

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. 55749-g76LJ BY MEADOW LAKE)
COUNTRY CLUB ESTATES)

* * * * *

The Proposal for Decision in this matter was entered on September 11, 1987. The Applicant Meadow Lake Country Club Estates (Meadow Lake) filed timely exceptions to the Proposal, and Oral Argument Hearing was held before the Assistant Administrator of the Water Resources Division on Thursday, December 3, 1987 at the DNRC Kalispell Water Rights Field Office. Participating in the Oral Argument for Meadow Lake were Peter Tracy, Dennis Carver of Carver Engineering, and Bill Osborne of Liberty Drilling. Participating Objectors were John Craft, Raymond Sorenson, Fran Bornikhof, and Elsie Melton. Also present was Department attorney James Madden.

The Proposal for Decision recommended denial of Application for Beneficial Water Use Permit No. 55749-g76LJ. The reason for denial was that Meadow Lake had failed to meet its burden to prove by substantial credible evidence that the water rights of prior appropriators would not be adversely affected by Meadow Lake's proposed appropriation. MCA § 85-2-311(1)(b). See Conclusion of Law 10, Proposal at pp 16-18. Meadow Lake excepted to Conclusion 10, as well as to Findings of Fact 11 and 12.

Proposed Finding of Fact 11 incorporates the results of a Department-conducted pump test utilizing Applicant's existing well and a nearby monitoring well:

11. Between April 9 and April 13, 1987, the Department conducted a pump test utilizing Applicant's existing well and a monitoring well. Analysis of the results of that test yield a finding that pumping of Applicant's wells would induce vertical leakage, and that at a conjunctive discharge of 418 acre feet per annum (equivalent to 260 gpm continuously pumped for one year) pumping the wells would theoretically yield a maximum total long-term drawdown of approximately 4.7 decreasing (with lateral distance) to 4.2 vertical feet in those wells located from 2000 to 3000 lateral feet from Applicant's well sites, and about 3.9 decreasing (with lateral distance) to 3.7 vertical feet in the wells located from 4000 to 5000 feet from said sites.

(Department Exhibit 1: Graph at page 4.)

In its exceptions and at oral argument Meadow Lake challenges several assumptions used in the Department's pump test report (Department report) as unrealistic and overly conservative in favor of the Objectors, and observes that the Department report is "heavily qualified". Meadow Lake also argues that the Proposal gives too much weight to the Department Report.

At the outset, I note that the effectiveness of these arguments is greatly reduced because they are not timely presented. Once a Proposal for Decision is issued, the Department can modify the Findings of Fact only if they have no basis in the record. As provided in the Montana Administrative Procedure Act:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

MCA § 2-4-621 (3) (emphasis added).

To successfully challenge the Department report at this stage in the proceedings, Meadow Lake must show that the report is entitled to virtually no weight, and thus that Finding 11 is not based upon "competent substantial evidence". Meadow Lake has not shown this, consequently Finding 11 will not be modified.

Meadow Lake was given an earlier opportunity to challenge the Department report, which it neglected to pursue. Because the pump test occurred after the hearing in this matter, the Hearing Examiner mailed copies of the report to all parties, and left the hearing record open for two months for any party to submit its response to the report. See Notice of May 19, 1987. All parties were free at that time to move for consideration of new or rebuttal evidence, or to cross-examine the author of the report, or to make any other appropriate motion. Meadow Lake failed to respond to the May 19 Notice. Had it responded at that time,

Meadow Lake's arguments could have been considered more fully than at this stage of the proceedings.

Even if Meadow Lake's arguments could be fully considered here, they would not lead to a reversal of the Proposal for Decision. While Meadow Lake has challenged the Department report's credibility, the record shows that Meadow Lake actually agrees with the report's conclusions. The central conclusion of the Department report is that the deep aquifer tapped by Meadow Lake's existing well and the shallow aquifers tapped by the Objectors' wells are not completely separated. Thus, pumping the Meadow Lake well would have some drawdown effect on neighboring wells. Meadow Lake has admitted, both at the hearing and at the oral argument, that this "vertical leakage" from the shallow to deep aquifers was a possibility. See Transcript of Hearing at p. 49. Second, both the Department report and Meadow Lake are in substantial agreement as to the amount of probable drawdown. See Transcript at p. 49 and Department Exhibit 1. Consequently, even if Meadow Lake's arguments were timely, the record shows that the basic conclusions of the Department report are uncontested. For this reason, Meadow Lake's challenges to the report are without merit.

It must be noted that the drawdown figures predicted by the Department report are not dispositive of this case. Adverse effect cannot be determined by well drawdown alone. For some wells, a large drawdown might not cause adverse effect. For

others, a small drawdown might be critical. To support a finding of adverse effect, a drawdown must be matched with facts showing that it will impair a particular well or wells.

In this case, the record shows a possible drawdown in nearby wells of 3-5 feet. See Department Report. The record also contains evidence that a nearby Objector's well went dry in 1985 when Meadow Lake was pumping its existing well to fill its lakes. There is no evidence as to the actual drawdown occurring at the Objector's well. Actual drawdown could have been either more or less than that credited by the Department Report. See Finding of Fact 12, Proposal at p. 9 and Notice of Errata at p. 1.

The Objector's case was plausible here, given the proximity of his well to the Applicant's existing well, the dry up of the Objector's well at a time the Applicant was pumping, and the uncontested interrelation of the Applicant's and Objector's aquifers. Taken together, the facts in Finding 12 and the Department report constitute a prima facie case of adverse effect. By definition, a prima facie case consists of just enough evidence to prevail until contradicted by opposing evidence. As noted below, the dispositive feature of this case was that Meadow Lake simply failed to offer evidence to contradict the Objector's prima facie case.

In excepting to Finding 12, Meadow Lake argues that the

Hearing Examiner erroneously concluded from it that Meadow Lake was the cause of the Objector's well problem. This argument overlooks the fact that the burden of proof is placed by statute on the Applicant. Pursuant to MCA § 85-2-311(1)(b), the Applicant has the burden to prove that its proposed appropriation will not adversely affect the water rights of prior appropriators. MCA § 85-2-311(1)(b). Where, as in this case, an Objector presents facts suggesting prima facie that the Applicant's proposed appropriation will adversely affect the Objector's water rights, the Applicant must present facts to disprove the Objector's claim. Beyond alleging at the hearing that the Objector's well might be inadequately constructed, Meadow Lake offered absolutely no evidence to prove its appropriation would not affect the Objector's well. Because it had the statutory burden of proof, Meadow Lake's failure to rebut the Objector's claim necessitates the conclusion that Applicant failed to prove by substantial credible evidence that the Objector's well would not be adversely affected.

I recognize that, in groundwater Applications, the Applicant has a difficult burden to prove that its well will not adversely affect prior appropriators. However, this burden of proof is imposed by statute, and the Department has no discretion to alter it. In any case, by using the discovery process, an Applicant can at least ascertain before the hearing the Objector's case, and prepare a rebuttal. ARM § 36.12.215. To prevail in this matter, Meadow Lake had the burden to specifically address the

Objector's case, and to prove that its proposed well was not the cause of the Objector's well problem. Having failed to do so, its Application is denied.

Having denied the Application, there is no need to address Meadow Lake's exception to Proposed Conclusion of Law 9, which raises the question of whether the proposed appropriation would constitute an "aesthetic" beneficial use of water during the winter months. I also will not consider any new evidence offered at the Oral Argument Hearing. Finally, I will deny Meadow Lake's motion, made during oral argument, to reopen the evidentiary record in this matter. While the Department has discretion to reopen a record at this stage, it will only do so to admit newly discovered evidence that a party could not, with reasonable diligence, have discovered or produced at the hearing, or evidence which for other justifiable reason was not adduced at the hearing, and which the Department finds essential to its determination of a case. See Final Order In the Matter of the Application for Change of Appropriation Water Right No. G128519-76H by Robert E. and Alice E. Thoft. I find no justification to reopen the record in this case.

Accordingly, all the Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and record herein, and the Oral Argument Hearing, the Department of Natural Resources and Conservation makes the following:

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ORDER

Application for Beneficial Water Use Permit No. 55749-g76LJ
by Meadow Lake Country Club Estates is hereby denied.

DATED this 27 day of January, 1988.



LAURENCE SIORKY
Assistant Administrator
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

NOTICE

The Department's Final Order may be appealed in accordance
with § 2-4-702 of the Montana Administrative Procedure Act by
filing a petition in the appropriate court within thirty (30)
days after service of the Final Order.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 27th day of January, 1988, as follows:

Meadow Lake Country Club Estates
Peter Tracy
1415 Tamarack Lane
Columbia Falls, MT 59912

Brad and Connie Kenfield
1215 Tamarack Lane
Columbia Falls, MT 59912

E.N. Ehlers
1290 Tamarack Lane
Columbia Falls, MT 59912

Dan and Dorothy McCaffree
1295 Tamarack Lane
Columbia Falls, MT 59912

James Madden
Legal Counsel
DNRC
(hand delivered)

Fran Borninkhof
988 Tamarack Lane
Columbia Falls, MT 59912

Fred and Elsie C. Melton
1014 Tamarack Lane
Columbia Falls, MT 59912

John Craft
1605 Tamarack Lane
Columbia Falls, MT 59912

Raymond R. Sorenson
P O Box 779
Columbia Falls, MT 59912

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


Susan Howard
Hearings Reporter

CASE # 55749

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. 55749-g76LJ BY MEADOW LAKE)
COUNTRY CLUB ESTATES)

* * * * *

Pursuant to the Montana Water Use Act, Montana Code Annotated (hereafter, "MCA") Title 85, Chapter 2 (1985), and the Montana Administrative Procedure Act, MCA Title 2, Chapter 4 (1985), a hearing the above-entitled matter was held on February 28, 1986 in Columbia Falls, Montana. The hearing was completed on February 28, 1986. However, the record was left open for the receipt of a report interpreting data from an aquifer test initially proposed at the hearing. A Memorandum prepared by Mark Shapley (see below) was received on May 15, 1987 and subsequently mailed to the parties with a notice that examination of the author by written question was to be completed by June 20, 1987. No party submitted questions; therefore, the memorandum was admitted into evidence and the record was closed on July 1, 1987.

Appearances

Applicant Meadow Lake Country Club Estates appeared by and through its sole proprietor, Peter Tracy.

--Dennis Carver, of Carver Engineering, appeared as a witness for Applicant.

--Tom Smith, of Liberty Drilling Company, appeared as a witness for Applicant.

Objector E. N. Ehlers appeared pro se.

Objectors Dan and Dorothy McCaffree (hereafter, "Objector McCaffree") each appeared pro se.

Objector Fran Borninkhof appeared pro se.

Objectors Fred M. and Elsie C. Melton (hereafter, "Objector Melton") each appeared pro se.

Objector Raymond R. Sorenson appeared pro se.

--Barbara Benzien, appeared as a witness for Objector Sorenson.

Objector Brad Kenfield was represented by Connie Kenfield.

Objector John Craft appeared pro se.

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

Exhibits

Applicant presented one exhibit for inclusion in the record. Applicant's Exhibit 1 is a map of a portion of Section 6, Township 30 North, Range 20 West Flathead County, Montana. Objectors Raymond Sorenson, John Craft and E. N. Ehlers objected to its admission on the grounds that they had not received copies in advance. However, there is no evidence that these Objectors had at any time requested discovery. Therefore, and as the

exhibit is simply illustrative of the proposed well location on Applicant's property, the objection is overruled and the exhibit admitted.

The Department presented one exhibit for the record. Department's Exhibit 1 (a Memorandum by Mark Shapley, dated May 15, 1987) was admitted without objection.

No objections were registered to the contents of the Department file.

Proposed Findings of Fact

1. MCA §85-2-302 (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 exceptions described in MCA §85-2-306 (1985), and thus application was properly made with the Department.

2. The Application in this matter was regularly filed with the DNRC on March 28, 1984 at 12:30 p.m.

3. The pertinent facts of the Application were published in the Hungry Horse News, a newspaper of general circulation in the area of the source, on June 28 and July 5, 1984.

4. The Application is for a permit to appropriate groundwater by means of two pumped wells to be operated either alternately or concurrently at Applicant's discretion. One of the wells presently exists and is currently operated pursuant to

Permit No. 28809-G76LJ. (See Finding of Fact 5.) A second well (hereafter, "the proposed well") is planned. It would be approximately 730 feet in total depth and would be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana.

The application requests a maximum total diversion from both wells of 320 gallons per minute (hereafter "gpm") up to 418 acre-feet per year for use as follows: 320 gpm up to 285 acre feet per year for year round domestic use; 120 gpm up to 80 acre feet per year for supplemental irrigation between May 1 and October 1, inclusive each year, with pond storage of 15.6 acre feet; 50 gpm up to 53 acre feet per year for aesthetic use in ponds (otherwise used for storage) between October 1 and June 1, inclusive, each year. Domestic use would occur in the E $\frac{1}{2}$ W $\frac{1}{2}$ and the W $\frac{1}{2}$ E $\frac{1}{2}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana. Water diverted for irrigation would be used on 83 acres in the E $\frac{1}{2}$ W $\frac{1}{2}$ and the W $\frac{1}{2}$ E $\frac{1}{2}$ of Section 6, Township 30 North, Range 20 West, Flathead County, MT. Ponds with a total capacity of 15.6 acre-feet for irrigation storage and aesthetic use would be located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana.

5. The Permit herein applied for would be used in conjunction with Permit No. 28809-G76LJ for a combined appropriation not to exceed 320 gpm up to 418 acre-feet per year.¹ The means of diversion authorized under Permit No.

¹Permit No. 28809-G76LJ presently authorizes appropriation of groundwater at a rate of 165 gpm up to 150 acre feet per annum for year-round domestic use in 100 residences to be located in

28809-G76LJ is a completed and operational well 730 feet deep located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana (hereafter "the existing well").

6. Although the Application states that the proposed well is to be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana, approximately 1200 feet east of the existing well, evidence given at the hearing indicates that the Applicant in fact intends to locate the proposed well in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana, 184 feet due east of the existing well. (Testimony of Dennis Carver, Peter Tracy.)

7. Although the diversion works for the appropriation authorized under Permit No. 28809-G76LJ have been completed, Permittee (Applicant in the present matter), who was initially to have applied the water to beneficial use by May 1, 1983, has not yet done so.

Permittee has been granted several extensions of time in which to perfect the Permit by putting water to the contemplated domestic use. At present, Permittee has been granted an

the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana; the authorized means of diversion is an electric pump; the priority date is July 1, 1980 at 1:59 p.m.

A Permit issued pursuant to this application would expand the allowable output of the existing well to 320 gpm (the additional 155 gpm to be authorized hereunder) so that Applicant could obtain 320 gpm entirely from the existing well, or entirely from the proposed well, or from any combination of the two.

extension until December 1, 1996, by which time the full 150 acre feet per annum must have been put to domestic use. (Department records.)

8. The aquifer in which Liberty Drilling completed the existing well, and in which the proposed well is to be completed, is a regionally-confined (by till deposit approximately 100 feet thick, exposed at the surface), complex stratified aquifer system. The Objectors' wells are completed in the upper few tens of feet of this system; i.e., said wells are located in various water-bearing strata between 100 and 200 feet in depth. Applicant's existing well is, and the proposed well would be, completed in a water-bearing stratum of this system located at a depth of approximately 730 feet. (Department Exhibit 1.)

9. Applicant contends that there is no hydraulic connection between the water-bearing stratum in which the proposed well would be completed and the water-bearing strata from which Objectors divert, estimating a 95-98% probability that Objectors' wells will not be affected. (Testimony of Dennis Carver.) However, as discussed below, the geologic evidence indicates that there is a hydraulic connection.

The stratified aquifer system consists of non-continuous layers of relatively transmissive strata interbedded with non-continuous layers of relatively less transmissive strata. Because the aquifer system is thus structured, the water-bearing strata in which Objectors' wells are completed are hydrologically connected, albeit rather inefficiently, with the water-bearing stratum in which Applicant's existing well is completed. This

inefficient connection will result in a phenomenon denoted as "vertical leakage" when the deeper well is pumped; i.e., the deeper well will derive a certain portion of its recharge vertically from overlying strata in addition to that derived horizontally from the water-bearing stratum in which it is completed. (Department file: LeCain Memorandum, March 22, 1985 (hereafter "LeCain Memo"); Testimony of Mark Shapley; Department Exhibit 1.)

10. Applicant supports its contention that it is 95-98% probable that there would be no affect to Objectors' well levels with the results of a pump test of short duration (24 hours) which utilized the existing well but did not utilize a monitoring well. The test showed water level stabilization in the existing well at about 18 hours into the test. (Testimony of Dennis Carver.)

However, a test of such design does not distinguish stabilization due to vertical recharge from that due to horizontal recharge. (Testimony of Mark Shapley.) Therefore, lacking other evidence, Applicant's assertion that the stabilization was due to horizontal, and not vertical, recharge, amounts to mere conjecture. Further, under cross-examination Applicant's own expert witness stated that over a long period (1000 days) of continuous pumping there could be four to six feet of drawdown in Objector's wells located 1000 lateral feet from the proposed well. (Testimony of Dennis Carver.) In sum, although Applicant contends that there would be no vertical leakage, the evidence demonstrates that vertical leakage is highly probable.

11. Between April 9 and April 13, 1987, the Department conducted a pump test utilizing Applicant's existing well and a monitoring well. Analysis of the results of that test yield a finding that pumping of Applicant's wells would induce vertical leakage, and that at a conjunctive discharge of 418 acre feet per annum (equivalent to 260 gpm continuously pumped for one year) pumping the wells would theoretically yield a maximum total long-term drawdown of approximately 4.7 decreasing (with lateral distance) to 4.2 vertical feet in those wells located from 2000 to 3000 lateral feet from Applicant's well sites, and about 3.9 decreasing (with lateral distance) to 3.7 vertical feet in the wells located from 4000 to 5000 feet from said sites.

(Department Exhibit 1: Graph at page 4.)

12. Objector McCaffree operates a groundwater well for domestic uses pursuant to Certificate of Water Right No. 4157-G76LJ. Said well is located approximately 2069 feet from the existing well and would be less than 2000 feet from the proposed well. (LeCain Memo.)

The total depth is 142 feet; the pump is set at two to three feet above the bottom of the well. The static water level of the well at the time it was drilled was 122 feet below ground level; after one hour of test pumping at 16 gallons per minute (the authorized rate) the water level stood at 126 feet. (See Department records.) The record contains no evidence to indicate the water level in the well during current normal operation.

Objector testified this during a period in the summer of 1985, when Applicant was pumping its existing well to fill lakes, Objector's well, for the first time since it was drilled in 1974, went dry.

13. Objector Sorenson operates a groundwater well for domestic and stock uses pursuant to Certificate of Water Right No. 40166-G76LJ. Said well is located approximately 2207 feet from the existing well and would be approximately 2400 feet from the proposed well. (LeCain Memo.)

The total depth is 126 feet; the pump is set at 121 feet. At the time the well was drilled, the static water level was 107.5 feet; after 2 hours of test pumping at 28 gpm, the water level stood at 108.5 feet. (See Department records.) The record contains no evidence indicating the water level in the well during current normal operation.

Objector Sorenson reported that he had never had any trouble obtaining water from his well.

14. Objector J. Craft operates a groundwater well for domestic, lawn and garden, and stock uses pursuant to Certificate of Water Right No. C-40666-G76LJ. Said well is located approximately 2250 feet from the existing well and the proposed well would be approximately 2450 feet distant. (LeCain Memo.)

The total depth is 136 feet; it is not known at what depth the pump is set. At the time the well was drilled, the static water level was 95 feet. After 1 hour of test pumping at 12 gpm (the authorized rate) the water level stood at 115 feet. (See Department records.) The record contains no evidence showing the water level in the well during current normal operation.

Objector J. Craft reported that he had never had any trouble obtaining water from his well.

15. Objector Ehlers operates a groundwater well for domestic use pursuant to Certificate of Water Right No. 26856-G76LJ. Said well is located approximately 2364 feet from the existing well and the proposed well would be approximately 2164 feet distant. (LeCain Memo.)

The total depth is 164 feet; the pump is set at 140 feet. The static water level when the well was drilled was 120 feet; after two hours of test pumping at 16 gpm (authorized rate = 10 gpm) the water level stood at 135 feet. (See Department records.) The record contains no evidence indicating the water level in the well during current normal operation.

Objector Ehlers reported that he had never had any trouble obtaining water from this well.

16. Objector Kenfield operates a groundwater well for domestic use pursuant to Certificate of Water Right No. 52716-G76LJ. Said well is located approximately 2679 feet from the existing well and the proposed well would be approximately 2479 feet distant. (LeCain Memo.)

The total depth is 289 feet; the depth of the pump is not of record. When the well was drilled, the static water level was 145 feet; after one hour of test pumping at 30 gpm (the authorized rate) the water level stood at 229 feet. (See Department records.) The record contains no evidence indicating the water level in the well during current normal operation.

Objector Kenfield did not state whether or not there have ever been problems obtaining water from the well.

17. Objector Melton operates a groundwater well for domestic use pursuant to Certificate of Water Right No. 35116-G76LJ. Said well is located approximately 4200 feet from the existing well and the proposed well would be approximately 4000 feet distant. (LeCain Memo.)

The total depth is 128 feet; the depth of the pump is not of record. The static water level when the well was drilled was 100 feet; after one hour of test pumping at 15 gpm (the authorized rate) the water level stood at 108 feet. (See Department records.) The record contains no evidence indicating the water level in the well during current normal operation.

Objector Melton did not state whether there have ever been problems obtaining water from the well.

18. Objector Borninkhof operates a groundwater well for domestic use pursuant to Certificate of Water Right No. 27574-G76LJ. Said well is located approximately 5200 feet from the existing well and the proposed well would be approximately 5000 feet distant. (LeCain Memo.)

The total depth is 180 feet (casing to 168 feet); the depth of the pump is not of record. The static water level when the well was drilled was 120 feet; after 2½ hours of test pumping at 30 gpm (twice the authorized rate) the water level stood at 148 feet. (See Department records.) The record contains no evidence indicating the water level in the well during current normal operation.

Objector Borninkhof did not state whether there have ever been problems obtaining water from the well.

19. Between the time of the filing of the Application and the time of the hearing in this matter, Meadow Lake Country Club Estates, formerly a partnership owning both the realty for the planned subdivision and the golf course, was apparently dissolved and reorganized, resulting in a transfer of ownership of the planned subdivision to an entity of the same name but owned as a sole proprietorship by Peter Tracy, and also resulting in a transfer of the golf course to Meadow Lake Golf Course, Inc., owned 50% by Peter Tracy's wife and 50% by a party whose name is not of record. However, no Certificate of Transfer has been filed with the Department. See MCA §85-2-422 et. seq.

20. Title to the existing well has evidently been transferred to the Meadow Lake Water and Sewer District, a non-profit corporation, owned by the users of the existing well. As of the time of the hearing, Peter Tracy was one of the users. Whether Permit No. 26716-G76LJ has been delivered to said entity is not of record. However, no Certificate of Transfer has been filed with the Department. See MCA §85-2-422 et. seq.

21. Applicant presently holds claims, authorizations and permits to appropriate 157.5 acre feet per year² (hereafter, "AF/yr") for irrigation of 83 acres of turf, i.e., a volume of 1.90 acre feet/per acre/per year. However, sprinkler irrigation of turf requires between 2.4 acre feet/acre/year in a year of normal precipitation and 3.42 acre feet/acre/year in a dry year.

²16.5 AF/yr under Permit 26723-G76LJ, 16.0 AF/yr under Permit No. 26721-G76LJ, 85 AF/yr under Authorization to Change Appropriation Water Right No. 26719 and 13917, 10 AF/yr under Permit No. 26717-G76LJ and 30 AF/yr under Permit No. 26711-G76LJ.

(Department file.) Applicant's request for an additional 80 acre feet per year would yield a total volume of 237.5 AF/yr for irrigation of 83 acres, i.e., a per acre volume of 2.86 acre feet/acre/year, a reasonable volume per acre.

22. A family of five persons requires approximately one acre foot per year for domestic use. (Department file.) Applicant proposes to supply 566 residences with a total of 285 acre feet/year which anticipates an average household occupancy of 2½ persons, a reasonable per residence occupancy prediction.

23. Applicant's proposed storage ponds are apparently necessary to provide reserve capacity so that irrigation can be accomplished on demand while the proposed well, in conjunction with the existing well, supplies domestic water for residences during periods of peak domestic use. (See Department file: Explanation of Groundwater Application.) The proposed capacity of the ponds (15.6 acre-feet) would allow 5.13 fills of the ponds per season (May 1 through September 30) for irrigation use.

Proposed 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 having been fulfilled, the matter is properly before the Hearing Examiner.

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3. All parties who failed to appear at the hearing either in person or by representation are in default and their claims and interests in this matter are dismissed. Administrative Rule of Montana (ARM) 36.12.208.

4. 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.

5. Although the Application in this matter lists Meadow Lake Country Club Estates as the Applicant, the evidence indicates that said entity has been dissolved and its interests

transferred to several successors. (Finding of Fact 19.) The exact distribution of interest in this Application is not of record. However, for the purposes of rendering a decision in this matter, the Application will be treated as if the Applicant of record continued to exist.

6. Irrigation is a beneficial use of water, MCA §85-2-102 (2)(a), and Applicant reasonably requires 80 acre-feet to supplement irrigation of 83 acres of turf, presently irrigated under several permits and change authorizations. (Finding of Fact 21.)

7. Domestic use of water is a beneficial use thereof, MCA §85-2-102(2)(a), and Applicant will reasonably require 285 acre-feet/year to supply a projected 566 residences with domestic water. (Finding of Fact 20.)

8. Storage for irrigation is not a beneficial use in itself, but is necessary and incidental to the irrigation use. (Finding of Fact 23.)

9. The Hearing Examiner assumes arguendo that aesthetic use is a beneficial use of water. (MCA §85-2-102(2)(a) is silent on this point.) However, Applicant provided no evidence as to why keeping the storage ponds filled with water during the winter months is an aesthetic use of water. Therefore, and because Applicant did not allege any other reason why the ponds should be kept filled near the end of the irrigation season when the need for irrigation storage ceases, the Hearing Examiner concludes that Applicant failed to prove that water diverted between October 1 and May 1 each year would be put to beneficial use.

10. Applicant must prove by substantial credible evidence that the proposed appropriation will not adversely affect the water rights of prior appropriators. This, Applicant has attempted to accomplish by advancing alternate propositions. It is first alleged that the proposed diversion would not affect the water level in Objectors' wells; i.e., there would be no change in the conditions of water occurrence. It is alternately alleged that, even if the increase does reduce the water level in Objectors' wells, such effect would not be an adverse effect so long as Objectors' wells are "properly constructed."

Applicant has failed to prove no adverse affect by way of proving no change in the conditions of water occurrence at the Objectors' points of diversion. The evidence shows Applicant's pumping will lower the water levels in Objectors' wells.

(Finding of Fact 10.) Nevertheless, Applicant could divert as proposed if each Objector is able to reasonably exercise his water right under the changed conditions; however, it remains the burden of the Applicant to prove by a preponderance of substantial credible evidence that Objectors' reasonable exercise of their water rights would not be adversely affected by the changed conditions of water occurrence.

To meet its burden, Applicant must prove either that the change in water occurrence would have no effect on Objectors' ability to divert, or that the effect would be so minor that all that would be required to regain the status quo is adjustment of the Objectors' existing means of diversion. Although pertinent evidence could have been sought through proper discovery, see

ARM 36.12.215, Applicant provided absolutely no evidence relevant to Objectors' ability to divert if conditions of water occurrence were in fact changed, i.e., well water levels were reduced.³ Consequently, Applicant failed to prove that the change in water occurrence would have no effect, or only a minor effect, on Objectors' ability to divert.

For instance, in the case of Objector McCaffree, who testified that his well ran dry during the period that Applicant was utilizing domestic Permit No. 28809-G76LJ to fill ponds (evidence that increased pumping would adversely affect Objector's ability to divert), Applicant failed to present evidence in rebuttal. When Objector further testified that his pump was set at only 2 to 3 feet above the total depth of the well (indicating that lowering the pump level to compensate for an additional 4.7 foot projected reduction in water level could not be accomplished without deepening the well, clearly not a simple adjustment), Applicant failed to present any evidence which would indicate that only a minor adjustment would need be made.

³The Department records do not help Applicant make its proof because, although the well logs of Objectors' wells showed water levels during test pumping (which was conducted at the time the wells were drilled) generally above the total depth, the test durations were short and the results don't necessarily reflect normal use patterns. Additionally, testimony at the hearing indicates that aquifer conditions may have changed since the time the wells were drilled.

Compare the testimony of Objector McCaffree that his well ran dry in 1985, with pump test data showing a water level 14 feet above the level of the pump (17 feet above total depth) after one hour of test pumping. (See Finding of Fact 12.)

As the other Objectors presented even less evidence of adverse effect in their cases, Applicant's burden as to their objections would presumably have been lighter. However, a preponderance of evidence does require some evidence, which Applicant did not provide.

Even if an Objector's ability to divert would be seriously impaired, Applicant could still prevail by proving that an Objector's means of diversion is not a reasonable means of diversion. An unreasonable means of diversion is not protectable. However, even though Applicant made the repeated assertion that if any one of the Objectors' wells would not work as a result of the proposed appropriation it must be "improperly constructed", i.e., be an unreasonable means of diversion, it presented no evidence that any of Objectors' wells were in fact improperly constructed. A naked assertion, though oft repeated, is not substantial credible evidence.

It is the Applicant's burden to provide substantial credible evidence that Objectors' water rights would not be adversely affected by the proposed appropriation. Applicant has not met its burden under any theory.

WHEREFORE, based upon the foregoing proposed findings of fact and conclusions of law, the Hearing Examiner proposes the following:

ORDER

That Application for Beneficial Water Use Permit No. 55749-g76LJ by Meadow Lake County Club Estates be denied without prejudice.

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.

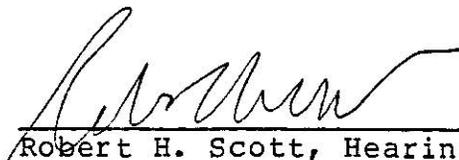
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the 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 Administrator. A request for oral argument 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 must specifically set forth the party's exceptions to the proposed decision.

Oral arguments 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 oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument 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 11 day of September, 1987.



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

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 17, 1987, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION by the Department of Natural Resources & Conservation (DNRC) on the Application for Beneficial Water Use Permit No. 55749-g76LJ, by Meadow Lake Country Club Estates, addressed to each of the following persons or agencies:

Meadow Lake Country Club Estates
Peter Tracy
1415 Tamarack Ln.
Columbia Falls, MT 59912
(certified postage prepaid)

Fran Borninkhof
988 Tamarack Ln.
Columbia Falls, MT 59912

Fred M. & Elsie C. Melton
1014 Tamarack Ln.
Columbia Falls, MT 59912

Brad & Connie Kenfield
1215 Tamarack Ln.
Columbia Falls, MT 59912

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E.N. Ehlers
1290 Tamarack Ln.
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Raymond R. Sorenson
P.O. Box 779
Columbia Falls, MT 59912

CASE # 55749

Dan & Dorothy McCaffree
1295 Tamarack Ln.
Columbia Falls, MT 59912

Chuck Brasen
Water Rights Bureau
Field Office Manager
P.O. Box 860
Kalispell, MT
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Susan Howard

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

On this 17th day of September, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, 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.

Frank Brasen

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/1/1990

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