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. 51769-S76LJ BY DUNCAN R. AND BARBARA D. CAMPBELL, JR. AND EDRA O. LIENEMANN	)))))	FINAL ORDER

* * * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in the above-entitled matter has expired. No exceptions or other arguments were filed by any party of record. The Department of Natural Resources and Conservation (hereafter, "Department") accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the Proposal, and expressly incorporates them herein by reference.

Therefore, on the basis of the record and proceedings herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 51769-s76LJ is hereby granted to Leonard Powell to appropriate 33 gpm up to 5.1 acre-feet annually for flood irrigation of 3.00 acres, during the period of March 1 to November 30 of each year. The point of diversion and place of use of this appropriation are located in the SE¼SE¼SE¼ Section 17, Township 25 North, Range 19

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West, Lake County, Montana. The source of supply is overflow water from a developed spring, to be diverted by means of a ditch. The priority date for this permit shall be 10:45 a.m., February 24, 1983.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidenced by this permit 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 diversions by the Permittee to the detriment of any senior appropriator.

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

C. The Permittee shall not divert more water than is reasonably required for the purposes for which application has been made. In no instance may the Permittee appropriate more water than the amount specified in the permit.

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DONE this 6 day of June, 1984.

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

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

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.

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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 June 8, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by EDRA O. LIENEMANN AND DUNCAN R. & BARBARA D. CAMPBELL, JR., , Application No. 51769-S76LJ, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Thomas J. Hoover, Attorney at Law, P.O. Box 247, Bigfork, MT 59911
2. W.G. & Joanne I. Mangels, East Lakeshore, Bigfork, MT 59911
3. Chuck Brasen, Water Rights Bureau Field Office Supervisor, (inter-departmental mail)
4. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Kay Elser

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

On this 8th day of June, 1984, 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.

Jan P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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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. 51769-S76LJ BY DUNCAN R. AND BARBARA D. CAMPBELL, JR. AND EDRA O. LIENEMANN	)))))	PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the Contested Case Provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held on March 2, 1984 in Kalispell, Montana.

Leonard Powell, successor in interest to the original Applicants, appeared personally and by and through his counsel, Thomas J. Hoover.

The Objectors, W.G. and Joanne Mangels, appeared personally.

Chuck Brasen, Area Office Supervisor of the Kalispell Water Rights Bureau Field Office, appeared as a representative for the Montana Department of Natural Resources and Conservation.

Statement of the Case

Duncan R. and Barbara D. Campbell, Jr. and Edra O. Lienemann filed an Application for Beneficial Water Use Permit to appropriate 33 gallons per minute ("gpm") up to 5.1 acre-feet per year of overflow water from a developed spring, for new irrigation on three acres located in the SE¼SE¼SE¼ Section 17, Township 25 North, Range 19 West, Lake County, Montana. The

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water is to be diverted by means of a ditch located in the SE¼SE¼SE¼ Section 17, Township 25 North, Range 19 West, and used for flood irrigation between March 1 and November 30, inclusive, of each year.

The pertinent portions of the application were published in the Polson Flathead Courier, a newspaper of general circulation in the area of the source, on July 7, 1983 and July 14, 1983.

William and Joanne Mangels filed a timely objection to the Application, alleging that the Applicants previously had altered the course of the overflow water, resulting in water entering the Mangels' property and causing damage; that they, the Objectors, had filed an appropriation claim on, and been granted a Certificate of Water Right for, the water entering their property in the amount of 20 gpm up to 10 acre-feet per annum; and that the Applicants had subsequently altered the overflow watercourse again, depriving the Mangels of their water.

In the interim between the Application in this matter and the hearing thereon, the original applicants sold the property to which the water right would be appurtenant to Leonard and Joan Powell. Leonard Powell, as successor in interest to the Applicants, decided to continue with the Application for Beneficial Water Use Permit, retaining the same point of diversion, place of use, proposed beneficial use, and requested amount. Hereafter, Leonard Powell will be referred to as "the Applicant".

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Exhibits

The present Applicant, Leonard Powell, submitted three exhibits in support of his Application in the above-entitled matter:

Applicant's Exhibits

1. Warranty deed from Edra Lienemann and Duncan and Barbara Campbell, Jr. to Leonard and Joan Powell, for property described as "a fractional part of Government Lot 4, Section 17, Township 25 North, Range 19 West, M.P.M., Lake County, Montana." (April 18, 1983).

2. Notification of Transfer of Appropriation Water Right from Edra Lienemann and Duncan and Barbara Campbell, Jr. to John Powell for property listed in Applicant's Exhibit Number 1. (April 18, 1983).

3. Map of the Mangels and Powell properties, with approximate locations of the watercourse for the spring overflow, Applicant's and Objectors' houses, orchards, and other improvements, and Applicant's proposed place of use and point of diversion.

Applicant's Exhibits 1-3 were accepted into the record without objection.

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

Both parties agreed to accept the September 19, 1983 field report prepared by James Rehbein of the Kalispell Water Rights Bureau Field Office into the record only for purposes of the factual data contained therein. Since Mr. Rehbein was not able

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to be present at the hearing, and therefore was not available for cross-examination, all information in the report which was gained through conversations, and all conclusions which were reached other than those regarding water availability, have been excluded from the record.

An off-the-record discussion at the hearing resulted in an agreement between the parties that they would try to reach a negotiated settlement whereupon the objection to the application would be withdrawn. The record was left open until April 16, 1984 for submission of notification that parties had finalized such an agreement.

A written settlement agreement signed by the parties to this matter was received by the Hearing Examiner on April 3, 1984. Two additional documents were received on April 16, 1984; a written withdrawal of the Mangels' Objection to Application for Beneficial Water Use Permit No. 51769-s76LJ, and a request that the Objectors' Certificate of Water Right No. 51718-g76LJ for 20 gpm up to 32.25 acre-feet per year, out of the water source for which the Applicant has applied, be cancelled.

The settlement agreement is a private agreement among the parties and is not within the Department's jurisdiction to authorize or to enforce. However, the resulting withdrawal of the only objection to the Application, and the Objectors' cancellation of their Certificate of Water Right for 20 gpm out of the source of supply are part of the record in this matter.

The Hearing Examiner, having reviewed the record in this

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matter and being fully advised in the premises, does hereby make the following Proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

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

2. The Application in this matter was duly filed with the Department on February 24, 1983, at 10:45 a.m.

3. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

4. The Applicant intends to use water for irrigation; a beneficial use.

5. Applicant's proposed means of diversion, construction, and operation of his appropriation works are adequate.

6. There are no planned uses or developments for which a permit has been issued or for which water has been reserved with which the proposed use will unreasonably interfere.

7. The Objectors have notified the Department of Natural Resources and Conservation of their intent to abandon their use of the source of supply, and requested that their Certificate of Water Right reflecting this use be cancelled. (Certificate No. 51718-g76LJ, priority date January 21, 1983, for 20 gpm up to 32.35 acre-feet per annum).

8. The source of supply is an unnamed tributary to Flathead Lake, created by overflow water from a developed spring

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located on the property of a third party.

9. The flow from the source of supply measures 11 gpm at the place of use, as measured on August 31 and September 14 and 19, 1983.

10. There are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant.

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

PROPOSED CONCLUSIONS OF LAW

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

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

3. The Department must 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;

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(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 use proposed by the Applicant (irrigation) is a beneficial use.

5. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. The water rights of a prior appropriator will not be adversely affected.

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

8. There are unappropriated waters in the source of supply.

9. The unappropriated waters are available during the period when they can be put to the use proposed by the Applicant.

10 Flow tests of the source of supply indicate that the full amount of the requested appropriation is not available, at least during August and September. However, the Applicant can make beneficial use of whatever amount of water is available, up to the amount of water which he has requested.

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

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PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 51769-s76LJ is hereby granted to Leonard Powell to appropriate 33 gpm up to 5.1 acre-feet annually for flood irrigation of 3.00 acres, during the period of March 1 to November 30 of each year. The point of diversion and place of use of this appropriation are located in the SE¼SE¼SE¼ Section 17, Township 25 North, Range 19 West, Lake County, Montana. The source of supply is overflow water from a developed spring, to be diverted by means of a ditch. The priority date for this permit shall be 10:45 a.m., February 24, 1983.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidenced by this permit 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 diversions by the Permittee to the detriment of any senior appropriator.

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

C. The Permittee shall not divert more water than is reasonably required for the purposes for which application are

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made. In no instance may the Permittee appropriate more water than the amount specified in the permit.

DONE this 3rd day of May, 1984.

Peggy A. Elting

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

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before May 29, 1984.

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AFFIDAVIT OF SERVICE

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 May 4, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Edra O. Lienemann and/Duncan R. & Barbara D. Campbell, Jr., Application No. 51769-s76LJ, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Thomas J. Hoover, Attorney at Law, P.O. Box 247, Bigfork, Montana 59911
2. W.G. & Joanne I. Mangels, East Lakeshore, Bigfork, Montana 59911
3. Chuck Brasen, Water Rights Bureau Field Office Supervisor, (inter-departmental mail)
4. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 4th day of May, 1984, 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.

Bethe Lambson
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 4 Oct 1985

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