the permit herein applied for.

5. The pertinent facts of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, Tetrault Lake, on June 10, 17 and 24, 1982. Timely objections to the Application were received from Dr. and Mrs. H. D. Smiley, James Karamanos, Frank H. Leonard, Derek Bridges, Joyce Poniecki, and Thomas and Lillian Dick.

6. Applicant intends to irrigate alfalfa. (Testimony of Applicant.) The theoretical volumetric irrigation requirement for alfalfa in the climatic area of the place of use is 2.08 acre-feet of water per acre per year, assuming a normal precipitation year. (Department file: "Irrigation Requirements".) Thus, Garrison's 100

acres should require approximately 208 acre-feet of irrigation water per growing season.

7. The design of Applicant's means of diversion, a sump connected to Tetrault Lake by means of a permanently imbedded, nearly horizontal pipe two feet in diameter (this pipe referred to hereafter as "the siphon"), will not allow Applicant to reduce the lake level below the elevation of the bottom of the siphon; i.e., the diversion herein proposed could not cause Tetrault Lake to be lowered more than approximately 2.3 vertical feet below its level of April 28, 1987. However, the absolute elevation of the bottom of the siphon can not be determined from the record. Consequently, no exact comparison can be made between the level of the siphon and the average historic level of Tetrault Lake.

8. The nominal source, Tetrault Lake a/k/a Carpenter Lake, is a spring-fed fresh-water lake with no surface inlet or outlet. As of 1968, its maximum depth was 58 feet; its total surface acreage was 94 acres. (Department Exhibit 1: Tetrault subsurface contour map.) However, because applicant intends to use only whatever water occurs in Tetrault Lake above the present level of the bottom of the siphon, the true source is "Tetrault Lake above the elevation of the bottom of the siphon as presently installed."

9. Applicant is currently successfully utilizing the siphon, sump, suction, pumps, and water distribution works, proposed for use hereunder, for operation under Permit No. 1523-s76D. By increasing duration of use, Applicant can use this same system to deliver 200 acre-feet per annum hereunder in addition to the amounts

authorized under Permit No. 1523, without diverting more than 1000 gpm.

10. The level of Tetrault Lake in late April to early May of both 1986 and 1987 corresponded approximately with the top of the Garrison siphon. (Testimony of Chuck Brasen, Bill Kowalski.) Thus, during those years, even assuming no irrigation season recharge, there were at least 188 acre-feet of water available for appropriation by Applicant. (Cf. Finding of Fact 8: surface acreage.) However, in both years during the period in which Applicant was diverting water from the lake pursuant to Permit No. 1523-s76D and Interim Permit No. 43104-S76D, the level of Tetrault Lake did not fall, but rose.² (Testimony of Allen Garrison.) Thus, it appears that influx to the lake from the underground springs exceeded the sum of the lake's natural outflow plus Applicant's diversion in those years, at least during the period of lake rise. However, whether diversion by Applicant over a period of years would reduce average lake level by reducing net annual lake recharge, i.e., whether, due to Applicant's proposed diversion, the lake would not rise as high as normal during the annual period of lake rise (would store a lesser volume of water prior to the period of lake fall), so that the lake level after lake fall would be lower than normal, thus yielding a lower base level at the beginning of lake

²Although alleged by Mr. Garrison, there is no evidence of a causal connection between Applicant's diversion and the rise in lake level. Indeed, the rise of Tetrault Lake during the summer months has occurred in all but one or two of the past forty years. (Testimony of Allen Garrison.) Thus, the rise appears to be a phenomenon independent of the Garrison diversion.

rise the next year, cannot be determined based on the record.³

11. Objectors Smiley and Leonard were the only objectors to submit evidence that they own water rights in Tetrault Lake.

Objector Smiley has filed Statements of Claim for Existing Water Right No. 26626-76D claiming 250 gallons per day (.173 gpm) up to .16 acre-feet per year from Tetrault Lake for stockwater use between May 1 and November 30 each year. The record contains no allegation or evidence that the drawdown which Applicant's diversion could cause in Tetrault Lake would in any way affect this claimed right.

Objector Leonard has filed Statement of Claim for Existing Water Right No. 04399-76D claiming 23 gpm up to 1.5 acre feet per year from Tetrault Lake for year-round domestic use. Objector Leonard was not present at the hearing of May 8, 1987 and the record contains no allegation or evidence that the drawdown which Applicant's diversion could cause in Tetrault Lake would in any way affect this claimed right.

³The level of any reservoir depends on the relative magnitude of influx and efflux of water. Both may vary. In the instant case, influx may be affected by diversions from the aquifer supplying the underground springs, fluctuations in the source supplying that aquifer, and may even be affected by the amount of water (pressure) in the lake. Natural efflux, which is augmented by diversions, may also vary depending on the amount of water (pressure) in the lake. (If lake water pressure is a factor, diversion may lower the pressure causing an increased influx and decreased efflux, i.e., the lake level may be "buffered" within certain limits.) Regardless, a large enough increase in total efflux would cause a reduction in average lake level if over several cycles, total efflux generally exceeded influx; i.e., if net annual recharge was generally reduced.

12. Other objectors have submitted evidence that they own water rights in an aquifer which may or may not be hydrologically connected to Tetrault Lake. Objector Bridges possesses Certificate of Water Right No. 20453-g76D for groundwater diverted by means of a well located near Tetrault Lake. The authorized rate of diversion is 15 gpm up to 1.5 acre-feet per annum. The record contains no allegation or evidence that the drawdown that Applicant's diversion could cause in Tetrault Lake would in any way affect this water right.

Objector Dick possesses Certificate of Water Right for groundwater diverted by means of a well located near Tetrault Lake. The authorized rate of diversion is 15 gpm up to 1.5 acre-feet per year. The record contains no allegation or evidence that the drawdown that Applicant's diversion could cause in Tetrault Lake would in any way affect this water right.

13. Tetrault Lake is used for boating, fishing, and swimming by the public. All objectors hereto allege that diversion hereunder by applicant will reduce the average level of Tetrault Lake and further allege that any reduction of the level of Tetrault Lake will adversely affect its ecology, aesthetic value, and recreational value.

The evidence presented for the record is inconclusive as to whether diversion hereunder would reduce the average level of Tetrault Lake. See Finding of Fact 10, supra. There is no evidence of record which shows that a reduction in the level of Tetrault Lake would harm its ecology or reduce its aesthetic or recreational value.

14. There is no indication in the record of other planned uses or developments of Tetrault Lake water for which a permit has been issued or for which water has been reserved.

CONCLUSIONS OF LAW

1. The department has jurisdiction over the subject matter hereunder, and over the parties hereto. MCA Title 85, Chapter 2, Part 3 (1985).

2. The department gave proper notice of the hearing (Finding of Fact 3) and, all substantive and procedural requirements of law and rule appearing fulfilled, the matter is properly before the Hearing Examiner.

3. MCA §85-2-311 (1985) provides that the department shall 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 a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

- (d) the proposed use of water is a beneficial 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 proposed use, irrigation, is a beneficial use of water.
MCA §85-2-102.

5. The amount of water requested is reasonable for the use proposed (Finding of Fact 6), and is thus not more water than can be beneficially used without waste for the purpose stated in the application. MCA §85-2-312(1).

6. The proposed use will not interfere with other planned uses or developments for which a permit has been issued on for which water has been reserved. (Finding of Fact 14.)

7. The proposed means of diversion, construction and operation of the appropriation works are adequate. (Finding of Fact 9.)

8. MCA §85-2-311(a) requires that the record show that, at least in some years, there are unappropriated waters in the source in the amount applicant seeks, and that in those years throughout the period of appropriation the amount sought is available. In the Matter of Application for Beneficial Water Use Permit No. 41255-q41B by A. W. Allred, Proposal for Decision, August 28, 1982, p. 20. (Final Order, November 1, 1984.)

In the instant case, the true source is Tetrault Lake above the bottom of Applicant's present permanently imbedded diversion siphon. (Finding of Fact 8.) The evidence shows that in years past the productive capacity of this source has been sufficient to supply the volume of water requested throughout the requested period of

appropriation. (Finding of Fact 10.) However, it must be acknowledged that the named source is in fact a reservoiring of water derived from a source of indeterminate productive capacity, i.e., the underground springs which feed the lake. Thus, even though the lake does rise yearly during the summer months (reflecting a variable recharge rate of Tetrault Lake, apparently greater during the summer months), because the evidence remains inconclusive as to whether the annual net recharge (total annual influx minus total annual efflux) will be sufficient to maintain historic lake levels over several years of diversion at the proposed rate of withdrawal hereunder (Finding of Fact 10), the long-term effect of the proposed diversion on the availability of water in the source can not be ascertained.

If annual lake recharge is generally insufficient to compensate for annual withdrawals, Applicant will eventually be physically unable to divert because the lake level will be too low. However, his failure to divert should, barring other influences, allow the lake to recover sufficiently to allow diversion the next year. Thus, sufficient water may in the future be available only in some years.

The criterion requires that water be available as requested in some years. The evidence shows that in some years the amount requested will be available throughout the period of appropriation. Therefore, it is hereby concluded that the requirements of MCA §85-2-311(a) are met.

9. The record shows the anticipated effect of the proposed appropriation on Tetrault Lake; i.e., the proposed appropriation could at most reduce the level of Tetrault Lake to the level of the

bottom of Applicant's diversion siphon. However, the record holders of prior water rights on the source neither alleged, nor presented evidence showing, that such lowering would adversely affect the exercise of their water rights. (Findings of Fact 11, 12.)

Therefore, Applicant having met his burden of production by showing the anticipated effect on the source, and Objectors having failed to require the Applicant to produce additional evidence by failing even to allege an adverse effect to their water rights, it is hereby concluded that this proposed appropriation will not adversely affect the water rights of prior appropriators. See In the Matter of the Application for Beneficial Water Use Permit No. 55834-s76LJ and No. 56386-s76LJ by Zon and Martha M. Lloyd, Proposal for Decision, January 22, 1987 pp. 21-23 (Final Order, April 23, 1987).

10. All Objectors contend that the Application should be denied, premising this contention on the allegation that the diversion of water hereunder will lower the level of Tetrault Lake, thereby causing ecological damage which would reduce the value of the lake for public recreation, wildlife and aesthetic uses. This argument alludes to the constitutionally embodied "Public Trust Doctrine", which prohibits the State from abdicating its trust responsibilities over waters susceptible of public use.

Although the State cannot abdicate its public trust responsibilities, whether this department has been delegated the duty to consider the public trust when determining whether to grant

or deny a permit to appropriate less than 4,000 acre-feet per year, or 5.5 cfs, of water, is not clear.⁴ To be sure, the legislation has not explicitly delegated the duty to the DNRC under the terms of the Water Use Act.⁵ However, the duty may be implicitly mandated by the Public Trust Doctrine. See MCA §85-2-311, In the Matter of the Application for Beneficial Water Use Permit No. 49573-s43B by Howard and Mildred Carter, Proposal for Decision, May 16, 1985, pp. 26-31 (Final Order, January 20, 1986). Assuming arguendo that the department does have the duty to consider evidence relating to trust issues in determining whether to issue beneficial water use permits, Applicant here would still receive a permit because the evidence of record does not show violation of the public trust.

In MCA §85-2-311(a), the legislature enumerated certain criteria for issuance of a permit, specifying that if an applicant proves these are met, he is to receive a permit. However, the legislature has not included in these criteria a requirement that the applicant prove to the department that the public trust will not be violated

⁴The legislature has expressly placed a burden on an applicant who proposes to appropriate over 4,000 acre-feet/yr and 5.5 cfs, to prove the proposed appropriation is a "reasonable use." The term "reasonable use" encompasses considerations which are arguably coincident with some, or all, public trust considerations. See MCA §85-2-311(2)(c). There is no analogous expression of trust considerations in the criteria for issuance of permits under 4,000 acre-feet/yr or under 5.5 cfs.

⁵There may be mechanisms provided in other statutes which adequately guard the public trust. See, e.g., Lakeshore Protection Act, Title 75, Chapter 7, MCA.

by the proposed project. Consequently, if the department indeed has an obligation to consider public trust values in making its decision, an apparent conflict is generated; i.e., the legislature has stated that an applicant can receive a permit without proving that no public trust violation would result, while the Public Trust Doctrine requires that the department not issue a permit if such violation would result.

This conflict is extant, however, only if it is assumed that the legislature intended by the omission that the department have no jurisdiction to consider trust values in making its decision. There is no conflict if the statute is interpreted as implicitly conferring trust jurisdiction, and the omission is explained simply as the intent not to shift the burden of persuasion as to public trust compliance onto the applicant for smaller appropriations.*

Of course, one result of the latter interpretation of the omission is that applicant has no initial burden to go forward on

*Prior to enactment of the Water Use Act (1973), anyone could appropriate surface water in Montana, without making any preliminary showing, simply by putting water to a beneficial use. An "offensive" diversion could only be prevented by filing an appropriate action in District Court. In such instance, the burden of persuasion rested with the party seeking relief, who in any case would not be the offending appropriator.

The Water Use Act attempts to screen out "offensive" appropriations by requiring a permit to commence an appropriation. However, under the Act, the applicant must prove he is in compliance with certain criteria (most of which were adopted from the common law), even if there is no objection to the Permit.

Although the language of MCA §85-2-311 seems to exclude consideration of issues other than the stated criteria, the statute may simply operate to place the burden of proof regarding those specified criteria onto the applicant, leaving the department the discretion to consider other salient issues, if raised. Cf. MCA §85-2-310, 312 for examples of issues that the legislature has expressly stated the department may consider but which could result in denial of a Permit even if the criteria set forth in §85-2-311 were proved met.

this issue, and thus, if trust issues are to be raised at all, the necessary inference is that they must be raised by the other parties to the matter.⁷ Further, trust considerations, because they are not germane to proof of the enumerated criteria, would have to be affirmatively raised in advance of the hearing in order to provide proper notice that they are at issue, and the party seeking dismissal, because he is raising a claim independent of the criteria, would bear the "burden of persuasion as to each fact the existence or non-existence of which is essential to the claim for relief . . . he is asserting." MCA §26-1-402.

In the instant case, the evidence of record indicates that diversion hereunder could indeed lower the level of Tetrault Lake to approximately the level of the base of Applicant's siphon. However, although Objectors ("trust claimants") have affirmatively alleged prior to the hearing that sustained drawdown would degrade Tetrault Lake and impair certain uses thereof which may be "trust uses",⁸

⁷The other parties include the objectors (who may be other state agencies) and the department. ARM 36.12.202(11). However, it should be noted that any evidence pertaining to the public trust in the possession of the department would have to be presented at the hearing by staff acting as objector or expert witness. The Hearing Examiner, with one exception, can not, either during or after the hearing, independently supply documents, data, theory and arguments regarding an issue. See United States of America and Montana Power Company vs. Department of Natural Resources and Conservation, et al., Opinion and Order, Cause 50612, District Court of the 1st Judicial District, June 15, 1987.

⁸"Trust uses" of Tetrault Lake could include fishing, hunting, bathing, swimming, boating, recreation, scientific study uses, open space, animal habitat, climate or aesthetic uses. Cf. Marks v. Whitney, 491 P.2d 374 (Cal. 1971); Nat'l Audubon Society et al. v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983).

they presented no evidence which establishes that a lowering of the lake level by several feet would either degrade the lake or impair any such uses. Because no party presented evidence that the proposed appropriation would violate the public trust, dismissal of the permit based on such allegation could not be granted, even assuming the department is empowered to consider public trust issues when rendering its decision.

WHEREFORE, based on the foregoing Proposed Findings of Facts and Conclusions of Laws the Hearing Examiner hereby makes the following:

PROPOSED ORDER

That subject to the following terms, conditions, restrictions, and limitations, Application for Beneficial Water Use Permit No. 43104-s76D is granted to Allen H. and Betty F. Garrison to appropriate water from Tetrault Lake at a rate of 875 gpm up to 200 acre-feet per annum between May 1 and October 15, inclusive, of each year by means of siphon, sump and electric pumps located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 37 North, Range 27 West, Lincoln County, Montana. The diverted water will be used for sprinkler irrigation of 100 acres described as follows: 40 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; 10 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, 10.00 acres located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; and

40.00 acres located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, all in Township 37 West, Range 27 West, Lincoln County, Montana. The priority date is December 8, 1981 at 2:35 p.m.

This Permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The Permittee shall proceed with reasonable diligence in completing the appropriation provided for herein by actually applying the water provided for herein to the named beneficial use.

E. This permit is issued in conjunction with Permit No. 1523-s76D for a combined flow rate not to exceed 1000 gpm.

F. Permittee shall install adequate flow metering devices. Permittee shall keep a written record of the flow rate of all water diverted hereunder, including the dates and hours during which water is diverted, and shall provide said record to the Department on request.

G. Permittee shall not move, relocate or otherwise alter the placement of the siphon which is his present means of diversion without first notifying the Department. Permittee is expressly prohibited from setting the siphon at a lower elevation than that of its location as of April 28, 1987, or placing any diversion facility in Tetrault Lake which is set at an elevation lower than the siphon was set as of said date.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for an oral argument hearing must be made in writing and be filed with the Hearing

Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument hearing must specifically set forth the party's exceptions to the proposed decision.

An oral argument hearing held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for an oral argument hearing may request a different location at the time the exception is filed.

Parties who attend an oral argument hearing are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 16 day of December, 1987.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 16th day of December, 1987, as follows:

Allen and Betty Garrison
Box 72
Eureka, MT 59917

Derek Bridges
P O Box 22
Eureka, MT 59917

Thomas and Lillian Dick
1504 Scotland Street, SW
Calgary, Alberta, Canada
T3L2L5

Frank H. Leonard
Box 348
Eureka, MT 59917

Eveline E. Curtis
Route 1, Box 96H
Eureka, MT 59917

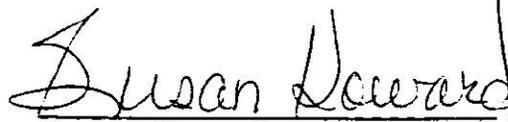
Dr. and Mrs. H. D. Smiley
Route 1, Box 96D
Eureka, MT 59917

Joyce Poniecki
3031 Underhill Drive
Calgary, Alberta, Canada
T2N4E4

James Karamanlis
71366 Biskra Road
Rancho Mirage, CA 92270

Dale McGarvey
745 South Main Street
Kalispell, MT 59901

Chuck Brasen
Kalispell Field Office
Kalispell, MT
(inter-departmental mail)



Susan Howard
Hearings Reporter

CASE # 43104

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 43104-s76D BY ALLEN H. AND)
BETTY F. GARRISON)

* * * * *

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on May 11, 1983, in the Courthouse East, Kalispell, Montana. The record in this matter closed at the end of the hearing.

Allen H. and Betty F. Garrison (hereinafter the "Applicants") were represented by Patrick M. Springer, Attorney at Law, 1111 South Main Street, Kalispell, Montana 59901. The objectors who appeared at the hearing were Dale L. McGarvey, 745 South Main Street, Kalispell, Montana 59901; Stephen Poniecki, 3031 Underhill Drive, Calgary, Alberta T2N 4E4; and Dr. and Mrs. H. D. Smiley, Route 1, Box 96D, Eureka, Montana 59917. All objectors appeared pro se. Charles F. Brasen, a representative from the Department's Kalispell field office, also appeared at the hearing.

This Proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed by June 27, 1983, with the Hearing

Examiner, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620. Notice is hereby given that the final decision shall not be made until after the expiration of the period for filing exceptions.

STATEMENT OF ISSUES

The issue in this proceeding is whether the Applicants should be granted a regular permit (under 85-2-311, MCA) or and interim permit (under ARM §36.12.104) to appropriate water from Tetrault Lake.

Based upon all the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On June 6, 1975, the Department issued interim (temporary) permit no. 1523-s76D to the Applicants. The interim permit allowed the Applicants to appropriate 1,000 gallons per minute (gpm) up to 300 acre-feet (ac-ft) of water from May 1 to October 15, inclusive of each year, for sprinkler irrigation of 75 acres of land located in the NW $\frac{1}{4}$ and 75 acres located in the SW $\frac{1}{4}$, all in Section 27, Township (T) 37 North (N), Range (R) 27 West (W), Lincoln County. The source of supply was Tetrault Lake and the waters thereof were to be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T37N, R27W, in Lincoln County. The interim permit was issued for a period of three years in order to document water-level fluctuations in Tetrault Lake.

2. Upon completion of the three year monitoring program, the Department of Fish, Wildlife & Parks and the Department of Natural Resources and Conservation reviewed the lake elevation

data and determined that no significant harm had occurred to Tetrault Lake from the Applicants' appropriation. Accordingly, the Department of Natural Resources and Conservation issued a provisional permit on August 9, 1978, to the Applicants. The priority date for provisional permit no. 1523-s76D (hereinafter the "permit") is February 8, 1974.

3. On December 8, 1981, the Applicants filed with the Department an application seeking authorization to appropriate 875 gpm up to 200 ac-ft of water from May 1 to October 15, inclusive of each year, for sprinkler irrigation of 100 acres of land. The 100 acres of land proposed to be irrigated are located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ (40 acres), the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ (10 acres), the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ (10 acres) and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ (40 acres), all in Section 27, T37N, R27W, in Lincoln County. The proposed source of supply is Tetrault Lake, the water thereof to be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T37N, R27W, in Lincoln County (the same point of diversion as in the permit).

4. The Applicants propose to divert water from Tetrault Lake by means of two, 60 horse-power pumps. The lake water will be conveyed to the place of use by a pipeline.

5. Currently, the Applicants are sprinkler irrigating the 150 acres authorized by their permit. The 100 acres the Applicants propose to irrigate are east of the 150 acres being irrigated pursuant to the permit.

6. On June 10, 17 and 24, 1982, the Notice of Application (hereinafter the "Notice") was published in the Tobacco Valley News, a newspaper of general circulation in the Eureka, Montana

area. The Notice set July 28, 1982, as the deadline for filing objections to the Application.

7. On July 14, 1982, Dr. and Mrs. H. D. Smiley filed with the Department an objection to the granting of the application. The Smileys are the holders of a use water right that has a priority date of June 25, 1931. The Smileys have filed a Senate Bill (S.B.) 76 claim for this existing water right. The use right allows the Smileys to divert 0.173 gpm up to 0.16 ac-ft of water from May 1 to November 30, inclusive of each year, for stock watering. Tetrault Lake is claimed as the Smileys' source of water supply for this 1931 use right. The point of diversion is claimed to be in the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 28, T37N, R27W, in Lincoln County. The place of use is located in the same place as the point of diversion.

The Smileys, in their filed objection, assert that Tetrault Lake has not filled as it normally did during the past three summers. According to the Smileys, withdrawal of irrigation water by the Applicants pursuant to their permit is a major factor in this "abnormal situation".

8. On July 30, 1982, Joyce Poniecki filed with the Department an objection to the granting of the Application. The Poniecki Objection essentially claims that if the Applicants are granted an additional permit to divert water from Tetrault Lake, the surface water elevation of the lake will be lowered. Poniecki asserts that a lower water elevation will adversely impact recreational use of the lake and diminish the quantity of water available for seven (unnamed) lakeshore property owners.

No objection was made that the Application will adversely affect Poniecki's water rights.

9. On July 30, 1982, Thomas and Lillian Dick and James Karamanlis filed separate objections with the Department to the granting of the Application. The only information given in the Dicks Objection and the Karamanlis Objection was that Tetrault Lake was claimed as the source of supply. Absent from both Objections was any information tending to show that the property, rights, or interests of the Objectors would be adversely affected by the proposed application. Neither Karamanlis nor the Dicks appeared at the hearing.

10. On July 30, 1982, Derrick Bridges filed an objection with the Department to the granting of the Application. The sole basis of Bridges' Objection is that diverting water from Tetrault Lake in the amounts proposed by the Applicants will be detrimental to the ecology of the lake. Bridges did not appear at the hearing.

11. On September 11, 1982, Frank H. Leonard, filed an objection to the granting of the Application. Leonard asserts that the Application will adversely affect his use right, which has a priority of May, 1971. Leonard has filed an S.B. 76 claim for this existing water right. The use right allows Leonard to divert 23 gpm up to 1.5 ac-ft for domestic uses continuously through the year. Tetrault Lake is claimed as the source of supply. The point of diversion and place of use are located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 37 N, Range 27 W in Lincoln County. Leonard did not appear at the hearing.

12. On February 28, 1983, the Administrator of the Department's Water Resources Division issued a Notice of Hearing, scheduling a contested case hearing in this matter for March 29, 1983. A copy of the Notice of Hearing was served by mail on the same day on all the parties of record.

13. On March 24, 1983, at the request of the Smileys and upon a showing of good cause, the Hearing Examiner continued the hearing. The hearing was rescheduled for May 11, 1983.

14. Dale McGarvey did not file an objection with the Department but nonetheless appeared at the May 11th hearing. Mr. McGarvey has sold lots, which abut Tetrault Lake, to some of the Objectors; and, has entered into covenants with respect to the recreational attributes of the lake. The concern of Mr. McGarvey was that if the lake levels were lowered by the Applicants' proposed appropriation, the recreational value of the lake might be impaired thereby resulting in a breach of the covenants that he has entered into with lot owners.

15. At the hearing and on the record, all the parties in attendance stipulated to the criteria necessary for the granting of an interim permit to the Applicants. The parties recommended that the Department issue an interim permit subject to the following five terms and conditions; first, that a staff gauge be permanently affixed in the bed of Tetrault Lake and placed near the Applicants proposed point of diversion so as to accurately measure the lake's surface water elevation; second, that the cost of installing the staff gauge (labor and materials) be apportioned equally between the parties; third, that lake

elevations be measured and recorded each month for three consecutive years at the staff gauge; fourth, that at least one Objector should always be present whenever the Applicant records monthly lake elevations; and fifth, that at the end of the three year monitoring period, either the Applicant or the Objector may request a contested case hearing on the issue of whether a regular permit should be granted.

PERTINENT STATUTORY AND REGULATORY EXCERPTS

MCA, Section 85-2-311 provides in part that the Department must issue a regular permit if the Applicant proves by substantial credible evidence that "(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, construction, and operation of the appropriation works are adequate; (4) the proposed use of water is a beneficial use; [and] (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. . . ."

Administrative Rules of Montana (ARM) § 36.12.104 provides as follows: "(1) Pending final approval or denial of an application for a regular permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an Applicant to begin appropriating water immediately.

(a) The department may not issue an interim permit unless there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA, will be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators.

(2) An interim permit is subject to revocation by the department in accordance with section 85-2-314, MCA.

(3) The issuance of an interim permit does not entitle an applicant to a regular permit, and approval of the application for a regular permit is subject to the procedures and criteria set out in the act.

(4) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the regular permit is denied or is modified from the terms of the interim permit.

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

CONCLUSIONS OF LAW

1. The Montana Department of Natural Resources and Conservation (Department) has jurisdiction over the parties and the subject matter of this hearing.

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. Pursuant to ARM §36.12.104(1)(a), the Department may not issue an interim permit unless there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA will be met.

4. The parties in attendance at the hearing stipulated to the criteria necessary for the granting of an interim permit to the Applicants.

5. James Karamanlis, Derrick Bridges, Frank Leonard, and Thomas and Lillian Dick failed to appear at this hearing and are in default pursuant to ARM §1.3.214(1).

Based upon the foregoing Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

1. That an interim permit be granted to Allen H. and Betty

CASE # 43104

C F. Garrison (interim permittees) to appropriate 875 gallons per minute up to 200 acre-feet of water for sprinkler irrigation of the following lands: 40 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 10 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, 10 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all in Section 27, Township 37 North, Range 27 West in Lincoln County. The source of supply shall be Tetrault Lake, the waters thereof to be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 37 North, Range 27 West in Lincoln County. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to October 15 of any given year.

2. That the interim permit be subject to the following conditions and terms:

C a. The interim permittees shall permanently secure a staff gauge in the bed of Tetrault Lake and place the gauge therein so as to ensure accurate measurements of the lake's surface water elevations. Lake elevations shall be recorded once-a-month at the staff gauge for each month of the year until July 1, 1986. At least one Objector shall be present when the interim permittee records monthly lake elevations. During the irrigation season (May 1 to October 15), the interim permittees shall also record the daily pumping rate, pumped volume and pumping time.

C b. The pumping and lake elevation data shall be submitted to the Area Office Supervisor of the Kalispell Water Rights Field Office by July 1 for of each year of the three year monitoring program. All data recorded during the monitoring period shall be made available to the Kalispell Area Office Supervisor upon demand.

c. After expiration of the three year monitoring program, the Objectors (Dale McGarvey, Joyce Poniecki or Dr. and Mrs. H. D. Smiley) or the interim permittees may request that a contested case hearing be held to determine whether a regular permit (85-2-311, MCA) should be granted. A hearing shall be held if a request for the hearing is submitted, in writing, to the Kalispell Area Office Supervisor on or before September 1, 1986 by the Objectors or the interim permittees or both. Each Objector's right to participate in the hearing is contingent upon the individual Objector filing a written request on or before the September 1 deadline. If no hearing is requested by any of the Objectors or the interim permittees on or before September 1, 1986, the Department shall issue a regular permit subject to 85-2-311 and 85-2-312(1), MCA.

3. That the Department postpone making a decision to grant or deny a regular permit to the interim permittees until at least September 1, 1986.

DONE this 17th day of June, 1983.

Kent B. Roberts
Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

NOTICE

Pursuant to MCA Sec. 2-4-623(5), the Department is required to serve its final decision on each party by first class mail.

MEMORANDUM

I.

ARM §36.12.104(1)(a) mandates that the Department cannot issue an interim permit unless "there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA, will be met." At the hearing, the parties stipulated to the criteria necessary for the granting of an interim permit. Consequently, this stipulation is the basis by which the Hearing Examiner has concluded that the requirements of ARM §36.12.104(1)(a) have been satisfied.

II.

In the Proposed Order, the Hearing Examiner recommended that the Applicants be granted an interim permit subject to a number of "terms and conditions". See, ARM §36.12.104(1)(b). Those terms and conditions are based on recommendations provided by the parties at the hearing and on the record. See, Finding 15. Of the five recommendations proposed by the parties, the Hearing Examiner adopted three of the recommendations in toto; one was slightly modified; and another was not adopted.

The one recommendation not adopted concerned allocating the cost of installing the staff gauge between the parties. This condition is not, in the Examiner's opinion, "necessary to protect the rights of prior appropriators." The "cost" condition

is best characterized as a contractual agreement between the parties. That type of agreement is personal in nature and typically enforceable by courts, not administrative agencies.

The recommendation slightly modified involved the parties' right to a contested case hearing after the expiration of the three year monitoring period. See, Proposed Order, Recommendation 2(c); cf., Finding 15. The added modification is that any Objector who wants a hearing must submit a written request to the Kalispell Area Office Supervisor by September 1, 1986 (two months after the monitoring program has been completed). This modification imposes a reasonable time limit on the Objectors' right to a hearing.

III.

On the record, the parties indicated they may request that personnel from the Department of Fish, Wildlife and Parks (FWP) measure and record surface water elevations at Tetrault Lake. The Hearing Examiner urges the parties to pursue this option. As noted at the hearing, the Hearing Examiner does not have the authority to order the FWP to measure and record Tetrault Lake surface water elevations. If FWP personnel agree to participate in this three year monitoring program, their participation would satisfy all the measuring and recording requirements of Condition 2(a) in the Proposed Order.

IV.

The Department normally grants interim permits to groundwater appropriators in order to determine whether the new appropriation

will adversely affect other groundwater wells in the area. Granting interim permits to surface water appropriators are not as common. However, in 1975, the Department did grant a surface water interim permit to the Applicants. See, Finding 1. This 1975 precedent plus the parties' stipulation to the granting of an interim permit serves as the basis for the Hearing Examiner's Proposed Order.

K.B.R.

AFFIDAVIT OF SERVICE

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

Patti K. Miller, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 17, 1983, she deposited in the United States mail, First Class Mail mail, an order by the Department on the Application by Allen & Betty Garrison, Application No. 43104, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Allen & Betty Garrison, Box 72, Eureka, MT 59917
2. Dr. & Mrs. H. D. Smiley, Rt. 1, Box 96D, Eureka, MT 59917
3. Derek Bridges, 404 6th Ave. S.W., Calgary, Alberta, Canada T2P0R9
4. Joyce Poniecki, 3031 Underhill Drive, Calgary, Alberta, Canada T2N4E4
5. Thomas & Lillian Dick, 1504 Scotland St. S.W., Calgary, Alberta, Canada T3L2L5
6. James Karamanlis, 71366 Biskra Road, Rancho Mirage, CA 92270
7. Frank H. Leonard, Box 348, Eureka, MT 59917
8. Patrick M. Springer, Attorney at Law, 1111 S. Main St., Kalispell, MT 59901
9. Cate & O'Mea, 11192 Highway 2 West, Marion, MT 59925, Attn: Gilbert Cate
10. Kent Roberts, Hearing Examiner, Helena, MT 59620 (hand deliver)
11. Chuck Brasen, Kalispell Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Patti K. Miller

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

On this 17th day of June, 1983, before me, a Notary Public in and for said state, personally appeared Patti Miller, known to me to be the Clerk 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.

Michael P. Brasen
Notary Public for the State of Montana
Residing at Helena, Montana

My Commission expires 4/6/84

CASE # 43104

Larry

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER GRANTING
NO. 43104-s76D BY ALLAN H. AND) INTERIM PERMIT
BETTY F. GARRISON)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No exceptions or other argument were filed by any parties of record. The Department accepts and adopts the Findings of Fact, Conclusions and Memorandum of the Hearing Examiner as contained in his Proposal for Decision, and incorporates them herein by reference.

Therefore, on the basis of all the files, records and proceedings, herein, the Department makes the following:

ORDER

1. That an interim permit be granted to Allen H. and Betty F. Garrison (interim permittees) to appropriate 875 gallons per minute up to 200 acre-feet of water for sprinkler irrigation of the following lands: 40 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 10 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, 10 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all in Section 27, Township 37 North, Range 27 West in Lincoln County. The source of supply shall be Tetrault Lake, the waters thereof to be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 37 North, Range 27 West in Lincoln County. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to October 15 of any given year.

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2. That the interim permit be subject to the following conditions and terms:

a. The interim permittees shall permanently secure a staff gauge in the bed of Tetrault Lake and place the gauge therein so as to ensure accurate measurements of the lake's surface water elevations. Lake elevations shall be recorded once-a-month at the staff gauge for each month of the year until July 1, 1986. At least one Objector shall be present when the interim permittee records monthly lake elevations. During the irrigation season (May 1 to October 15), the interim permittees shall also record the daily pumping rate, pumped volume and pumping time.

b. The pumping and lake elevation data shall be submitted to the Area Office Supervisor of the Kalispell Water Rights Field Office by July 1 of each year of the three year monitoring program. All data recorded during the monitoring period shall be made available to the Kalispell Area Office Supervisor upon demand.

c. After expiration of the three year monitoring program, the Objectors (Dale McGarvey, Joyce Poniecki or Dr. and Mrs. H. D. Smiley) or the interim permittees may request that a contested case hearing be held to determine whether a regular permit (85-2-311, MCA) should be granted. A hearing shall be held if a request for the hearing is submitted, in writing, to the Kalispell Area Office Supervisor on or before September 1, 1986 by the Objectors or the interim permittees or both. Each Objector's right to participate in the hearing is contingent upon the individual Objector filing a written request on or before the

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September 1 deadline. If no hearing is requested by any of the Objectors or the interim permittees on or before September 1, 1986, the Department shall issue a regular permit subject to 85-2-311 and 85-2-312(1), MCA.

3. That a decision to grant or deny a regular permit to the interim permittees shall be postponed until at least September 1, 1986.

DONE this 1st day of July, 1983.



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



Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 449-3962

NOTICE

The Department's Order granting an interim permit 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 this Order.

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AFFIDAVIT OF SERVICE
ORDER GRANTING INTERIM PERMIT

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

Nicky J. Wylie, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 11, 1983, she deposited in the United States mail, _____, an order by the Department on the Application by Allen & Betty Garrison, Application No. 43104, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Allen & Betty Garrison, Box 72, Eureka, MT 59917
2. Dr. & Mrs. H. D. Smiley, Rt. 1, Box 96D, Eureka, MT 59917
3. Derek Bridges, 404 6th Ave. S.W., Calgary, Alberta, Canada T2P0R9
4. Joyce Poniecki, 3031 Underhill Drive, Calgary, Alberta, Canada T2N4E4
5. Thomas & Lillian Dick, 1504 Scotland St. S.W., Calgary, Alberta, Canada T3L2L5
6. James Karamanlis, 71366 Biskra Road, Rancho Mirage, CA 92270
7. Frank H. Leonard, Box 348, Eureka, MT 59917
8. Patrick M. Springer, Attorney at Law, 1111 S. Main St., Kalispell, MT 59901
9. Cate & O'Mea, 11192 Highway 2 West, Marion, MT 59925, Attn: Gilbert Cate
10. Dale L. McGarvey, 745 South Main Street, Kalispell, MT 59901
11. Kent Roberts, Hearing Examiner, Helena, MT 59620 (hand deliver)
12. Chuck Brasen, Kalispell Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by _____

Nicky J. Wylie

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

On this 11th day of July, 1983, before me, a Notary Public in and for said state, personally appeared Nicky Wylie, known to me to be the Clerk 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.

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



[Handwritten Signature]

Notary Public for the State of
Montana
Residing at Helena, Montana
My Commission expires 1/21/84

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