

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

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 54154-s43Q BY ROBERT BOWMAN)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No timely exceptions were received from any party of record. Therefore, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the April 25, 1985 Proposal for Decision, and incorporates them herein by reference.

Based upon the Findings of Fact and Conclusions of Law, and all files and records herein, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit No. 54154-s43Q by Robert Bowman is hereby denied.

DONE this 31st day of May, 1985.

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

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

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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

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 31, 1985, she deposited in the United States mail, First class mail, an order by the Department on the Application by Robert V. Bowman, Application No. 54154-s43Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Robert V. Bowman, 1002 N. Mitchell Ave., Hardin, MT 59034
2. Yellowstone Conservation District, Allen Bond, Executive Secretary, 1629 Ave. D., Bldg. A, Suite #7, Billings, MT 59102
3. Duane & Vicki L. Bender, P.O. Box 31553, Billings, MT 59107
4. Dept. of Health & Environmental Sciences, Larry L. Brown, Water Quality Bureau, Room A-206, Cogswell Bldg., Helena, MT 59620
5. Sherman & Elaine Diède, 7 Sumac Dr., Billings, MT 59101
6. Amanda E. White, Blue Creek Rd., Billings, MT 59101
7. Maxine E. & Richard L. Oliver, 121 Monroe St., Billings, MT 59101
8. G. Edward Oliver, 411 Hillview Ln., Billings, MT 59101
9. Patrick P. White, Blue Creek Rd., Billings, MT 59101
10. Emanuel Fox, 28 N. Crestwood Dr., Billings, MT 59102
11. Barbara J. Purcell & Grace E. Brown, 4124 Acer Dr., Billings, MT 59101
12. Ralph S. & Zena K. Wright, 2555 Blue Creek Rd., Billings, MT 59103
13. Jack J. Halverson, Blue Creek Rt., Billings, MT 59101
14. Yellowstone County Commissioners, P.O. Box 35000, Billings, MT 59107
15. Cedar Park Homeowners, c/o Henry Lindgren, 4408 Bowman Drive, Billings, MT 59101
16. Keith Kerbel, Water Rights Bureau Field Manager, Billings, MT (inter-departmental mail)
17. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 31st day of May, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

John P. Gilman

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

CASE # 54154

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. 54154-s43Q BY ROBERT BOWMAN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on September 19, 1984, in Billings, Montana.

Robert V. Bowman, the Applicant in this matter, appeared personally at the hearing.

- Objectors Sherman and Elaine Diede appeared personally.
- Objector Amanda E. White appeared personally.
- Objector Maxine E. Oliver appeared personally.
- Objector Patrick P. White appeared personally.
- Objector G. Edward Oliver appeared personally.
- Objector Barbara J. Purcell appeared personally.
- Objector Jack J. Halverson appeared personally.

Homeowners from Cedar Park who appeared as witnesses for the Applicant are Sandy Kocab, Steven and Pamela Brewster, and Henry Lindgren. Homeowners David Mueller and John Harris also attended the hearing.

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Don Riddle, New Appropriation Specialist for the Billings Water Rights Bureau Field Office, and John Sanders, Civil Engineer II for the Billings Water Rights Bureau Field Office, appeared as staff witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

Objectors Ralph and Zena Wright were unable to attend the hearing in this matter, but submitted an affidavit in support of their Objection (received October 22, 1984).

Objector State of Montana Department of Health and Environmental Sciences did not attend the hearing in this matter, but submitted an affidavit in support of its Objection (received September 17, 1984).

Duane and Vicki Bender, Emanuel Fox, and the Yellowstone Conservation District filed timely objections in this matter, but did not appear at the hearing or make written submissions other than the initial Objections.

STATEMENT OF THE CASE

On February 22, 1984, the Applicant filed an Application for Beneficial Water Use Permit, seeking to appropriate 90 gallons per minute ("gpm") up to 145.1 acre-feet per year from Blue Creek, for domestic uses in Cedar Park Subdivision, located in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 21, Township 01 South, Range 26 East, in Yellowstone County, Montana. The water is to be diverted from Blue Creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 01 South, Range 26 East by means of a pump, for use from January 1 to December 31, inclusive, of each year.

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Cedar Park has been diverting water since 1976 pursuant to a Certificate of Water Right issued for a groundwater well. Subsequent investigations have shown that Cedar Park in actuality is diverting surface water from Blue Creek, and the present permit application was submitted to correct the situation. (See Memorandum.)

The pertinent portions of the Application were published in the Billings Gazette, a newspaper of general circulation in the area of the source, on March 28 and April 4, 1984.

Timely objections were filed to Application No. 54154-s43Q on Blue Creek by Jack J. Halverson, Ralph S. and Zena K. Wright, Barbara J. Purcell and Grace E. Brown, Emanuel and Clara Fox, Patrick P. White, G. Edward Oliver, Maxine E. and Richard L. Oliver, Amanda E. White, Sherman and Elaine Diede, Water Quality Bureau of the State of Montana Department of Health and Environmental Sciences, Duane and Vicki L. Bender, and the Yellowstone Conservation District.

Jack Halverson objected to the Application on the basis that there are no unappropriated waters in Blue Creek; that Blue Creek regularly goes dry in the months of July, August, and September, and the water source is overappropriated and overused. Mr. Halverson also objected on the basis that the proposed point of diversion is upstream from his uses, and will take all of the available water in the creek during dry months to the detriment of his prior water rights.

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Ralph S. and Zena K. Wright objected to the Application on the same bases as Mr. Halverson; that there are no unappropriated waters in Blue Creek, and that the proposed diversion is upstream from the Objectors and will adversely affect their prior water rights.

Barbara J. Purcell and Grace E. Brown objected to the Application on the basis that the proposed appropriation would adversely affect their water rights by reducing Blue Creek to a trickle and by affecting the groundwater table which allegedly supplies two shallow irrigation wells and a 30-foot domestic well.

Emanuel Fox objected to the Application on the basis that there is not always enough water in the creek; he stated that he has lived near Blue Creek for 66 years and that most of the time it is dry by the first of July.

Patrick P. White objected on the basis that Blue Creek is dry from June until May of the next year on his property near the mouth of Blue Creek, and that he does not get enough water even though he has "one of the oldest rights". Mr. White also made a general allegation of violations of appropriation rights.

G. Edward Oliver based his objections to the Application on the lack of unappropriated water in Blue Creek, especially during July and August, and on general allegations of misuse of the waters by other appropriators. Maxine E. and Richard L. Oliver objected to the Application on the basis that they have not had enough water for three of four years to take care of their

pasture and trees, and included the same statement of allegations concerning misuse of Blue Creek water that was submitted by G. Edward Oliver.

Amanda E. White objected to the Application on the basis that the low flow in Blue Creek cannot support the current users, let alone another appropriator.

Sherman and Elaine Diede stated in their objection that the proposed diversion could dry up Blue Creek, adversely affecting their use of Blue Creek water for irrigation, and possibly also affecting their domestic well.

The State of Montana Department of Health and Environmental Sciences ("DHES"), Water Quality Bureau, objected to the Application on the basis of water quality concerns, stating, "Blue Creek supplies insufficient quantities of quality water for domestic purposes during the period requested by the Applicant. Blue Creek has had a history of severe flooding resulting in extremely high sediment loads in the spring and extremely low, saline and bacteria-latent flows in the summer. The means of diversion is not adequate for delivery of quality water for domestic purposes." In a cover letter to the Objection, DHES states that it is their position that "the proposed infiltration gallery and diversion facilities are not adequate nor in the best interest of health and safety", and that they would agree to issuance of a permit only if the Applicant constructs an adequate means of diversion and drinking water treatment facility.

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Duane and Vicki L. Bender filed an objection to the Application on the basis that their property, rights, and interests would be adversely affected by the proposed diversion due to insufficient water in Blue Creek to supply the Application amount. Mr. and Mrs. Bender also alleged that Cedar Park, in conjunction with other appropriators, has dammed Blue Creek on specified occasions and thereby left the downstream appropriators without water. Mr. and Mrs. Bender additionally voiced concern about the "health factor", stating that the water has been fouled by livestock and possibly by unsanitary pumping practices.

Yellowstone Conservation District objected to the Application on the basis that use of Blue Creek water may infringe upon the Conservation District's senior reservation right. The Objection further states that a DNRC study of the Yellowstone River (the "Sobashinski Report") indicates that no water is available for new appropriations from the Yellowstone River, and suggests the City of Billings municipal reservation as an alternative source of water.

A May 22, 1984 Memorandum by Keith Kerbel, entitled "A Brief History of Conflicts on Blue Creek Regarding Cedar Park Subdivision", was sent to the Helena DNRC for review; enclosures documented the past Department activity on Cedar Park's diversions from Blue Creek (see, Memorandum to this Proposal for Decision).

A September 11, 1984 Memorandum was prepared by Don Riddle for inclusion in the Department's contested case file in the matter, documenting an estimated flow measurement for Blue Creek,

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calculations on the Blue Creek drainage area, a Soil Conservation Service flow measurement taken in 1969, and some observations on Blue Creek by Mr. Riddle.

On September 12, 1984, the Department received a Motion for Continuance, submitted on behalf of Ralph and Zena Wright, asking that the contested case hearing in this matter be rescheduled, due to Mr. Wright's serious illness and consequent inability to attend the hearing as scheduled. After consultation between counsel for Mr. Wright and the Hearing Examiner, a decision was made to allow Mr. Wright the opportunity to submit post-hearing testimony in the form of an affidavit, with a response period allowed for the Applicant; this matter was documented in a September 18, 1984 Memorandum by the Hearing Examiner which was sent to all parties in this matter.

On September 17, 1984, the Department received an affidavit from Jerry Burns, Environmental Program Manager for the Montana Department of Health and Environmental Sciences, submitting DHES testimony as to the unsuitability of Blue Creek water for use as a water supply, and DHES's position that the water therefore "cannot legally be put to a beneficial use as required by Section 85-2-311(1)(d), MCA".

EXHIBITS

The Applicant submitted four exhibits in support of the Application in the above-entitled matter.

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Applicant's Exhibit 1 is a photocopy of a sketch on a form marked as a "computation sheet", of the preflood stream channel and the post flood stream channel of Blue Creek in relation to the Cedar Park infiltration gallery. The sheet is headed with the information "Yellowstone Co. RSID, FDAA-558 Sheet No. 1 of 3, EPA Region VIII" and dated "6-14-78", and is marked with a gallery relocation alternative.

Applicant's Exhibit 2 is a photocopy of two sketches of infiltration galleries, labeled "Alternative A" and "Alternative B", on a "computation sheet" form, with the same information and date listed as is listed on Applicant's Exhibit 1, with the exception that Exhibit 2 is marked "Sheet No. 2 of 3".

Steve Brewster testified that the two exhibits are copies of Army Corps of Engineers documents which were developed when the Corps rebuilt Cedar Park's diversion system in 1978, after a flood had washed out the original site.

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

Two additional exhibits were offered in support of the Application in this matter:

Applicant's Exhibit 3 is a copy of a study entitled "Evaluation of Water Supply Sources for Cedar Park Subdivision", prepared by HKM Associates. The study reviews the water supply

situation at Cedar Park, reviews the supply alternatives in terms of water quality, quantity, and construction and maintenance costs, and discusses the urgency of the need for a new water supply.

Applicant's Exhibit 4 is a loan application and supplement submitted to DNRC's Water Development Bureau by Yellowstone County, for Cedar Park Water System (Loan Application received by the Department on June 15, 1984; Supplement to Loan Application received by the Department on July 31, 1984). The Application and Supplement review the water supply alternatives for Cedar Park Subdivision, discuss the need for a new water supply system, and review the anticipated expenses.

Applicant's Exhibits 3 and 4 were admitted into the record without objection.

The Objectors submitted five exhibits in support of their objections to the Application in this matter:

Objector's Exhibit A is a reproduction of a U.S.G.S. map of the "Yegen Quadrangle" in Yellowstone County, showing the relevant part of the Blue Creek drainage. The map is mounted on a display sheet which also includes photocopied maps showing enlargements of those portions of the U.S.G.S. map which represent Quanta Subdivision (where some of the Objectors own property) and Blue Creek Acreage Tracts (where the Applicant's

diversion site is located). The three maps are marked with approximate well locations for Quanta Subdivision and for the Applicant.

Objectors' Exhibit B consists of eight photographs mounted on a display sheet. The photographs depict the Purcell-Brown property and the property they lease, show the irrigation of this property, and show two views of Blue Creek as it passes through the property. The photographs were taken by Barbara Purcell on September 1, 1984.

Objectors' Exhibit C is a photocopied map of Quanta Subdivision, showing the location of the property owned and leased by Barbara Purcell and Grace Brown. The map is marked with the location of Blue Creek through the property, and of three wells for sprinkler irrigation and the house well.

Objectors' Exhibit D is an article from the May 10, 1984 edition of the Billings Gazette, captioned "Water woes plague residents". The newspaper article contains a discussion of the water situation in Cedar Park Subdivision, and includes a photograph of a portion of that Subdivision.

Objectors' Exhibit E is a photograph of Blue Creek as it passes through the Diede property downstream from the Applicant's point of diversion. The photograph was taken in July, 1977 by Sherman Diede.

Objectors' Exhibits A, B, C, and E were accepted into the record without objection. Objection was made to Objectors' Exhibit D on the basis that the newspaper article contained inaccurate statements. Objectors' Exhibit D was accepted into the record for the limited purpose of the photograph's depiction of the area, and for the general fact that there are perceived problems with the water supply situation in Cedar Park Subdivision, rather than for the truth of the matters asserted in the article.

The Department offered five exhibits for admission into the record.

Department Exhibit 1 is a September 11, 1984 memorandum prepared by Don Riddle for inclusion in the record in this matter. It gives a brief synopsis of the Cedar Park diversion on Blue Creek, a calculation of the Blue Creek drainage area, a single U.S.G.S. flow measurement, an estimated flow made by the Department, and random observations concerning Blue Creek flow patterns. The memorandum has two attachments: a photocopy of the U.S.G.S. report showing a July 18, 1969 flow measurement on Blue Creek, and a photocopy of the cross-sectional area diagram prepared by Department personnel when they made an estimated flow measurement on August 23, 1976.

Department Exhibit 2 consists of five photographs of Blue Creek, taken by D.W. Riddle. Photograph No. 1 was taken at the

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bridge where Blue Creek flows under State Highway 416, on August 1, 1980. Photograph No. 2, also taken on August 1, 1980, shows Blue Creek at the point it passes under the county road above Cedar Park's point of diversion. Photographs Nos. 3, 4, and 5 show Cedar Park's diversion from Blue Creek as of August 27, 1981; the photos show a culvert or pipe extending out of a gravel layer on the creek bank into Blue Creek, below the water surface.

Department Exhibit 3 is a set of three computer printouts listing all known water rights on Blue Creek. The printouts were made by the Department's Water Rights Bureau, accessing all water rights information available to the Department.

Department Exhibit 4 is a composite map of Blue Creek drainage, assembled from photocopies of U.S.G.S. quad maps of the area. The exhibit is marked with the boundaries of the Blue Creek drainage basin, with Blue Creek and its tributaries, and with the known points of diversion for existing water rights to surface water (no claimed groundwater rights are shown).

Department Exhibit 5 is a copy of a Department report entitled "Water Reservations and Water Availability in the Yellowstone River Basin" by Daniel A. Sobashinski and Diane Fitz Lozovoy, published in May, 1982.

Department Exhibits 1, 2, 3, and 4 were accepted into the record without objection. Objection was made to Department Exhibit 5 on the basis that it is not relevant, since there is no data in the report which specifically refers to Blue Creek. Department Exhibit 5 therefore was accepted into the record for the limited purpose of giving a general overview of the water availability situation in the area, and of the water available through various appropriation options such as the City of Billings municipal reservation. In addition, the Exhibit is relevant to Yellowstone Conservation District's Objection.

Upon request of counsel for Ralph and Zena Wright, the record in this matter was left open for submission of posthearing written testimony by Mr. Wright, concerning his objection to the Application in this matter. Mr. Wright's affidavit was received by the Department on October 22, 1984. A copy of the affidavit was mailed to the Applicant in this matter, who was given two weeks to repond to the testimony contained in Mr. Wright's affidavit. No additional submissions were received from the Applicant or the Objectors in this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

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FINDINGS OF FACT

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

2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on February 22, 1984, at 2:05 p.m.

3. The Applicant intends to use the water for domestic purposes (for household and lawn and garden uses), which is a beneficial use. M.C.A. 85-2-102(2).

4. The source of supply for the proposed appropriation is Blue Creek, a tributary of the Yellowstone River.

5. Available flow data on Blue Creek consists of one U.S.G.S measurement of 2610 cfs, taken on July 18, 1969 at a point in the SW $\frac{1}{4}$ of Section 21, Township 01 South, Range 26 East, Yellowstone County, and one reading taken by Department personnel on August 23, 1976 at Reese Bridge (SW $\frac{1}{4}$, NW $\frac{1}{4}$, NE $\frac{1}{4}$ of Section 28, Township 01 South, Range 26 East, Yellowstone County), estimating the flow at 2.45 cfs.

6. Applicant Robert Bowman testified that he has lived on Blue Creek for many years, and that the creek normally goes dry in certain stretches in the summer; that in his experience the creek has never gone dry at the Cedar Park point of diversion, but goes dry in stretches downstream, although water is available

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by digging in the bed of the creek at those points. Mr. Bowman stated that Cedar Park's use of Blue Creek water under its Certificate of Water Right (see Memorandum) does not cause the creek to go dry downstream from the Cedar Park point of diversion, but rather that the stream normally goes underground at this point in the summer and re-emerges further downstream.

Mr. Bowman testified that, to his knowledge, Blue Creek has never gone dry at the lower bridge since Yellowtail Dam went in. He further testified that he believes that the subdivision which is upstream from Cedar Park subdivision is putting additional water into Blue Creek because it is irrigating along Blue Creek with water from the Yellowstone River.

7. Cedar Park homeowner Sandy Kocab testified that Don Riddle and Keith Kerbel of the Department's Billings Field Office had told him that the location of Briarwood Subdivision upstream from Cedar Park will enhance the flow of Blue Creek more than enough to supply Cedar Park's proposed appropriation. Mr. Kocab also stated that Claude Forguer, who has lived at Cedar Park's point of diversion for a number of years, told Mr. Kocab that Yellowtail Dam has enhanced the flow of Blue Creek.

Mr. Kocab testified that Cedar Park Subdivision has 117 lots, with 55 houses presently built. He estimated that perhaps a total of 100 houses eventually would be built. He stated that Cedar Park needs enough water to supply all of the units with domestic and lawn and garden water without rationing. Mr. Kocab stated that the Application for a permit for surface water is to

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assure that the correct source is identified, but that otherwise the 1976 Certificate of Water Right issued to Cedar Park is to be reaffirmed.

8. Cedar Park homeowner Steven Brewster stated that any effect the Objectors may be seeing on the Blue Creek flow is not solely the result of Cedar Park diversion, but rather is the result of an accumulation of withdrawals by several developments which have begun drawing on Blue Creek in the last ten years. Mr. Brewster stated that Cedar Park's diversion is an influence, but is not the only one.

Mr. Brewster testified that "90% of the time", there is a lot of water going by Cedar Park's point of diversion. He further testified that the present Cedar Park pump system is capable of pumping only 70 gpm, and that he normally turns the pumps on for a 24-hour period, then off for 48 hours.

Mr. Brewster stated that Cedar Park has instituted water rationing during the low months of the summer to show their willingness to cooperate, and to try not to overburden the water supply in the Blue Creek area.

9. Cedar Park homeowner Henry Lindgren testified that the subdivision needs water for domestic uses, lawn and garden uses, fire protection, and for "stockwater" for some animals and poultry. He stated that projected water needs in Cedar Park can be found in the loan application Yellowstone County submitted to the Water Development Bureau in Cedar Park's behalf, and in the evaluation of water supply sources that HKM Engineers developed for the subdivision (Applicant's Exhibits 3, 4).

Mr. Lindgren testified that, as the discussions contained in the loan application and the water supply study show, the Cedar Park ad hoc committee is studying sources of water other than Blue Creek for possible use by Cedar Park. He stated that the committee has assumed that the present water intake system will have to be rebuilt if Cedar Park continues to use Blue Creek Water, because of Department of Health's objections to the current system. Mr. Lindgren stated that Cedar Park wishes to continue with the permit process for Blue Creek water, even though it is pursuing other water source options, because the alternative sources of supply are very expensive. He testified that it is his understanding, however, that Cedar Park still has a valid permit for a groundwater well which has not been revoked.

10. Applicant's Exhibits 3 and 4 estimate the present population to be approximately 300 persons (Exhibit 4, p. 2), and the "ultimate population" at 268 persons (Exhibit 3, p. 3). The discrepancy appears to arise from Exhibit 4's estimate that there currently are 125 developed lots in Cedar Park, while testimony indicates that only 55 lots are developed (see Finding of Fact 9, supra), but that approximately 100 lots eventually will be developed.

Applicant's Exhibits 3 and 4 also contain numerous statements that Blue Creek already is overappropriated (see Applicant's Exhibit 3, pp. 2, 3; Applicant's Exhibit 4, cover letter, pp. 1, 2, 6; Exhibit 4 Supplement, cover letter, Introduction, criteria narrative 1. and 3.), and that Blue Creek water may pose a health hazard (see Applicant's Exhibit 3, pp. 2, 3, 4, 25, 26;

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Applicant's Exhibit 4, cover letter, pp. 2-3, 6; Exhibit 4 Supplement, cover letter, introduction, criteria narrative 1. and 3.).

11. The affidavit submitted by Jerry Burns for the Department of Health and Environmental Sciences ("DHES") states that the 1978 flooding on Blue Creek transformed Cedar Park's water diversion system from a "subsurface diversion utilizing an infiltration gallery", submitted to and approved by DHES, into a surface supply. The affidavit further states that the current diversion has never been submitted for review and approval by DHES, that the Cedar Park Subdivision water supply system therefore "is not being operated in compliance with state law", and that the Applicant may not lawfully divert Blue Creek water until DHES has determined the diversion to be "in compliance with applicable requirements" of the Montana Public Water Supply Act, and ARM 16.20.401(3) and ARM 16.20.205.

In closing, Mr. Burns' affidavit states that, without DHES approval, the Applicant cannot represent that the water being applied for can be put to a beneficial use, as required by MCA § 85-2-311(1)(d); that no water rights permit may be issued to the Applicant without being conditioned upon the Applicant first submitting plans and specification of the Cedar Park diversion structure to DHES and receiving DHES's approval in accordance with statutory requirements.

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12. Objector Barbara Purcell introduced exhibits showing the location of the Purcell-Brown land in Quanta Subdivision, downstream from the Applicant's point of diversion, and of the house well and the three wells that are used to irrigate the Purcell-Brown acreage and grazing land which they lease.

Ms. Purcell stated that she believes the wells in Quanta are using the Blue Creek aquifer, since the wells are only 12 to 15 feet deep, which is way above the level of the Yellowstone River. She further testified that Blue Creek "has dried up every summer" since Cedar Park Subdivision began pumping water in 1976, (see Memorandum), and that the wells dry up, also.

Ms. Purcell testified that Blue Creek and the wells are their only source of water supply, and that they will be harmed if Applicant is allowed to pump from Blue Creek, since there is no water available for Applicant's use.

13. Objector Patrick White testified that he lives right at the end of the creek, where it goes into the Yellowstone River, and that Blue Creek has been dry there for the last 7 or 8 years. He stated that their only source of water is Blue Creek, and that they use the water for irrigation, stockwater, and domestic uses.

Mr. White stated that almost half of the flow they normally receive has been lost in the last few years, and that "a lot of times" the only water they've had has been "back-up water" from the Yellowstone River. He stated that he can't irrigate, because the slough he pumps out of is dry, and that he hasn't been able to irrigate the pastures with a sprinkler, because the

groundwater which used to come up in springs in the pastures has been depleted ever since the Cedar Park diversion went in. Mr. White testified that he believes the groundwater as well as the surface waters are being depleted by Cedar Park, and that the Applicant has not been a resident of the area for the last 13 years, and does not have first hand knowledge of what's been happening to the creek.

14. Objector Sherman Diede introduced a photograph of Blue Creek as it looked on his property in August, 1977; the photograph shows an almost-dry streambed. He testified that the Applicant started pumping in 1976, and that the creek started going dry in 1977 and has been going dry every year since in June, July, August, and the first part of September.

In response to the Applicant's statements that certain stretches of Blue Creek have always gone dry, Mr. Diede stated that the creek does go underground "behind Halverson's" and doesn't emerge for two miles before it hits the river, but that the water is no longer just below the surface like it use to be.

Mr. Diede testified that he had used Blue Creek as his source of supply prior to 1976, then had put in a well; that the well had over 12 feet of water in it originally, but had lost over 4 feet of water since Applicant's pumping began.

15. Objector Maxine Oliver testified that they are located a short distance from the Applicant's point of diversion, and that Blue Creek has gone dry at various times. She stated that they don't have water now, and no longer can irrigate their garden or pasture.

16. Objector Amanda White testified that she has a 1900 water right which she uses for domestic, irrigation, and stockwater purposes, and that she strongly objects to the Applicant taking water out of Blue Creek. Mrs. White is located toward the end of Blue Creek, downstream from the Applicant's point of diversion.

17. Objector Jack Halverson testified that he moved out to Blue Creek in the late 1940's, and has lived there full time for the last 13 years. He stated that in the last few years Blue Creek has been dry more times than there's been water; that sometimes they have a little trickle at the upper end of their place, but that sometimes they haven't had enough water even for their stockwater, domestic, and irrigation uses.

Mr. Halverson stated that when he first moved to Blue Creek he irrigated hay fields with gravity flow, and the creek supported a trout population. He stated that in the last few years there has not been enough water in Blue Creek to pump, let alone to divert with a dam.

Mr. Halverson further testified that, 13 years ago when he moved to Blue Creek permanently, he put a culvert in Blue Creek down to blue shale. He stated that the water level has dropped 10 feet and now barely covers the blue shale; that water no longer is in the bottom gravel of the creek like the Applicant testified it has been.

Mr. Halverson also expressed concern that if the Applicant was allowed to continue pumping from Blue Creek, Cedar Park could install a much larger pump and draw more water, since there is a 4-inch water main already going up to the storage tank.

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18. The affidavit submitted by Ralph S. Wright states that he and his wife purchased property on Blue Creek in 1971, along with appurtenant historic water use rights, and have since used Blue Creek water for irrigation, stockwater, and domestic use. The property owned by Mr. and Mrs. Wright lies "approximately 200 yards" below the Applicant's point of diversion.

Mr. Wright's affidavit states that Blue Creek historically from time to time has gone dry during the late summer months, "depending on the amount of upstream use and the amount of rain fall", but in most years since Mr. and Mrs. Wright have lived on the property;

Blue Creek has gone dry during late July or early August and does not start to run until fall rains start in September. Since the Applicant, Robert Bowman, installed his water system for his subdivision known as Cedar Park Subdivision, the waters of Blue Creek have consistently gone dry during these late summer months on an annual basis Affiant believes that said use on a consistent basis is responsible for the declining surface waters in Blue Creek which are especially noticable (sic) during the late summer months as previously mentioned.

Mr. Wright further states that he believes the present Cedar Park diversion is inconsistent with the "existing permit", since it is actually a taking of surface waters, but that surface waters should not be granted to the Applicant for several reasons: the lack of unappropriated surface waters in Blue Creek, the unlikelihood that any of the water diverted will return to the stream (in part because the high bentonite content of the soil does not allow for subsurface water percolation), the inadequacy of Cedar Park's present system of diversion, and the poor quality of Blue Creek water.

Mr. Wright summarizes his testimony by stating that he and his wife object to the Applicant's proposed appropriation because the proposed use conflicts both in quantity and in period of use with the ability of the Wrights and other downstream users, as prior appropriators, to use their prior water rights.

19. Don Riddle, New Appropriation Specialist for the Billings Water Rights Bureau Field Office, introduced Department Exhibits showing all known water rights on Blue Creek, the known points of diversion for existing water rights, the two flow measurements taken on Blue Creek (see Finding of Fact 7), and photographs taken above, below, and at the Applicant's point of diversion. (Department Exhibits 1-4). Mr. Riddle testified that the water pipe clearly evident at the Applicant's point of diversion in the 1981 photographs was exposed after Blue Creek flooded and changed the creek course approximately five feet toward Applicant's diversion works, and lowered it approximately two feet. (At the time of the site visit on September 19, 1984, immediately after the hearing in this matter, the pipe was covered with a bed of gravel.)

Mr. Riddle testified that he had not made any statement concerning the enhancement of Blue Creek flow by Briarwood Subdivision (see Finding of Fact 9), although Keith Kerbel may have discussed possible recharge to the Blue Creek aquifer from the irrigation of Briarwood's golf course and lawns and gardens. Mr. Riddle testified that Briarwood also is utilizing water rights from Blue Creek, however.

Mr. Riddle gave a brief history of Cedar Park's attempts to gain a water right in Blue Creek (see Memorandum). He stated that a Notice of Completion of Groundwater Development had been filed for Cedar Park by Lowell Rasmussen in 1976, that subsequent investigation had proved the well to be an infiltration gallery pulling Blue Creek surface water, and that an application had been filed for a permit for surface water and subsequently withdrawn because of the large number of objections to it which were filed. Mr. Riddle stated that he had requested Mr. Rasmussen to notify him prior to any alteration of the diversion system, but that Mr. Rasmussen had acted to remove portions of the infiltration gallery without notifying the Department, and had then requested that Cedar Park's Certificate for groundwater be reinstated; Mr. Rasmussen alleged that the diversion had been brought into compliance through the alterations, and was no longer utilizing surface water.

Mr. Riddle testified that he and two other Department employees made an inspection on August 23, 1976, and saw no visible signs of a surface diversion: the Certificate of Water Right was issued to Cedar Park in 1977, with its original 1976 priority date. (As the Memorandum discusses in more detail, the Cedar Park diversion became the focus of an ongoing series of complaints by other appropriators and discussions between the parties and the Department, culminating in the Application in the present matter.)

20. Civil Engineer John Sanders, appearing as a Department staff witness, gave a brief synopsis of a study issued by the Department in 1982, entitled "Water Reservations and Water Availability in the Yellowstone River Basin", (Department Exhibit 5): the study concludes that at the Billings gaging station on the Yellowstone River, there is no flow in 4 to 5 years out of every 10 years for new appropriations, if all the reserved water rights (e.g. federal reserved rights, Indian reserved rights, instream flow requirements, Wyoming's share of the Yellowstone) are perfected.

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

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto, whether present at the hearing or not.
2. Objector Yellowstone Conservation District, having failed to appear at the hearing, is in default pursuant to Administrative Rule of Montana § 1.3.214(1).
3. Objectors Duane and Vicki L. Bender, having failed to appear at the hearing, are in default pursuant to Administrative Rule of Montana § 1.3.214(1).
4. Objector Emanuel Fox, having failed to appear at the hearing, is in default pursuant to Administrative Rule of Montana § 1.3.214(1).

5. 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.

6. The Department must issue a permit in an application for new appropriation if the applicant proves by substantial credible evidence:

- (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.

7. Domestic use usually is a beneficial use of water. (See MCA § 85-2-102(2).) However, an illegal use of water is not a beneficial use. Toohy v. Campbell, 24 M. 13, 60 p. 396 (1900). It is not possible to tell from the record whether the proposed use would be illegal (see Finding of Fact 12, Applicant's Exhibits 3 and 4). However, the disposition of the matter makes it unnecessary to decide this issue.

8. The Applicant has failed to prove by substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and that throughout the period during which the Applicant seeks to appropriate the amount requested is available.

The only evidence supplied by the Applicant concerning water availability in Blue Creek is testimony by Mr. Bowman and Steven Brewster, respectively, that there has always been water at the Cedar Park point of diversion and that "90 percent of the time" there is "a lot" of water going by the point of diversion. The only other flow information by the Applicant was in the form of speculation by Mr. Bowman and by Sandy Kocab through hearsay, that the flow of Blue Creek may be enhanced by the presence of Yellowtail Dam, and of Briarwood Subdivision upstream on Blue Creek (See Findings of Fact 8, 9, 11).

The fact that there is water in the source of supply, however, does not mean that there are "unappropriated waters". The water which is going by the Cedar Park point of diversion supplies the Objectors and other downstream appropriators: it is not available for appropriation by the Applicant except to the extent that it exceeds the requirements of prior appropriators.

As the record in this matter makes clear, there is minimal flow data available for Blue Creek, and the data that is available is not consistent. (See Finding of Fact 7.) However, if Mr. Riddle's uncontradicted statement that 1100 gpm is an average flow for Blue Creek in August (See Department Exhibit 1)

is used as a basis for comparison, a review of Department records makes it clear that Blue Creek is overappropriated at this time of the year. Senior surface water uses downstream from Cedar Park, as evidenced by Water Use Permits and SB76 Claims, apparently far exceed the amount of water available for the claimed uses. (See Department Exhibits 3, 4.) This conclusion is supported by testimony and evidence presented by the Objectors in this matter. (See Objectors' Exhibit E, Findings of Fact 13-19.)

In addition, Applicant's Exhibits 3 and 4 contain repeated admissions that Blue Creek is overappropriated. (See, e.g., Applicant's Exhibit 3, pp. 2 and 3; Applicant's Exhibit 4, cover letter, pp. 1, 2, and 6; Exhibit 4 Supplement, cover letter, introduction, criteria narrative 3.)

Some of the senior claimed water rights claim a period of appropriation which extends only through the summer months. It is possible that there are unappropriated waters during the winter months, after the fall rains. However, there is no information in the record upon which to make a determination that water is available for appropriation by the Applicant, or the period of time during which water might be available.

9. The Applicant has not proved by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

Many of the Objectors present at the hearing testified that they have not been able to get the full amount of their appropriative right in the past few years. Although Mr. Bowman

testified that Blue Creek has always gone dry in certain stretches of the creek, and that Cedar Park has not caused these areas to go dry, testimony by the Objectors indicates that the water which used to be present in the bottom gravels of the creek is no longer available.

Testimony concerning the subdivisions and other developments which have gone in on Blue Creek in recent years indicates that the Cedar Park diversion, in all probability, is not the only factor responsible for the current water shortages. However, the diversion of even the smallest amount of water adds to the cumulative impact on the water availability of an overappropriated stream. It is one of the fundamental tenets of Montana water law's "doctrine of prior appropriation" that a junior appropriator is not entitled to divert any amount of water, however small, when the water needs of a senior appropriator who otherwise would receive the water have not been met.

The most obvious proof that the rights of a prior appropriator would be adversely affected by the Applicant's proposed appropriation is the fact that the Applicant currently is diverting water out of Blue Creek for the same project pursuant to a Certificate of Water Right, and this diversion has at least contributed to the water shortages which the Objectors testified they have been experiencing in recent years. Even though the permit for which the Applicant has applied is intended to be in lieu of, and not in addition to, the Certificate of Water Right, a water use which adversely affects other

appropriators will not cease to do so simply because the grant of right to appropriate the water now carries a different title. The evidence present in the record in this matter indicates that the same point of diversion will be maintained, and that no less water will be withdrawn¹: apparently no changes are contemplated between diversion pursuant to the certificate and diversion pursuant to a permit, and hence no mitigation of the effect to the Objectors' water rights can be expected.

In addition, Applicant's own exhibits 3 and 4 contain repeated admissions that Blue Creek is overappropriated. (See, Applicant's Exhibit 3, pp. 2 and 3; Applicant's Exhibit 4, cover letter, pp. 1, 2, and 6; Exhibit 4 Supplement, cover letter, Introduction, criteria narrative 3.)

10. The Applicant has failed to prove by substantial credible evidence that the current means of "diversion, construction, and operation of the appropriation works" are adequate. The record in this matter indicates that Blue Creek water has high levels of turbidity and poses other potential health hazards, and that the present diversion system does not

¹ Although the Application for Beneficial Water Use Permit in this matter requests a flow rate of 9 gpm less than the Certificate (90 gpm instead of 99 gpm), the testimony indicates that Cedar Park has never pumped more than 70 gpm (see Finding of Fact 11). Therefore, pumping at the requested permit rate of 90 gpm would result in a greater impact to the flow of Blue Creek, rather than a lesser impact.

provide for adequate treatment of the water. (See Finding of Fact 13; Applicant's Exhibit 3, pp. 2, 3, 4, 25, 26; Applicant's Exhibit 4, cover letter, pp. 1, 2-3, 6; Exhibit 4 Supplement, cover letter, introduction, criteria narrative 1. and 3.)

Testimony by witnesses for the Applicant, in conjunction with Applicant's Exhibits 3 and 4, makes it clear that serious efforts are being made to rectify the water quality problem. Because of the disposition of the matter herein, however, the question of whether or not the Applicant has shown that proposed changes in the diversion, construction, and operation of the appropriation works will render the proposed diversion adequate need not be addressed.

11. Yellowstone Conservation District objected to the present Application on the basis that the proposed appropriation might infringe on the District's senior water reservation right. (See MCA § 85-2-311(e).) Yellowstone Conservation District did not appear at the hearing in this matter, and it is not possible to tell from the record whether or not the District's right might be affected. However, because of the disposition of the matter herein, it is not necessary to reach a determination on this issue.

12. The findings of fact, conclusions of law, and decision made in the present Application for Beneficial Water Use Permit do not act to cancel Certificate of Water Right No. 12993-g43Q, issued to Cedar Park Development with a priority date of August 23, 1976. (See Memorandum.)

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

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 54154-s43Q by Robert Bowman is hereby denied.

DONE this 25 day of April, 1985.

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 is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposal for decision, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 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 before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

CASE # 54154³²

MEMORANDUM

The above-entitled matter concerns an Application for Beneficial Water Use Permit by Robert Bowman, who is applying for 90 gpm up to 145.1 acre-feet of water per year to be diverted by means of a pump from the surface water source, Blue Creek, to be used year-round for domestic purposes in Cedar Park Subdivision.

The current Application is not the first attempt that has been made to find a source of water for the subdivision. In August, 1976, Lowell Rasmussen filed a Notice of Completion of Groundwater Development for 99 gpm domestic use for Cedar Park, with a remark listed on the Notice that "the water well is used for a private municipal water supply until system is included in the City of Billings water supply. Estimated at five years." After several complaints were received by the Department from other appropriators on Blue Creek, three Department employees field-investigated the Cedar Park diversion and found it to be an infiltration gallery which appropriated surface water from Blue Creek, rather than a well which diverted groundwater. On the basis of the investigation, the Department notified Mr. Rasmussen in November, 1976, that the Notice of Completion of Groundwater Development was "inappropriate", and that he should file an Application for Beneficial Water Use Permit for surface water from Blue Creek.

In January, 1977, Mr. Rasmussen filed an Application for Water Use Permit for surface Water from Blue Creek. The Application requested 90 gpm up to 55 acre-feet a year for year-round domestic use for Cedar Park Subdivision. The Department received thirty-two objections to the Application.

In July, 1977, the Department received a letter from Mr. Rasmussen, requesting that the Application for Beneficial Water Use Permit for surface water be terminated, and the Notice of Completion of Groundwater Development be reinstated. Mr. Rasmussen stated that the perforated pipe which had penetrated the bank of Blue Creek had been removed to a point greater than 10 feet from the bank, and that the streambank had been rebuilt. Subsequent to a site visit by Department personnel, a Certificate of Water Right was issued to Cedar Park in September, 1977, for 99 gpm up to 159 acre-feet per year, with a priority date of August 23, 1976.

The Department continued to receive numerous complaints from other appropriators, alleging injury to their water use by Cedar Park's appropriation and the means by which water was being obtained for the subdivision (i.e., Blue Creek allegedly was dammed by subdivision residents to divert water for Cedar Park). The Department made several field investigations and numerous written responses on the basis of the complaints, and notified Mr. Rasmussen in August, 1981 that the Cedar Park diversion was being made directly from Blue Creek and would require a permit unless the use had been initiated prior to July 1, 1973.

Mr. Rasmussen apparently notified the Department that the subdivision was trying to get a more permanent source of water from wells located next to the Yellowstone River, and that the engineering firm working on the project felt the wells could be completed as early as the spring of 1982 if funding was received.

The Department responded to further complaints by other appropriators by informing them of Mr. Rasmussen's reply, and by stating, in part, "we are currently looking into taking legal action, if we have support from yourself and other effected (sic) downstream water users. Our policy is that we will go to court, if those effected (sic) also agree to mitigate the lawsuit. The Department will not seek a temporary restraining order, because we have no rights which are being effected (sic). The individuals effected (sic) by the alleged violation should seek the temporary restraining order." (See, e.g. September 16, 1981 letter from Keith Kerbel to Mr. and Mrs. Duane Bender.)

None of the complainants requested legal action. However, no alternative water supply was ever developed for Cedar Park, and the Department continued to receive complaints from other appropriators on Blue Creek. Therefore, the Department contacted Cedar Park Subdivision owner Robert Bowman, who made the Application for Beneficial Water Use Permit which is the subject of the present action in February, 1984.

Mr. Bowman testified at the hearing that he had not known, until a few months earlier, that the Cedar Park diversion was not in compliance, since Lowell Rasmussen previously had been handling Cedar Park correspondence on the matter. He stated that he personally had considered only Blue Creek as a source of water supply for the subdivision because of the costs involved in alternative water sources; that the cost of purifying water in the present system is small compared to the cost of the

alternatives. Mr. Bowman stated that groundwater in the area is located 200 to 300 feet deep, under the blue shale layer, and has too many minerals to be drinkable; the cost of tying Cedar Park's water system into the nearby Briarwood Subdivision would cost \$200,000 plus the expense of running the pipe between the two; and that the cost of running a water system from the Yellowstone River would be somewhat lower, but still prohibitive in view of the number of homeowners who would share the cost.

Henry Lindgren, a member of the Cedar Park homeowners' ad hoc committee which has been reviewing alternatives to the current water supply system, testified that the committee has hired an engineering firm to research the problem. They have been reviewing various options and an application has been made for a DNRC water development loan to help finance an adequate water supply system for Cedar Park. Mr. Lindgren testified that in the meantime, however, the Cedar Park homeowners wish to continue with the present Application for Beneficial Water Use Permt.

On the basis of the record in this matter it is not possible to grant Cedar Park a surface water right in Blue Creek. It also is not possible to cancel Cedar Park's existing Certificate of Water Right through the present hearing, under the guise of reviewing the record to make a determination on the Application for Beneficial Water Use Permit. Therefore, Cedar Park is left with a source of water under the 1976 Certificate. However, diversion of water by the present system means that Cedar Park remains in non-compliance with the Montana Water Use Act, since the Certificate grants a water right for groundwater and the

present system is diverting surface water. (See, MCA § 85-2-102(8), 85-2-301, 85-2-302, 85-2-306.) In addition, it is likely that Cedar Park is violating provisions of the Montana Public Water Supply Act when it diverts Blue Creek water by means of its present system. (See Finding of Fact 12 and Conclusion of Law 10, supra.)

The decision in this matter would appear to sustain the status quo; in other words, it would appear that nothing has been accomplished. Cedar Park remains without a "legal" source of water, and the Objectors and other downstream water users are still faced with the problems of Cedar Park diverting upstream pursuant to its Certificate.

In actuality, however, the hearing on this Application has served to narrow the options of the parties involved in this matter. The decision herein should serve to notify Cedar Park that they will not be able to obtain a permit for surface waters from Blue Creek, and that they must look elsewhere for their water supply or face the possible repercussions of their noncompliance.

The decision also should serve to notify the Objectors in this matter that the Department will not act alone to mitigate any adverse effects that appropriators downstream from Cedar Park may be experiencing. Unlike a permit to appropriate surface water, which the Montana Water Use Act specifically gives the Department the authority to modify or revoke (see MCA § 85-2-314), a groundwater appropriation of less than 100 gpm

falls under an exception to permit requirements (MCA § 85-2-306) which the Department is not given administrative authorization to modify or revoke.

In such instances, legal remedies may be pursued. However, the Department reasserts the position it previously has taken in regard to Cedar Park's appropriation from Blue Creek; that the Department does not have rights which are being affected, and therefore, is not the proper party to seek a restraining order or other legal action against Cedar Park. If a party affected by Cedar Park's appropriation pursuant to the Certificate of Water Right wishes to pursue legal action, it may join the Department. However, the Department will not initiate such action unsupported by the affected water right users.

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 April 24, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Robert V. Bowman, Application No. 54154-s43Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Robert V. Bowman, 1002 N. Mitchell Ave., Hardin, MT 59034
2. Yellowstone Conservation District, Allen Bond, Executive Secretary, 1629 Ave. D., Bldg. A, Suite #7, Billings, MT 59102
3. Duane & Vicki L. Bender, P.O. Box 31553, Billings, MT 59107
4. Dept. of Health & Environmental Sciences, Larry L. Brown, Water Quality Bureau, Room A-206, Cogswell Bldg., Helena, MT 59620
5. Sherman & Elaine Diede, 7 Sumac Dr., Billings, MT 59101
6. Amanda E. White, Blue Creek Rd., Billings, MT 59101
7. Maxine E. & Richard L. Oliver, 121 Monroe St., Billings, MT 59101
8. G. Edward Oliver, 411 Hillview Ln., Billings, MT 59101
9. Patrick P. White, Blue Creek Rd., Billings, MT 59101
10. Emanuel Fox, 28 N. Crestwood Dr., Billings, MT 59102
11. Barbara J. Purcell & Grace E. Brown, 4124 Acer Dr., Billings, MT 59101
12. Ralph S. & Zena K. Wright, 2555 Blue Creek Rd., Billings, MT 59103
13. Jack J. Halverson, Blue Creek Rt., Billings, MT 59101
14. Yellowstone County Commissioners, P.O. Box 35000, Billings, MT 59107
15. Cedar Park Homeowners, c/o Henry Lindgren, 4408 Bowman Drive, Billings, MT 59101
16. Keith Kerbel, Water Rights Bureau Field Manager, Billings, MT (inter-departmental mail)
17. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

CASE # 54154

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

On this 25th day of April, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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



Wm P. Gibson

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

CASE # 5-4154