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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMITS) FINAL ORDER
NOS. 55834-s76LJ AND 56386-s76LJ)
BY ZON G. AND MARTHA M. LLOYD)

* * * * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal of January 22, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

The Department hereby ceases action on that portion of Application for Beneficial Water Use Permit No. 55834-s76LJ, and that portion of Application for Beneficial Water Use Permit No. 56386-s76LJ, seeking 40 gpm up to 4.00 acre-feet per year and seeking 60 gpm up to 9.00 acre-feet per year, respectively,

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for domestic use and returns same to Applicant. Applicant may reapply for same domestic uses, if and when his intent to appropriate water for the specified domestic use is bona fide.

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 55834-s76LJ by Zon G. and Martha M. Lloyd is hereby granted to appropriate 240 gpm up to 82 acre-feet per year between April 15 and October 1, inclusive, of each year for sprinkler irrigation of 40.00 acres located in the W½E½SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana. The source is Station Creek. There are two points of diversion: one in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19 West, Lake County, Montana. Both means of diversion are concrete dams with pipeline. The priority date is May 4, 1984 at 4:20 p.m.

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 56386-s76LJ by Zon G. and Martha M. Lloyd is hereby granted to appropriate 90 gpm up to 30 acre-feet per year between April 15 and October 1, inclusive, of each year for sprinkler irrigation of 15.00 acres located in the NW¼SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana. The source is Station Creek. There are two points of diversion: one in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19

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West, Lake County, Montana. Both means of diversion are concrete dams with pipeline. The priority date is July 2, 1984 at 4:50 p.m.

These Permits are subject to the following express conditions, limitations, and restrictions:

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

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

C. Nothing herein shall be construed to affect or otherwise reduce the Permittees' liability for damages which may be caused by the exercise of these Permits.

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

E. These Permits are subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

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

F. These Permits are subject to the condition that Permittees install adequate outlet structures in both diversion dams.

G. These Permits are subject to the condition that Permittees install adequate flow measuring devices at each point of diversion. The Permittees shall keep a written record of the flow rate of all water diverted, including the dates and time periods during which water is diverted, and shall provide said record to the Department upon request.

NOTICE

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

DONE this 23rd day of April, 1987.

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

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

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AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department of Natural Resources & Conservation (DNRC) on the Applications for Beneficial Water Use Permits by Zon G. & Martha M. Lloyd, Application Nos. 55834-s76LJ and 56386-s76LJ, addressed to each of the following persons or agencies:

Zon G. & Martha M. Lloyd
Rt. 1, Box 94BB
Ronan, MT 59864

Richard W. & Ree K. Henning
East Lake Shore
Bigfork, MT 59911

Clayton Matt,
Water Administrator
Confederated Salish
& Kootenai Tribes of the
Flathead Reservation
Box 278
Pablo, MT 59855

Charles Brasen,
Manager
Kalispell Field Office
Box 860
Kalispell, MT 59901
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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

On this 24TH day of APRIL, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.

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

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1990

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

* * * * * * * * * *

IN THE MATTER OF APPLICATIONS)
FOR BENEFICIAL WATER USE PERMITS) PROPOSAL FOR DECISION
NOS. 55834-s76LJ AND 56386-s76LJ)
BY ZON G. AND MARTHA M. LLOYD)

* * * * * * * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-captioned matter was held on June 9, 1986 in Polson, Montana.

Appearances

Applicants Zon G. and Martha M. Lloyd (hereafter, "Applicant Lloyd") both appeared in person. Veldon DeSaussure, retired "ditch rider" for the Flathead Irrigation District, appeared as a witness for Applicant.

Objectors Richard W. and Ree K. Henning (hereafter, "Objector Henning") both appeared in person.

Charles F. Brasen, Manager of the Kalispell Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC").

Objector Confederated Salish and Kootenai Tribes filed a pre-hearing brief regarding the legal basis of its objection but did not appear at the hearing.

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Objector Harry P. Medland withdrew his objection to Application No. 55834-s76LJ prior to the commencement of the hearing. Mr. Medland did not file an objection to Application No. 56386-s76LJ.

SUMMARY OF THE CASE

Applicant seeks Permit No. 55834s-76LJ in order to appropriate water from Station Creek, tributary to Flathead Lake, at a rate of 280 gpm up to 86 acre-feet per annum for domestic and irrigation uses in the W½E½SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana. Applicant seeks Permit No. 56386-s76LJ to appropriate water from the same source at a rate of 150 gpm up to 39 acre-feet per annum for domestic and irrigation uses in the NW¼SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana.

Objector Henning objects, alleging that there are no unappropriated waters in the source. He also claims that his water delivery system was once damaged due to the failure of neighbor Harry Medland's water delivery pipeline and alleges that, potentially, breaks in Applicant's proposed delivery pipeline could similarly occur.

Objector Confederated Salish and Kootenai Tribes' objection to the Applications is based upon its position that the State of Montana has no jurisdiction or authority to permit use or diversion of any water from the Flathead Indian Reservation, but rather that such authority resides only in the Confederated Salish and Kootenai Tribes. This Objector submitted a brief

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summarizing its position prior to the hearing, which position is noted by the Department.

Exhibits

The Applicant submitted seven Exhibits in support of the Applications.

Applicant's Exhibit 1 is an aerial photograph which shows the area of the proposed points of diversion and places of use described in the Application. The photo is marked with red ink; "x" s showing the two proposed points of diversion, dotted lines showing delivery pipelines.

Applicant's Exhibit 2 is a copy of a 4-page memorandum dated September 14, 1972, signed by Fred G. Malroy, subject: Cruise Report, Allotment 2813, Daniel Dennison Hull.

Applicant's Exhibit 3 is a hand drawn diagram of the type of measuring device (weir) that was purportedly "used July 23-84" by Applicant and Veldon DeSaussure for measuring Station Creek.

Applicant's Exhibit 4 is a photocopy of a Lake County "Residential Improvements and Lot Appraisal Form" which shows that the taxable value of concrete fish tanks on Objector Henning's property is zero.

Applicant's Exhibit 5 consists of two pages, each page a photocopy of a topographic map of the area of Applicant's proposed appropriation, marked to show Applicant's property and area of water use.

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Applicant's Exhbit 6 is a photocopy of a topographic map of the area of Applicant's proposed appropriation, marked to show his property lines (purple), proposed points of diversion (red "x" s), proposed conveyance pipelines (red dotted line); and irrigation area (solid red outlines).

Applicant Exhibit 7 is a hand-drawn diagram representing the design of Applicant's proposed diversion structures.

All seven of Applicant's Exhibits were admitted into the record without objection.

The Department offered one Exhibit for the record.

Department Exhibit 1 is entitled "Investigation Report, Water Right Permit Application #55834-s76LJ and #56386-s76LJ", prepared by Charles F. Brasen, December 1985. The report contains a title page; 7 typed pages summarizing Mr. Brasen's investigation; a page listing "attachments"; 4 photos taken by Applicant with descriptions of the photos; 15 photos taken by Chuck Brasen with description of the photos; five Appendices entitled as follows: Appendix A - "Station Creek Drainage", Appendix B - "Hell Roaring Creek Drainage"; Appendix C - "Recorded Uses - Station Creek"; Appendix D - "General Map of Lloyd Proposed Uses"; Appendix E - "DNRC Form 615"; 2 copies of aerial photographs showing the general vicinity of the proposed appropriations; and, an aerial photo of the immediate area of the proposed appropriation.

Department Exhibit 1 was admitted without objection.

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The two Department files in this matter, file No. 55834-s76LJ and file No. 56386-s76LJ were admitted without objection.

PROPOSED FINDINGS OF FACT

1. Section 85-2-302 MCA (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in § 85-2-306 MCA, "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".

2. Application for Beneficial Water Use Permit No. 55834-s76LJ was regularly filed with the Department on May 4, 1984 at 4:20 p.m. Application for Beneficial Water Use Permit No. 56386-s76LJ was regularly filed with the Department on July 2, 1984 at 4:50 p.m.

3. The pertinent facts of Application No. 55834-s76LJ were published in the Flathead Courier on June 7 and 14, 1984. The pertinent facts of Application No. 56386-s76LJ were published in the Flathead Courier on August 9 and 16, 1984.

4. By Application No. 55834-s76LJ, Applicant seeks to divert 280 gallons per minute (hereafter, "gpm") up to 86.00 acre-feet per annum of water from Station Creek, a tributary of Flathead Lake, at two points, one located in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19 West, Lake County, Montana. Of the total flow rate and volume to be appropriated, 40 gpm up to 4.00

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acre-feet per year would be diverted between January 1 and December 31, inclusive, of each year for domestic use in the W½E½SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana, and 240 gpm up to 82.00 acre-feet per year would be diverted between April 15 and October 1, inclusive, of each year for sprinkler irrigation of 40 acres located in the W½E½SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana.

5. By Application No. 56386-s76LJ, Applicant seeks to divert 150 gpm up to 39.00 acre-feet per annum of water from Station Creek, a tributary of Flathead Lake, at the same two points as were named in Finding of Fact 4, supra; i.e., one located in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19 West, Lake County, Montana. Of the total flow rate and volume to be appropriated, 60.00 gpm up to 9.00 acre-feet per year would be diverted between January 1 and December 31, inclusive, of each year for domestic use in the NW¼SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana, and 90.00 gpm up to 30.00 acre-feet per year would be diverted between April 15 and October 1, inclusive, of each year for sprinkler irrigation use of 15.00 acres located in the NW¼SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana.

6. In both Applications, Applicant asserts that the proposed irrigation projects will be constructed and in use

within three years from the date the Permit is issued. Applicant plans to irrigate areas which have already been clear cut due to a mistletoe infection. However, he requires time not only for installation of the diversion and distribution works but also to adequately prepare the land for planting of the intended crops, i.e., cherry, apple and/or Christmas trees. (Testimony of Applicant.)

7. Applicant did not specify an estimated date of completion of the proposed domestic uses in either Application. Applicant asserts he cannot estimate a date for final development and putting to use of the water requested for domestic use because the domestic uses would pertain to homes for his six children and himself, which he desires, but has no present plans, to build. Applicant does not plan to subdivide the place of use but does believe a Permit to appropriate water for domestic use would enhance the value of the property, a portion of which he wishes to sell undeveloped. (Testimony of Applicant.)

8. Applicant proposes similar means of diversion at both proposed points of diversion. Applicant would dam Station Creek at both points, utilizing practically identical concrete structures. Each structure would contain two outlets: the primary outlet, which would be constructed to continuously allow sufficient water past the structure to satisfy the needs of downstream users; and the secondary outlet, which would allow water, in excess of the needs of downstream users and therefore accumulated in the "back-up pond" created by the dam, to flow

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into a pipeline leading toward Applicant's place of use. Two points of diversion are necessary to provide adequate pressure by gravity flow; the higher point will provide water to the sprinkler irrigation lines located at the higher altitudes. (Applicant Exhibit 6 and 7, Testimony of Applicant.)

Applicant has not yet made a determination as to the size of the primary outlet which would be required to guarantee downstream users their needs. However, Applicant will allow prior appropriators onto his property to verify that sufficient amounts of water flow past his points of diversion. (Testimony of Applicant.)

9. Station Creek, originating in the Mission Mountains, is a perennial stream with a fairly constant flow. (Testimony of Applicant.) Mr. Meyerhoffer, an appropriator situated at the mouth of Station Creek, stated the stream has never dried up at its mouth. (Testimony of Chuck Brasen.) Station Creek's theoretical percent exceedence flows are as follows:

30% of the time, at least 3.9 cfs of water flow in Station Creek.
40% of the time, at least 2.5 cfs of water flow in Station Creek.
50% of the time, at least 1.7 cfs of water flow in Station Creek.
60% of the time, at least 1.2 cfs of water flow in Station Creek.
70% of the time, at least 1.0 cfs of water flow in Station Creek.
90% of the time, at least 0.7 cfs of water flow in Station Creek.

The methodology used to predict these exceedence flows does not allow prediction of mean monthly flows, thus making prediction of exact time period of low flows difficult. However, the period of lowest mean flows at nearby Hell Roaring

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Creek (located one township South of Station Creek) is during January, February and March. (Department Exhibit 1.)

One measurement was taken on Station Creek, July 23, 1984, approximately ½ mile east of highway 35, at a point above the first diversion. A portable weir was utilized and at that time a minimum of 1.5 cfs was flowing in Station Creek. (Testimony of Veldon DeSaussure.) On June 3, 1985, Station Creek flow was estimated by Charles Brasen to be 3.8 cfs. (Department Exhibit 1.)

10. All claimed water rights with points of diversion on Station Creek, excluding those claimed by Objector Henning and Harry Medland, total 50 gpm up to 9 acre-feet per year. (Department Records.)

11. Harry Medland has filed Statement of Claim of Existing Water Right No. 39758, claiming 450 gpm up to 10-acre feet per year of water from Station Creek for sprinkler irrigation of 10 acres between May 15 and September 15, inclusive, of each year. (Department Record.) At the rate of 450 gpm, Mr. Medland would divert his claimed annual volume in five days of continuous irrigation (120 hours).

12. Objector Henning has filed three Statements of Claim of Existing Water Right in the waters of Station Creek. Claim No. 39685 is for 10 gpm up to 3 acre-feet per year for domestic use; Claim No. 39684 is for 2 cfs up to 360 acre-feet per year for sprinkler irrigation of 13 acres; Claim No. 39683 is for 3 cfs up to 2,170 acre-feet per year for non-consumptive fish raceway use. (Department Records.)

13. Objector Henning has never used water under Claim No. 39683, nor have the fish raceways been utilized since 1959. (Uncontradicted testimony of Applicant; copy of March 13, 1984 letter from Montana Department of Fish, Wildlife and Parks, Department file.) The concrete fish tanks are of no taxable value. (Applicant Exhibit 4.)

14. Objector Henning presently uses 100-125 gpm continuously throughout the irrigation season to sprinkler irrigate orchards. However, past users of the right, priority date 1931, have flood-irrigated utilizing a much greater flow rate than the 100-125 gpm Objector presently uses. Objector Henning, at some time in the future, intends to improve his sprinkler system, which would then use 200-250 gpm. (Testimony of Richard Henning.)

15. The Henning diversion system consists of a covered wooden structure into which Station Creek water is diverted. Inside, the water enters a pipeline which then exits the structure and goes underground. Water in excess of the amount entering the pipe emerges from the diversion structure and returns to the creek bed. The pipe surfaces on the Henning property at the old fish hatchery site where it is connected to the irrigation system. (Department Exhibit 1.)

In the middle of the "point of diversion" access road, approximately 150 feet below the point of diversion, water surfaces in the road. Whether this phenomenon is due to a leak in the pipe or is a natural occurrence cannot be determined from the record. (Department Exhibit 1.)

OBJECTION #

16. The amount of water which must be diverted in order to supply Objector Henning with the 100-125 gpm he presently applies to his orchard would be very little more than 100-125 gpm if the pipe conveying water to the place of use was in good condition. (Generally recognized technical fact.) However, there may be significant conveyance loss due to the potentially imperfect condition of the pipe. (There is some indication that this is the case - see Finding of Fact 15.)

17. The Soil Conservation Service estimates 6 gpm is required for sprinkler irrigation of one acre, assuming continuous use. (Testimony of Chuck Brasen.)

18. The critical months for irrigation are June, July and August. (Testimony of Objector Henning.)

19. The amounts of water Applicant seeks to appropriate are based on figures suggested by the Department's standards in situations when there is not specific use information available. (Department Exhibit 1.)

20. There are no other planned uses or developments for which a Permit has been issued or for which water has been reserved apparent from the record.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 3, MCA (1985). (Findings of Fact 1, 2.)

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule

having been fulfilled, the matter is properly before the Hearing Examiner. (Finding of Fact 3.)

3. Section 85-2-310(3) MCA (1985) provides: "The department may cease action upon an application for a permit and return it to the applicant when it finds the application is not in good faith or does not show bona fide intent to appropriate water for a beneficial use." Accordingly, the Department must examine the nature of the Applicant's intent.

That the intention of the claimant is an important factor in determining the validity of an appropriation of water was expressed as early as 1898 in Power v. Switzer, 21 Mont. 523, 529-30, 55 P. 32; that such intent must not be speculative was stated in Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); and that the intent must be bona fide and not a mere afterthought, in Bailey v. Tintinger, 45 Mont. 159, 178, 122 P. 575 (1912). The policy behind the law, as expressed in Toohey, supra, 124 Mont. at 17, is "to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculation, profit or advantage, without regard to existing or contemplated beneficial uses." (Emphasis added.)

Historically, a determination as to whether an appropriator had the bona fide intent to effect a particular beneficial use at the time of making the appropriation, was made by the courts long after the appropriation in settling disputes over the issue of whether that particular use of water "related back" to the claimed date of appropriation. However, since the enactment of

the Water Use Act in Montana in 1973 and the concomitant institution of the Permit system, the conditions under which this determination must be made have changed.

Pursuant to § 85-2-310(3) MCA (1985), the Department, unlike the Court in "relation back" cases, must make the determination as to whether an appropriator's intent is bona fide prior to any act physically furthering the appropriation. Consequently, there can exist no evidence of past acts which would tend to confirm or defeat the assertion that the prospective appropriator's intent is bona fide. Therefore, the present circumstances under which this determination must be made renders the "relation back" cases of limited precedential value in the Department's administrative proceeding.

Montana has had no recent court cases regarding bona fide intent, and no cases pertaining thereto since the enactment of the Water Use Act. However, one may look to our sister state, Colorado, which has had to confront this issue.

In Colorado River Water Conservation District v. Vidler Tunnel Co., 594 P. 2d 566 (Colo. 1979) (en banc), the Colorado Supreme Court reversed a lower court's grant of a conditional water right to Vidler. (Similar to Montana's Permit to Appropriate, a conditional water right is "a right to perfect a water right with a certain priority date upon the completion with reasonable diligence of the appropriation upon which such water right is to be based" § 37-92-103(6), Colorado Revised Statutes, 1973). In denying the conditional water right, the Court held that Vidler's intent was speculative because Vidler

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had not demonstrated the "definite commitment for use required to prove the intent here required." Vidler, supra at p. 568.[1] In other words, in Colorado, an Applicant's intent will not be found to be bona fide unless the evidence shows that the prospective appropriator of the water has demonstrated a "definite commitment" to effect the use proposed.

Application of such a rule in Montana is well advised, for in no other way can the nature of a prospective appropriator's intent be judged. Therefore, the Hearing Examiner concludes that an applicant must demonstrate definite commitment to put water to present and actual beneficial use in order to meet the requirement that his intent be bona fide.

As to what constitutes "definite commitment", the essence of the distinction made in Vidler between definite commitment and mere speculative intent on the part of the prospective appropriator seems to lie in the objective degree of certainty that he possesses that the water will be put to beneficial use.

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[1] The Vidler Tunnel Co., an established Colorado corporation, organized to supply and deal in water, applied for a conditional water right for creation of the proposed "Sheephorn reservoir". The initial planning phase of the project completed, Vidler spent approximately $122,000 to define the size and location of the reservoir and to research water availability. A high water survey was completed and an FPC license applied for, for the generation of hydroelectric power.

Vidler planned to sell the majority of the water, and to this end, had conducted preliminary discussions with various cities. However, no contracts for use of the water had been entered into with any of them (except options conditioned on the success of the project). The court held that mere negotiations do not rise to the level of definite commitment for use required to prove the intent to put the water to beneficial use (despite a high probability that contracts would eventually be entered).

The holding in Vidler was reaffirmed in Rocky Mountain Power Co. v. Colorado River Water Conservation District, 646 P. 2d 383 (Colo. 1982) (en banc).

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Of course, no one can be 100 percent certain that a beneficial use will be effected pursuant to plan, but there are increasing degrees of certainty which at some point make the transition from "might" to "will", from conjecture to commitment. If the Applicant is uncertain that he will put water to beneficial use, i.e., his plan to do so is made contingent on future circumstance, his intent is speculative; if the Applicant has a fixed and definite plan which is not made contingent upon future circumstance, but is subject to defeat only by an unanticipated contingency, he is definitely committed to the plan and his intent is bona fide. Whether the necessary transition has been made, whether the Applicant is definitely committed, is a question which must be answered based on the evidence presented.

In the instant case, Applicant has presented uncontradicted evidence, in the form of signed Applications and testimony, which shows a fixed and definite plan with regard to the proposed irrigation use. He has specified that he intends to irrigate lands clear cut due to mistletoe infection. He has named the crops he will irrigate. He has stated how soon he expects to be able to complete the irrigation project and why it will take that amount of time. (Findings of Fact 4, 5, 6.) The existence of such a fixed and definite plan indicates that the Applicant's plans to irrigate are certain. Further, there is no indication that he intends implementation of the plans be contingent on future circumstance. In sum, Applicant has demonstrated a definite commitment to irrigate.

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However, regarding the proposed domestic uses, Applicant has stated that he has no present plans to build the homes and that he therefore cannot estimate a date of completion for any of the homes. Indeed, Applicant has stated that he may sell a portion of the property without homes on it, and would like a Permit to appropriate domestic water because it would increase the value of the property. (Finding of Fact 7.)

All indications are that Applicant desires to build homes on a portion of the property someday. However, his plans are otherwise undeveloped and apparently circumstantial (whether Applicant will eventually build the desired homes evidently depends on factors now unresolved, perhaps personal or monetary contingencies).

Amorphous desire alone simply does not rise to the level of a definite commitment; it is notoriously subject to caprice. Therefore, the Hearing Examiner concludes that the Applicant does not have a bona fide intent to appropriate water for domestic use, that those portions of the captioned Application seeking appropriation of water from Station Creek for domestic use do not show bona fide intent to appropriate water for a beneficial use, and that the Department must cease action on same.

4. Section 85-2-311 MCA (1985) directs that the Department 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,

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(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. The proposed use, irrigation, is a beneficial use. § 85-2-102(2) MCA (1985); Sayre v. Johnson, 33 Mont. 15, 81 P. 385 (1905). The amounts requested are reasonable for the irrigation use proposed. (Findings of Fact 17 and 19.) See generally, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Huffine v. Miller, 79 Mont. 50 (1925).

6. The proposed use will not interfere with other planned uses or developments for which a Permit has been issued or which water has been reserved. (Finding of Fact 20.)

7. The record in this matter shows that the proposed means of diversion, construction and operation of the appropriation works are adequate; i.e., the design of the proposed works does not indicate a propensity for their failure or that they will result in a waste of the resource. (Finding of Fact 8.)

8. Although filed claims seem to show heavy existing use of Station Creek (Finding of Facts 10, 11, 12), such claims are only prima facie evidence of their content. If evidence is presented which contradicts the content of the claims, the evidence contesting the contents of the claims will be weighed

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against the evidence in favor of the content of the claim. In the balance lies the preliminary administrative finding of the extent of the water right. See In the Matter of Applications for Beneficial Water Use Permits Nos. 56782-s76H and 56830-s76H by Bobby D. Cutler, Proposal for Decision, November 21, 1984, at pp. 25, 26; In the Matter of Application for Beneficial Water Use Permits Nos. G-5081 and G-5083 by Neil Moldenhauer, Final Order, March 20, 1984, pp 10-13; In the Matter of Application for Beneficial Water Use Permit No. 43117 by Morris Mancoronal, Proposal for Decision, April 18, 1984, pp 16-17 (Final Order, June 14, 1984).

In the instant case, the evidence shows that throughout the irrigation season, approximately 160-185 gpm are consistently diverted from Station Creek for beneficial use (100-125 gpm for Henning irrigation, Finding of Fact 14; 10 gpm for Henning domestic, Finding of Facts 12 and 13; 50 gpm for total other uses, Finding of Fact 10), this total being increased by 450 gpm to as much as 635 gpm for only 120 hours each irrigation season due to the Medland diversion. (Finding of Fact 11.) Thus, it may be concluded that in order to supply the amount of water Applicant seeks for the period during which prior appropriators are diverting approximately 175 gpm, but not during the period in which Medland is diverting, Station Creek flow would have to equal or exceed 505 gpm (330 gpm requested by Applicant + 175 gpm prior uses). During the Medland diversion, the flow would have to equal or exceed 955 gpm (505 gpm + 450 gpm).

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The evidence further shows that 60 percent of the time at least 1.2 cfs (538 gpm) flow in Station Creek and that 70 percent of the time at least 1.0 cfs (449 gpm) flow therein. (Finding of Fact 9.) Interpolation of these data yield the result that approximately 64 percent of the time at least 505 gpm flow in Station Creek. Hence, it may be concluded that for almost two days out of three there is sufficient water in Station Creek to supply existing users and the Applicant's requested amount.

Unfortunately, the calculations above referred to are theoretical and cannot predict mean monthly flows. (Finding of Fact 9.) Thus, exact determinations of availability of unappropriated water during the months of irrigation cannot be made from them. However, the months of lowest flow are commonly the winter (non-irrigation) months (generally recognized technical fact); indeed, measurements taken of nearby Hell Roaring Creek corroborate that January, February and March encompass the lowest flows of the year. (Finding of Fact 9.) Thus, most of the days in which Station Creek runs less than 505 gpm (1.12 cfs) occur during those non-irrigation months; the converse in April through December. In fact, the two actual stream readings of record, 3.8 cfs in Station Creek in June 1985, and 1.5 cfs (674 gpm) in Station Creek in July 1984, support this conclusion. (Finding of Fact 9.) Hence, it is highly probable that throughout the period of appropriation requested, 330 gpm of unappropriated water will be available for Applicant's use.

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Of course, some years are drier than others, and there may not every year be a consistent 505 + gpm flowing in Station Creek throughout Applicant's period of appropriation (April 15 to October 1), and in only 40 to 50 percent (5 to 6 months) of the year during higher flow periods will there be sufficient water available to supply Applicant during the five days when Medland is diverting. (Station Creek would have to flow at 2.2 cfs to supply Objector Medland and all others. See Finding of Fact 9 for corresponding percent exceedence flows.)[2] However, in order to satisfy the requirements of § 85-2-311(a) MCA, Applicant need not prove that there will always be unappropriated water available to him, for that standard of proof would be impossible to meet. The sporadic nature of water occurrence, a fact which is affirmed by the very existence of the doctrine of prior appropriation, obviates any argument that an Applicant must show water is always available for his appropriation. Rather, the criteria specified in § 85-2-311(a) MCA are met if Applicant proves that sufficient unappropriated water will be available as described in § 85-2-311(a), in at least some years. See generally, In the Matter of Application for Beneficial Water Use Permit No. 41255-q41B by A.W. Allred, Proposal for Decision, August 28, 1985.

[2] Even if Objector Henning eventually doubles his irrigation use to 250 gpm (assuming that the Water Court approves his claim for more than 125 gpm), or if he presently diverts more water than he uses due to leaking conveyance pipes, so that diversions on Station Creek totalled 640 gpm (250 gpm for Henning irrigation, 10 gpm for Henning domestic, 50 gpm by other appropriators excluding Medland and 330 gpm by Applicant), sufficient water flows in Station Creek to supply 640 gpm (1.4 cfs), 55 percent of the time (or about 6½ months of the year--See Finding of Fact 9 for corresponding percent exceedence flows.)

On the basis of the foregoing, the Hearing Examiner hereby concludes that the record contains substantial credible evidence that in the average year, unappropriated water will be available from April 15 to October 1 (at times when Applicant can put it to use), in the amount of 330 gpm (which he seeks to appropriate); and that throughout the period he seeks to appropriate, the requested amount will be available. (See analysis p. 18 supra.)

9. Regarding the issue of adverse effect, the Department has previously held that, in a change proceeding, the Objector bears the burden of production on the issue of injury to his water right. Stated another way, the Objector must adduce evidence that will appraise the Applicant of the kind and character of the injury the intended change threatens to cause. In The Matter of Application for Change of Water Right Nos. 36294-c41A, et seq., by Beaverhead Partnership, Interlocutory Order, March 8, 1984 (Proposal for Decision, February 11, 1985).

This allocation is predicated on the fact that "change in water flows attendant to changes in water rights potentially involve a myriad welter of disturbances for users, depending on the precise character and pattern of need reflected by those uses," Beaverhead, supra, "Burden of Proof" p. 11, and therefore allocating this burden to the Objector results in the "salutorious effect of assuring that an applicant need not be required to rebut all possibilities of injury that may be attendant to his intended change." Beaverhead, ibid.

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This allocation of the burden of production should be equally applicable in proceedings in which an application for a new use is to be decided. It is predicated upon the same fact; i.e., there are changes in patterns of water flow attendant to a new use, just as there are to a change in an existing use; and, as in a change proceeding, the Objector is in a better position to identify any potential injury to his water right which may be caused by such changes in water flow. Further, without such an allocation, the applicant would be forced to "flounder in the evidentiary morass of attempting to rebut all conceivable instances of injury", just as he would in a change proceeding. Beaverhead, supra "Burden of Proof", p. 12.

Therefore, the Hearing Examiner concludes that in an application for new use the Applicant bears the burden of production[3] on the specifics of his intended use; the Objector bears the burden of production on the issue of the threatened injury to his water right, extending to the kind and character of adverse effect complained of, but not to the specific amount or measure of such effect. The Applicant bears the burden of persuasion on all relevant and material issues. Cf Beaverhead, supra. "Burden of Proof", p. 12, 13. Therefore, once the Applicant has met his burden on the specifics of his intended

[3] The burden of production is discharged when the evidence and all reasonable inferences therefrom, viewed in a light most favorable to the party bearing the burden, is sufficient to allow a reasonable mind to conclude that the ultimate fact exists. Clearing the burden of production permits, but does not require, a conclusion that the burden of persuasion is satisfied. See Beaverhead "Burden of Proof" p. 12.

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use, only those effects properly put in issue by Objectors will trigger a challenge under § 85-2-311(b) MCA to Applicant's proposed use.

In the instant case, Applicant discharged his burden of production by producing evidence on the specifics of his intended use. Objector Henning then suggested that a failure of Applicant's proposed conveyance system could wash out (adversely affect) his own conveyance system.[4]

No further evidence was offered by either party. Thus, the record contains only Objector Henning's allegation that the proposed means of diversion could fail and thereby adversely affect his delivery system versus Applicant's description of the proposed means of diversion.

It is the position of the Hearing Examiner that the evidence presented in support of Objector's allegation of adverse effect is insufficient to discharge Objector's burden of production, for even when viewed in a light most favorable to the Objector, that evidence is not sufficient to allow a reasonable mind to conclude the existence of the ultimate fact, i.e., that Applicant's proposed appropriation would cause damage to Objector's delivery system.

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[4] In support of this contention, Objector Henning testified to an incident wherein his delivery system was damaged by the failure of the system of another appropriator. However, he made no attempt to compare, equate or otherwise link this evidence, in any way, to Applicant's proposed appropriation.

Because the evidence presented by Objector Henning applies to a different conveyance system and a different appropriator, and is in no way linked to Applicant's proposal or the Applicant, it is irrelevant in this context. Therefore, the Hearing Examiner will not consider the testimony of Objector Henning regarding the past wash out of his conveyance system.

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The burden of production placed upon an Objector is not limited to simple identification of the kind and character of an adverse effect, for such a burden can be met by merely describing some potential harm, however remote the likelihood of the proposed appropriation causing it. Rather, Objector's burden also includes the requirement that the Objector produce some evidence which, when viewed in a light most favorable to him, provides a substantial causal nexus between the proposed appropriation and the alleged harm. Here, the causal nexus is the potential for failure of the delivery system.

In the instant case, Objector Henning did characterize the adverse effect he believed might occur, i.e., a washout of his water delivery system. However, he produced no relevant evidence, by his own testimony or otherwise, that would, even if viewed in a light most favorable to him, provide a reasonable basis to conclude that there is substantial potential for failure[5] in Applicant's proposed delivery system; i.e., that his appropriation would cause an adverse effect. In sum, Objector Henning failed to discharge his burden of production.

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[5] Of course, every delivery system has some potential for failure, arising from the vicissitudes of nature, or the inherent fallibility of man and his creations. However, that potential alone is not substantial potential.

If permits to appropriate were routinely denied on a de minimus basis, no new diversion of water would ever be permitted. Further, it is not the purpose of § 85-2-311(b) MCA to guarantee absolute security for the prior appropriator's water right; there are other remedies for damages. (See Permit Condition "C", infra.)

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No reasonable basis for the assertion that the proposed appropriation would adversely affect a prior appropriator having been produced, and none being apparent from the record, the Hearing Examiner holds that the evidence otherwise presented shows that the water rights of prior appropriators will not be adversely affected by Applicant's proposed diversions.

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

PROPOSED ORDER

The Department hereby ceases action on that portion of Application for Beneficial Water Use Permit No. 55834-s76J, and that portion of Application for Beneficial Water Use Permit No. 56386-s76LJ, seeking 40 gpm up to 4.00 acre-feet per year and seeking 60 gpm up to 9.00 acre-feet per year, respectively, for domestic use and returns same to Applicant. Applicant may reapply for same domestic uses, if and when his intent to appropriate water for the specified domestic use is bona fide.

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 55834-s76LJ by Zon G. and Martha M. Lloyd is hereby granted to appropriate 240 gpm up to 82 acre-feet per year between April 15 and October 1, inclusive, of each year for sprinkler irrigation of 40.00 acres located in the W½E½SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana. The source is Station Creek. There are two points of

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diversion: one in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19 West, Lake County, Montana. Both means of diversion are concrete dams with pipeline. The priority date is May 4, 1984 at 4:20 p.m.

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 56386-s76LJ by Zon G. and Martha M. Lloyd is hereby granted to appropriate 90 gpm up to 30 acre-feet per year between April 15 and October 1, inclusive, of each year for sprinkler irrigation of 15.00 acres located in the NW¼SE¼ of Section 10, Township 23 North, Range 19 West, Lake County, Montana. The source is Station Creek. There are two points of diversion: one in the NE¼NW¼NW¼ of Section 14 and the other in the SW¼SE¼SE¼ of Section 10, both in Township 23 North, Range 19 West, Lake County, Montana. Both means of diversion are concrete dams with pipeline. The priority date is July 2, 1984 at 4:50 p.m.

These Permits are subject to the following express conditions, limitations, and restrictions:

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

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

C. Nothing herein shall be construed to affect or otherwise reduce the Permittees' liability for damages which may be caused by the exercise of these Permits.

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

E. These Permits are subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

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

F. These Permits are subject to the condition that Permittees install adequate outlet structures in both diversion dams.

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G. These Permits are subject to the condition that Permittees install adequate flow measuring devices at each point of diversion. The Permittees shall keep a written record of the flow rate of all water diverted, including the dates and time periods during which water is diverted, and shall provide said record to the Department upon request.

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 before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for

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the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 22 day of January, 1987.

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

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AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 26, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision by the Department on the Applications for Beneficial Water Use Permits by Zon G.& Martha M. Lloyd, Application Nos. 55834-s76LJ and 56386-s76LJ, addressed to each of the following persons or agencies:

1. Zon G. & Martha M. Lloyd
   Rt. 1, Box 94BB
   Ronan, MT 59864

2. Richard W. & Ree K. Henning
   East Lake Shore
   Bigfork, MT 59911

3. Clayton Matt, Water Administrator
   Confederated Salish & Kootenai Tribes
   of the Flathead Reservation
   Box 278
   Pablo, MT 59855

4. Charles Brasen,
   Water Rights Bureau
   Field Office Manager
   Kalispell, MT
   (inter-departmental mail)

5. Robert Scott
   Hearing Examiner
   (hand-deliver)

6. Gary Fritz
   Administrator
   Water Resources Division
   (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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

On this 26th day of January, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.

T. J. Reynolds

Notary ~~Public~~ for the State of Montana
Residing at _____, Montana
My Commission expires _____

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My Commission Expires July 23, 1989

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