

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. 60117-g76L BY WILLIAM C. HOUSTON)

* * * * *

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

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal of April 24, 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 makes the following:

ORDER

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston is hereby granted to appropriate 510 gallons per minute up to 301.4 acre-feet per

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annum of groundwater by means of a pumped well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana. Of the total flow rate and volume appropriated, 500 gpm may be diverted between April 15 and October 1, inclusive, each year, up to 107.6 acre-feet per annum for sprinkler irrigation on 40.00 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, and up to 190.4 acre-feet per annum for supplemental sprinkler irrigation on 120 acres described as follows: 40.00 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2; 40.00 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11; and 40 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, all in Township 23 North, Range 24 West, Sanders County, Montana. 10 gallons per minute up to 3.40 acre-feet per annum may be diverted between January 1 and December 31, inclusive, each year for stock use in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana.

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

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

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

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

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

E. This Permit is 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 to be appropriated pursuant to the Permit granted herein.

NOTICE: This is to inform you, the Permittee, 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. Permittee shall maintain an adequate flow measuring device at the wellhead and shall keep a written record of the flow rate at which water is diverted, as well as the dates and time periods during which water is diverted pursuant hereto and pursuant to Permit No. 27618-g76L, together with notations as to whether, when and how much water is utilized pursuant to the Permit, Claims and Certificates listed in Condition G below.

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Permittee shall make such records available to the Department upon request.

G. The maximum allowable annual volume of water which may be diverted hereunder (301.4 acre-feet) is reduced to the extent Permittee diverts water pursuant to Permit No. 3094-g76L; Statements of Claim of Existing Water Right Nos. 46932-76L, 46933-76L, 46935-76L; and Water Right Certificate Nos. 40319-76L and 40320-76L for use on the places of use authorized hereunder.⁵

H. This Permit is issued in conjunction with Permit No. 27618-g76L for a combined appropriation not to exceed 750 gpm up to 430.4 acre-feet per year.

⁵Applicant may divert under all rights and Permits appurtenant to the places of use authorized hereunder, including the one herein granted, in order to achieve necessary flow rates. (See Findings of Fact 7, 13.) However, to lessen the possibility of excessive volume application, he may not apply volumes pursuant to Permit No. 60117-g76L which have been or will be applied under Permit No. 3094-g76L, Statements of Claim Nos. 46932-76L, 46933-76L, 46935-76L, and Certificate Nos. 40319-76L and 40320-76L in any given year. That is, for each acre-foot of water diverted under aforesaid Permit, Claims and/or Certificates for use on the places of use authorized hereunder, the maximum allowable annual volume which may be diverted under Permit No. 60117-g76L is reduced by one acre-foot. For example, if Permittee in a given year diverts a total of 10 acre-feet under the Permit, Claims and/or Certificates, he may only divert 291.4 acre-feet hereunder. If he diverts a total of 301.4 acre-feet under said Permits, Claims and Certificates, he may not divert any volume of water hereunder.

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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 11 day of August, 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 August 12, 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 Application by William C. Houston, Application No. 60117-g76L, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

William C. Houston
Rt. 2
Niarada, MT 59852

Keith McCurdy
PO Box 1172
Polson, MT 59860

Carlton P. Cameron
Rt. 3
Hot Springs, Mt 59845

Lando R. & Bevra D. Bras
Box 3
Lonepine, MT 59848

John & Julia Malinak
Rt. 3
Hot Springs, MT 59845

Clayton White
Box 399
Hot Springs, MT 59845

Carl R. Christensen
H.T. Sampson
Lonepine, Mt 59848

Bill & Margalo Christensen
Rt. 3, Box 640
Hot Springs, MT 59845

Glenna M. Winebrenner
Carl V. Winebrenner
Rt. 3, Box 254
Hot Springs, MT 59845

Kemp Ranch
David R. Kemp Partner
Box K
Hot Springs, MT 59845

David R. Kemp
Box K
Hot Springs, MT 59845

Lando L. & Dorothy Bras
Box 56
Lonepine, MT 59848

Frank C. Carr
Rt. 3, Box 456
Hot Springs, MT 59845

Raymond J. Oberlander
Marian L. Oberlander
PO Box 142
Hot Springs, MT 59845

Dwight Preston
Box 636
Hot Springs, MT 59845

Douglas D. & Diane L. Page
2444 Hwy 28
Hot Springs, MT 59845

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 60117-g76L BY WILLIAM C. HOUSTON)

* * * * *

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-entitled matter was held on June 27, 1986 in Hot Springs, Montana. The hearing was completed on June 27, 1986 and the record closed.

Subsequently, by Interlocutory Order of February 20, 1987, the record was reopened for submission of additional data. The record was again closed on March 24, 1987.

Appearances

Applicant William C. Houston appeared in person and by and through Keith W. McCurdy, Attorney at Law.

--Paul Howser, former owner of Applicant's property, appeared as a witness for the Applicant.

Objector Carlton P. Cameron appeared pro se.

Objectors John and Julia Malinak (hereafter, "Objector Malinak") appeared by and through John Malinak.

Objector Clayton White appeared pro se.

Objector H. Clark Powell appeared pro se.

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Objectors Lando and Dorothy Bras (hereafter, "Objector Bras") appeared by and through Dorothy Bras.

Objectors Raymond J. and Marian L. Oberlander (hereafter, "Objector Oberlander") both appeared in person.

Objector Dwight Preston appeared pro se.

Chuck Brasen, Manager of the Kalispell Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") and Mark Shapley, geohydrologist for the Department, appeared as staff expert witnesses for the Department.

Joe Donovan, geohydrologist for the Montana Bureau of Mines and Geology, appeared as special expert witnesses for the Department.

Objectors Lando R. and Bevera D. Bras, Carl R. Christensen and H.T. Sampson, Bill and Margalo Christensen, Glenna M. and Carl V. Winebrenner, Kemp Ranch, David R. Kemp, Frank C. Carr, Douglas D. and Diane L. Page did not appear in person or by representation.

Objector Confederated Salish and Kootenai Tribes did not appear at the hearing. However, said Objector filed a memorandum prior thereto, waiving a factual hearing, but asserting that the DNRC has no "jurisdiction or authority" to permit use or diversion of any waters from within the Flathead Indian Reservation.

Summary of the Case

Applicant seeks a Permit to appropriate groundwater at the rate of 510 gallons per minute up to 301.4 acre-feet per annum

to be used as follows: 10 gpm, year-round, up to 3.4 acre-feet per annum for stock use; 500 gpm, between April 15 and October 1, inclusive, of each year, up to 107.6 acre-feet per annum for new irrigation on 40 acres, and up to 190.4 acre-feet per annum for supplemental irrigation on 120 acres.

The well from which Applicant would pump the requested amount (hereafter referred to as the "Houston well") is presently in existence. Applicant now holds Permit No. 27618-g76L to appropriate 250 gpm up to 132.5 acre-feet per annum from said well for new sprinkler irrigation on 80 acres and supplemental sprinkler irrigation on 40 acres. The Public Notice regarding this Application states that the Permit here sought would be used in conjunction with Permit No. 27618-g76L for a total flow rate from the Houston well not to exceed 750 gpm between April 15 and October 1, inclusive, of each year or 10 gpm during the remainder of the year; and a total volume from the Houston well not to exceed 430.4 acre-feet per annum.

All Objectors hereto, except Confederated Salish and Kootenai Tribes, object to the proposed appropriation, alleging that Applicant's pumping of 500 additional gpm from the aquifer which his well intercepts will lower the hydrostatic head in the area of their wells. In other words, they allege their water rights will be adversely affected by the resultant elimination of or decrease in the artesian flow of their flowing wells, or by a drop in the static water level of their pumped wells.

Objector Confederated Salish and Kootenai Tribes bases its objection solely upon the allegation that DNRC does not have

jurisdiction to permit use or diversion of waters within the Flathead Reservation.

The hearing in this matter was completed on June 27, 1986, and the record was closed at the end of the hearing.

PRELIMINARY MATTERS

Pursuant to Interlocutory Order of February 20, 1987, the record was reopened and Applicant directed to file, within 30 days of the Order, an affidavit, accompanied by a certificate of service, setting forth with particularity the intended disposition of certain claimed water rights and permits which Applicant had not addressed at the hearing. In the Order it was further stated that "[f]ailure to do so will result in a presumption that Applicant uses, and intends to continue use of, said claimed rights and permits in the manner described in the Department records, and Proposal for Decision will issue based, inter alia, on that presumption." Department records indicate that Applicant presently is entitled to use the above-mentioned rights on the places of use proposed herein. (See Findings of Fact 11 and 12, infra.)

Applicant timely returned an affidavit, dated March 20, 1987 which was not accompanied by a certificate of service, and which did not set forth with particularity the intended disposition of the rights. The entire statement contained therein was: "My program revolves on getting a permit for the well. I will then, as finances permit, transfer water from spring development to

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other ground. I will not use excess water nor will it be permanent to have two different permits on the same ground."

The Hearing Examiner finds that this statement of intent is substantially in accord with the presumption of intent which would have resulted had Applicant not filed the affidavit; that is, that Applicant (for the present, at least), intends to continue use of the presently appurtenant rights in the manner described in the Department records. Therefore, despite the statement's lack of particularity, Applicant's intent has been established. (See Finding of Fact 13 infra.)

Further, Applicant's intent in the present context results in the attenuation of the right applied for. (See Conclusion of Law 7, infra.) Accordingly, there will be no denial of due process to the other parties hereto resulting from Applicant's failure to serve copies of his affidavit upon said parties; a restriction on the Permit applied for will not be detrimental to Objectors' interests.

Exhibits

The Applicant submitted one exhibit in support of the Application.

Applicant's Exhibit 1 is a photocopy of a topographic map of the area of the proposed place of use. It is marked to show the location of the point of diversion (POD), the proposed places of use (blue shading), and the location of new and supplemental uses under Permit No. 27618-g76L (red striping).

Applicant Exhibit 1 was admitted without objection.

None of the Objectors submitted any exhibits in support of their objections.

The Department submitted two exhibits for the record.

Department Exhibit 1 is a photocopy of a topographic map of the area of the proposed place of use. It is marked to show the location of irrigation use under Permit No. 27618-g76L (green), under Permit No. 3094-g76L (pink), the use proposed hereunder (blue), and miscellaneous claims (orange).

Objection was raised to the admission of the exhibit. Applicant disagreed with the purported location of water use under Permit No. 3094-g76L as represented on the map. (Pink areas.) Applicant withdrew his objection with the understanding that the Hearing Examiner would note that Applicant disagreed with the representation of the place of use under Permit No. 3094-g76L in the exhibit. The Hearing Examiner noted the disagreement and admitted the exhibit.

Department Exhibit 2 consists of two pages. One is a photocopy of a topographic map showing the Little Bitterroot drainage wherein Applicant and Objectors' wells are located. It is marked with various colored dots showing the approximate location of one well belonging to each party. (Only one well is shown, even if a party has more than one well.) The other page is an index correlating each party's name with the color representing his well on the topographic map.

Department Exhibit 2 was admitted without objection.

The Department moved for the admission of the Department file, which includes a 15-page memorandum (10 numbered pages, four figures and one table) from Mark Shapley to Chuck Brasen, dated April 28, 1986 and regarding the present Application.

The file was 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 (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." This Application was not made for the appropriation of waters as provided for under § 85-2-306 MCA (1985). Therefore, § 85-2-302 applies in this matter.

2. The Application in this matter was regularly filed with the DNRC on May 30, 1985 at 4:14 p.m.

3. The pertinent facts of the Application were published in The Plainsman, a newspaper of general circulation in the area of the source, on January 9 and 16, 1986.

4. By this Application, Applicant seeks to divert 510 gallons per minute ("gpm") up to 301.4 acre-feet per annum of groundwater by means of a pumped well (the "Houston well") located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana. Of the total flow rate and volume to be appropriated, 500 gpm would be diverted between

April 15 and October 1, inclusive, each year, up to 107.6 acre-feet per annum for new sprinkler irrigation on 40.00 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, Sanders County, Montana, and up to 190.4 acre-feet per annum for supplemental sprinkler irrigation on 120 acres described as follows: 40.00 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2; 40.00 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11; and 40 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11; all in Township 23 North, Range 24 West, Sanders County, Montana. 10.00 gpm up to 3.40 acre-feet per annum would be diverted between January 1 and December 31, inclusive, each year for stock use in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana.

5. Applicant presently holds Permit No. 27618-g76L, which authorizes appropriation of 250 gpm by means of the Houston well, between April 15 and October 1, inclusive, each year, up to 100 acre-feet per annum for new sprinkler irrigation on 80.00 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, and the NE $\frac{1}{4}$ of Section 11, all in Township 23 North, Range 24 West, Sanders County, Montana; and up to 32.50 acre-feet per annum for supplemental sprinkler irrigation on 40.00 acres located in the NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana. (Department Records.)

6. Applicant intends to utilize any Permit which may be granted pursuant hereto in conjunction with Permit No. 27618-g76L, for a combined flow rate not to exceed 750 gpm, and a combined volume not to exceed 430.4 acre-feet per year. (Department file: Public Notice.)

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7. Applicant intends to irrigate a total of 160 acres under this Application and Permit No. 27618-g76L. The net irrigation application (volume of water applied per irrigation) for Applicant's fields has historically been three inches, i.e. 0.25 acre-feet. (Testimony of Paul Howser.) Recommended peak consumptive use rate for such net irrigation applications in Climatic Area 2 is 0.28 inches/day. (Irrigation Guide for Montana, SCS, 1973.) Application efficiency for Applicant's sprinkler system is 70 percent. Inserting these factors in a formula used to determine the theoretical peak consumptive use $\{(\text{acres} \times \text{net irrigation application} \times \text{a constant of } 1890) \text{ divided by } 70\% = \text{peak consumptive use}\}$, it is found that Applicant could require as much as 1,210 gpm in order to meet his irrigation requirements during periods of peak consumptive use. (Generally recognized technical fact.)

8. Liberty Drilling Company tested the Houston well and found it is capable of producing 900 gpm over the short term. (Uncontradicted testimony of Applicant.) Precisely what the "short term" is, cannot be determined from the record.

9. Applicant intends to irrigate alfalfa crops primarily. (Testimony of Applicant.) The theoretical volumetric irrigation requirement for alfalfa on the acreage proposed to be irrigated hereunder is 2.69 acre-feet per acre per year, assuming a semi-drought year. (Department file: "Irrigation Requirements".) Therefore, each 40-acre parcel theoretically requires a volume of 107.6 acre-feet per year.

10. Regarding the 80 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, both in Township 23

North, Range 24 West, Sanders County, Montana, 100 acre-feet per year are already appurtenant and used for sprinkler irrigation under Permit No. 27618-g76L. (Department Exhibit 1, Department Records.) As the theoretical crop requirement for 80 acres is 215.2 acre-feet per year (see Finding of Fact 9), an additional 115.2 acre-feet per year will be required for irrigation of alfalfa on said parcel.

11. Regarding the 40 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana, Department records show 98.5 acre-feet are presently appurtenant thereto; more particularly, 32.5 acre-feet for sprinkler irrigation under Permit No. 27618-g76L (Department Exhibit 1); 30 acre-feet under Permit No. 3094-g76L (as Authorized on October 13, 1982) specifically appurtenant to the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11; and approximately 36 acre-feet for sprinkler and flood irrigation under Statement of Claim No. 46932-76L appurtenant to 25 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11. (Department Records: See Appendix for more particular descriptions of Permit No. 3094-g76L and Statement of Claim No. 46932-76L.)

As 107.6 acre-feet per year are theoretically required to sprinkler irrigate alfalfa on 40 acres (Finding of Fact 9), an additional 9.1 acre-feet would be required for irrigation of alfalfa on the parcel if all rights presently appurtenant to said 40 acres under Statement of Claim No. 46932-76L and Permit Nos. 3094-g76L and 27618-g76L are applied by sprinkler. If only water from the Houston well is used, an additional 75.1 acre-feet per year will be required.

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12. Regarding the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, Sanders County, Montana, Department records show at least 187.2 acre-feet per annum presently appurtenant thereto, specifically: 90 gpm up to 35.5 acre-feet per year by flood irrigation under Statement of Claim No. 46933-76L; 90 gpm up to 35.5 acre-feet per year by flood irrigation under Statement of Claim No. 46935-76L; 898 gpm up to 57.2 acre-feet per year by sprinkler irrigation under Statement of Claim No. 46932-76L; and 350 gpm up to 60 acre-feet per year by sprinkler irrigation under Permit No. 3094-g76L. Also, on record as appurtenant to said 40 acres are Water Right Certificates Nos. 40319-g76L and 40320-g76L, each for 71.00 acre-feet per year. However, there is strong indication that these Certificates actually concern the same water rights claimed under Statements of Claim Nos. 46933-76L and 46935-76L. (Department records, see Appendix for more particular descriptions of Statements of Claim Nos. 46932-76L, 46933-76L, 46935-76L; Permit No. 3094-g76L; and Certificate Nos. 40319-g76L, 40320-g76L.)

If the above-stated rights are presently utilized on said 40 acres for sprinkler irrigation of alfalfa, no additional volume of water is required. If water from the Houston well was utilized exclusively, a volume of 107.6 acre-feet would be required for the irrigation of alfalfa.

13. Applicant, for the present, does not intend to apply for a Change Authorization to relocate the water rights, which are presently appurtenant to the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$

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of Section 2, and the 40 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, all in Township 23 North, Range 24 West, but which have points of diversion other than the Houston well. In the future, as his finances permit, he may apply for a Change Authorization in order to transfer portions of said water rights to other ground. (Affidavit of Applicant, March 20, 1987.)

14. The principal aquifer of the Little Bitterroot Valley (this valley is the location of the wells of the Applicant and of all Objectors hereto) is composed of coarse, stratified sediment deposited by glacial streams (outwash gravel); is overlain and effectively confined by 200 or more feet of silty clay; and has been named the "Lonepine Aquifer". (Department file.)

Surface drainages in the central and southern reaches of the Little Bitterroot Valley are not in significant hydrologic communication with the Lonepine Aquifer. However, at the north end of the valley there exists a semi-confined aquifer, which the Houston well penetrates and draws water from, and which is in hydrologic contact with, and derives recharge water from, unconfined stream gravels underlying the Little Bitterroot River (hereafter, said unconfined gravels will be referred to as the Little Bitterroot aquifer). Said semi-confined aquifer, composed of interbedded gravels and silts, is also in somewhat inefficient hydraulic contact with the confined Lonepine Aquifer. Because of this relationship between aquifers, the Little Bitterroot aquifer in the vicinity of the Houston well ultimately contributes, through the semi-confined aquifer, to the recharge of the Lonepine Aquifer. Also because of this

relationship, pumping of the Houston well potentially could interfere (cause well drawdown) in wells completed in the Lonepine Aquifer, as well as those completed in the terrace gravels flanking the Little Bitterroot River and those wells completed in the semi-confined aquifer in which the Houston well is completed. (Uncontradicted testimony and Memorandum of Mark Shapley.)

The record shows no wells completed in the terrace gravels flanking the Little Bitterroot River (save, perhaps, Houston's own wells under water rights described supra at Finding of Facts 11 and 12). It shows one well, Montana Bureau of Mines and Geology (MBMG) monitoring well No. 184, completed in the semi-confined aquifer in which the Houston well is completed, and one well, MBMG monitoring well No. 196, which may have been completed in the semi-confined aquifer, the Lonepine Aquifer, or in both. The remainder of the wells of record are either completed in the Lonepine Aquifer or bear no hydrologic connection with the Houston wells. (Department file, Department Exhibit 2.)

15. The Houston well, if pumped 132 days at a discharge rate of 750 gpm, could, under the worst possible theoretical combination of hydrologic circumstances (an improbable situation) interfere with other wells in the Little Bitterroot Valley as follows: Within a two mile radius of the Houston well cause well drawdown in excess of three feet; between approximately two and five miles of the Houston well, cause well drawdown between two and three feet; between approximately five

and eight miles of the Houston well, cause well drawdown between one and two feet; at a greater than eight mile radius from the Houston well, cause well drawdown of less than one foot, gradually approaching zero drawdown as the distance from the well increases. (Uncontradicted testimony and Memorandum of Mark Shapley.)

16. The record in this matter shows two wells owned by people other than Applicant, within two miles of the Houston well. One is MBMG monitoring well No. 196, which is strictly an observation well. The other is MBMG monitoring well No. 184, used for irrigation by Don Frolin (the "Frolin well"). Neither the owner of MBMG No. 196 nor the owner of MBMG No. 184 objected to the present Application. Drawdown in MBMG No. 196, whether significant or not, would be inconsequential as said well is only an observation well. (Department file, Department Exhibit 2.)

17. The record in this matter shows one well located between approximately two and five miles from the Houston well, that is, in the area where worst-case scenario drawdown (see Finding of Fact 15) would be between two and three feet. This well is known as MBMG No. 211, also known as the "Andrews" or "Bureau of Reclamation" well. It is used primarily as an observation well. The owner of said well did not object to this Application. (Department file, Department Exhibit 2.)

18. The record in this matter shows five wells located between approximately five and eight miles from the Houston well, that is, in the area where worst-case scenario drawdown (see Finding of Fact 15) is between one and two feet. One well

is owned by Lando and Bevra Bras (see Statements of Claim Nos. 134575-76L, 134576-76L, and 134577-76L), Objectors hereto; one well by Carl R. Christensen (Certificate No. 22748-g76L), an Objector hereto; one well by Lando L. and Dorothy Bras (see Statements of Claim Nos. 123046-76L, 123047-76L), Objectors hereto; and two wells owned by Douglas D. and Diane L. Page (see Statements of Claim Nos. 4682-76L through 4685-76L, and 142332-76L through 142335-76L), Objectors hereto. (Department Records, Department file, Department Exhibit 2.) None of these Objectors alleged why a drawdown of between one and two feet would prevent him from reasonably exercising his right.

19. All other wells shown in the record in the matter are located further than approximately eight miles from the Houston well and hence in the area where well drawdown will be, in the worst case, one foot or less. (See Finding of Fact 15, Department file, Department Exhibit 2.) None of the Objectors with wells located in this area alleged why a drawdown of less than one foot would prevent him from reasonably exercising his right.

20. The record shows flowing artesian wells exist only at distances equal to or greater than approximately five miles south of the Houston well. (Department file.)

21. Because whether an artesian well flows or has to be pumped depends upon the surface elevation in the immediate vicinity of the well (a variable parameter), as well as the hydrostatic head of the aquifer, which is relatively constant in a given area, wells in the same general vicinity may be flowing

wells or not, depending on surface elevation. Of the five wells specified in Finding of Fact 18, the only one which is claimed to be capable of flowing is the one owned by Lando and Bevra Bras. However, the objection addendum filed by the Objector states that water is often withdrawn from said well by pump. (Department file.)

22. Although the semi-confined aquifer in which the Houston well is completed does contribute to a certain extent to the recharge of the Lonepine Aquifer, such recharge should not be substantially affected by Houston's pumping an additional 297.9 acre-feet per year (the difference between the total volume which would be appropriated hereunder conjunctively with Permit No. 27618-g76L, i.e., 430.4 acre-feet per year, and the volume appropriated under Permit No. 27618-g76L alone, 132.5 acre-feet per year) from the semi-confined aquifer; the evidence suggests removal of the additional water will be largely compensated for by the quick induction of additional recharge to the semi-confined aquifer caused by pumping the Houston well. (Uncontradicted testimony and Memorandum of Mark Shapley.)

23. The diversion works, i.e., the well, are already in place and have been utilized for appropriation of water at the rate of 250 gpm during irrigation seasons since 1984. The production capacity of the works would be increased to 750 gpm by installation of a new pump, if this Application is approved. There is no evidence on the record that operation of this system wastes the resource, that it is inordinately susceptible to failure, or that it would waste the resource or be inordinately susceptible to failure if a larger capacity pump were installed.

24. 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 face of the record.

PROPOSED CONCLUSIONS OF LAW

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

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 85-2-311 MCA (1985) provides that the Department shall issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use 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 24.)

5. The record in the matter shows that the proposed means of diversion, construction and operation of the appropriation works are adequate. (Finding of Fact 23.)

6. The proposed uses, irrigation and stockwater, are beneficial uses. Section 85-2-102(2) MCA (1985); Sayre v. Johnson, 33 Mont. 15, 81 P. 385 (1905).

7. The volume requested by Applicant is reasonable if the total volume of water appropriated hereunder and under Permit No. 27618-g76L is the only water diverted and applied to the places of use, i.e. 430.4 acre-feet per year diverted for use on 160 acres. (Finding of Fact 9.) However, Applicant possesses other rights which are presently appurtenant to said places of use (Findings of Fact 11, 12) which he does not intend to relocate immediately. (Finding of Fact 13.) As these rights allow Applicant to divert and apply water to the proposed places of use hereunder, the total volume which could be appropriated if this Application is approved would be in excess of the amount

which is reasonably needed to effect the beneficial use proposed. However, Applicant may require the additional flow rate. (Finding of Fact 7.)

The Department may not grant a permit for more water than can be beneficially used without waste for the purpose stated in the application. Section 85-2-312 (1) MCA. However, the Department may issue a permit subject to terms, conditions and limitations it considers necessary to satisfy the criteria listed in Section 85-2-311 MCA, i.e., to ensure that the amount of water requested is to be put to beneficial use (as opposed to a wasteful use). To so ensure, any Permit issued hereunder will issue with the condition that Permittee cannot divert volume pursuant hereto to the extent he diverts volume pursuant to the existing appurtenant rights which are not diverted by means of the Houston well.

8. Applicant's initial burden on the issue of adverse effect is to produce substantial credible evidence regarding the specifics of the proposed use.¹ These include the anticipated

¹The allocation of burden of production and burden of proof as pertains to the issue of adverse effect in a water right change application was first explicitly set forth in In the Matter of Applications for Change of Appropriation Water Rights Nos. 36294-c41A, et seq., by Beaverhead Partnership, Interlocutory Order, March 8, 1984, (Proposal for Decision, February 11, 1985). The rationale, and analogous allocation of said burdens, were applied to the issue of adverse effect in a determination regarding a water use Permit in In the Matter of Applications for Beneficial Water Use Permits Nos. 55834-s76LJ and 56386-s76LJ by Zon G. and Martha M. Lloyd, Proposal for Decision, January 22, 1986, (Final Order, April 23, 1987). See generally, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §16.9 (2d. ed. 1980).

effects of the proposed use on the conditions of water occurrence in the source.

Applicant's discharge of this burden places a description of the proposed appropriation and its anticipated effect upon the source of supply in the record, while simultaneously enabling the Objector to identify the kind and character of the use proposed. If Applicant fails to meet his initial burden, the permit will be denied.

Upon discharge of Applicant's burden, the Objector must go forward by producing certain information which is peculiarly, and sometimes exclusively, within his power to produce: Objector must show that he has a water right, describe the operation of his right with particularity (especially his means of diversion), state how he anticipates the proposed use will change the conditions of water occurrence in the source (if different from Applicant's appraisal) or how it will otherwise affect his right, and allege why the Objector will not be able to reasonably exercise his water right under the changed conditions (or because of other effects). See §85-2-401 MCA.

If Objector produces this information, Applicant will be able to ascertain the exact nature of the Objector's concern. The Applicant then must prove by a preponderance of substantial credible evidence that Objector's water right will not be thus adversely affected. If Objector fails to produce sufficient information, no additional burden is placed on Applicant on the issue of adverse effect, for he cannot be expected to specifically address an unspecified concern. Rather, the

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potential of the proposed appropriation for causing adverse effect in general will be evaluated based on the evidence contained in the record.

9. In the instant case, in addition to a description of Applicant's proposed uses (Findings of Fact 4, 6, 7, 9), evidence has been presented showing that the Houston well penetrates a semi-confined aquifer which is its immediate source of supply (Finding of Fact 13); that the amount pumped out of that semi-confined aquifer is quickly and to a large extent replaced by induction (an increase in the rate of recharge of the aquifer induced by the pumping) (Finding of Fact 22); that therefore withdrawal of the volume of water herein requested will not substantially affect seasonal recharge to the Lonepine aquifer in which all wells here of record, except the Houston well and the Frolin well, are completed (Finding of Fact 22); that recharge is derived from the direction of the Little Bitterroot aquifer, which in the area of the Houston well is not tapped by any wells other than Applicant's (Finding of Fact 14); that the semi-confined aquifer is hydrologically connected with the Lonepine aquifer in a somewhat inefficient manner (Finding of Fact 14); and that therefore pumping the Houston well at the proposed rate could in the worst case cause well interference resulting in only a one to two foot drawdown in those wells of Objectors located between five and eight miles from the Houston wells (Finding of Fact 18), and less than a one foot drawdown in all other Objectors' wells of record (Finding of Fact 19).

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The presentation of this information provides sufficient specifics of the proposed use and its anticipated effects on the source to enable Objectors to formulate their objections; thus, Applicant's initial burden is met.

All Objectors who appeared at the hearing, and who possess water rights, have based their objections on the anticipated lowering of water levels in their wells (temporarily, due to well interference; as well as over the long run, due to reduced recharge) which they allege will occur because of the proposed appropriations. The testimony of Mark Shapley regarding the anticipated effects of increased withdrawal via the Houston well was not contradicted, and hence the effects were found to be as stated by Mr. Shapley. (See Findings of Fact 14, 15, and 22.) Consequently, the extant obligation on each of the Objectors is to describe the operation of his water right and to state why he would not be able to reasonably exercise his water rights under the uncontroverted changed conditions; i.e., why well interference, at worst causing a one to two foot drawdown, would prevent the reasonable exercise of his right.

The thrust of each objection hereto is that any drawdown is too much; however, no Objector has stated why he would be unable to reasonably exercise his water rights under the changed conditions of water occurrence. (Findings of Fact 18, 19.) The mere allegation that the water levels (or artesian pressure) would be lowered is not sufficient, for such lowering is not in itself determinative of whether a water right can be reasonably exercised. Also insufficient is the naked allegation that the

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changed conditions would "stop my well flowing", for the means of diversion utilized may not be reasonable and only reasonable means of diversion are protectible.² Rather, because Objector is in the best position to elucidate the details of his method of operation, and because Applicant must be made aware of those details in order to argue his case, the Objector must describe with particularity the operation of his right, as well as allege why he could not reasonably divert under the changed conditions.³

Although some of the Objectors herein have described their means of diversion in sufficient detail, none has alleged why he could not reasonably operate with (at most) a two foot drawdown, or equivalent reduction in artesian pressure. In sum, none of the Objectors has produced the information necessary to compel further proof by the Applicant.⁴

²See e.g.: In the Matter of Application for Beneficial Water Use Permit No. 42666-g41F by Richard MacMillan, Revised Proposal for Decision, February 28, 1986; Final Order, March 31, 1986.

³Per example, if the Objector describes his means of diversion as a submersible pump, a two foot drawdown would probably require that the Objector lower the pump two feet. The Objector must state why such requirement would be unreasonable. If the Objector did not have two feet left to total depth, the question would then arise as to whether his present means of diversion is reasonable, i.e., does his well barely penetrate the water-bearing aquifer, and is such means of diversion reasonable? The same scrupulous attention must be given flowing artesian wells: Is the reduction of pressure such that the Objector cannot reasonably exercise his right?

⁴Of course, neither have the appropriators who failed to object produced such information. (See Findings of Fact 16, 17.)

However, the evidence which has been presented regarding the effect of the increased withdrawal hereunder on the source is substantial, credible and indicates that those effects will be minimal even in a worst-case scenario. Therefore, the Hearing Examiner concludes that the water rights of prior appropriators will not be adversely affected by the use here proposed.

10. It is exceedingly difficult, and at best speculative, to determine the actual extent of an underground water resource. However, it has been shown that the flow of water requested by Applicant is physically available to him in the amount he seeks to appropriate throughout the period he can put the water to use (Findings of Fact 8, 22), and that there will be no adverse effect to prior appropriators. See Conclusion of Law 7, supra.

Therefore, because diversion of appropriated water always adversely affects prior appropriators and, as it has been determined that there will be no adverse effect and because the water is physically available as stated supra, it is hereby concluded that there are unappropriated waters in the source of supply at times when the water can be put to use by the Applicant, in the amount Applicant seeks to appropriate; and throughout the period during which Applicant seeks to appropriate the amount requested is available. See In the Matter of Application for Beneficial Water Use Permit No. 62231-g41I by City of East Helena, Proposal for Decision, April 22, 1987, pp. 25-27.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston is hereby granted to appropriate 510 gallons per minute up to 301.4 acre-feet per annum of groundwater by means of a pumped well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana. Of the total flow rate and volume appropriated, 500 gpm may be diverted between April 15 and October 1, inclusive, each year, up to 107.6 acre-feet per annum for sprinkler irrigation on 40.00 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, and up to 190.4 acre-feet per annum for supplemental sprinkler irrigation on 120 acres described as follows: 40.00 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2; 40.00 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11; and 40 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, all in Township 23 North, Range 24 West, Sanders County, Montana. 10 gallons per minute up to 3.40 acre-feet per annum may be diverted between January 1 and December 31, inclusive, each year for stock use in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana.

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

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

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

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

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

E. This Permit is 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 to be appropriated pursuant to the Permit granted herein.

NOTICE: This is to inform you, the Permittee, 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. Permittee shall maintain an adequate flow measuring device at the wellhead and shall keep a written record of the flow rate at which water is diverted, as well as the dates and time periods during which water is diverted pursuant hereto and pursuant to Permit No. 27618-g76L, together with notations as to whether, when and how much water is utilized pursuant to the Permit, Claims and Certificates listed in Condition G below.

G. The maximum allowable annual volume of water which may be diverted hereunder (301.4 acre-feet) is reduced to the extent Permittee diverts water pursuant to Permit No. 3094-g76L; Statements of Claim of Existing Water Right Nos. 46932-76L, 46933-76L, 46935-76L; and Water Right Certificate Nos. 40319-76L and 40320-76L for use on the places of use authorized hereunder.⁵

H. This Permit is issued in conjunction with Permit No. 27618-g76L for a combined appropriation not to exceed 750 gpm up to 430.4 acre-feet per year.

⁵Applicant may divert under all rights and Permits appurtenant to the places of use authorized hereunder, including the one herein granted, in order to achieve necessary flow rates. (See Findings of Fact 7, 13.) However, to lessen the possibility of excessive volume application, he may not apply volumes pursuant to Permit No. 60117-g76L which have been or will be applied under Permit No. 3094-g76L, Statements of Claim Nos. 46932-76L, 46933-76L, 46935-76L, and Certificate Nos. 40319-76L and 40320-76L in any given year. That is, for each acre-foot of water diverted under aforesaid Permit, Claims and/or Certificates for use on the places of use authorized hereunder, the maximum allowable annual volume which may be diverted under Permit No. 60117-g76L is reduced by one acre-foot. For example, if Permittee in a given year diverts a total of 10 acre-feet under the Permit, Claims and/or Certificates, he may only divert 291.4 acre-feet hereunder. If he diverts a total of 302 acre-feet under said Permits, Claims and Certificates, he may not divert any volume of water hereunder.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, 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). Written requests for an oral argument must specifically set forth the party's exception(s) to the proposed decision.

Oral arguments held pursuant to such a request will be scheduled for 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. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 24 day of April, 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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APPENDIX

The following contains descriptions of those claimed water rights, Permits (and Certificates) obtained from Department records.

Permit No. 3094-g76L, priority date July 23, 1974 was transferred to the Applicant from Paul Howser and allows (pursuant to an Authorization to Change granted October 13, 1982) the appropriation of 350 gpm from McClary Springs, a developed spring located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, Sanders County, Montana, between April 15 and September 15, inclusive, of each year, up to 30.00 acre-feet per annum for supplemental sprinkler irrigation of 20 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, and up to 60 acre-feet per annum for sprinkler irrigation of 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, all in Township 23 North, Range 24 West, Sanders County, Montana. (Permit 3094-g76L states the places of use no more specifically than "in the SW $\frac{1}{4}$ " of Section 2. However, two maps on file with the above-specified Authorization to Change more particularly describe the places of use as they existed before the change, i.e., 40 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2 and 20 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2. The Change Authorization substituted the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ for the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ as one place of use; however, it did not move the other place of use, which evidently remained located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2. See also: the provision entitled "Clarification of Appropriation", which is included in the Authorization to Change, for quantification of the volume appurtenant to the new place of use.)

Statement of Claim No. 46932-76L, priority date October 25, 1965, was transferred to the Applicant from Paul Howser and claims 2 cfs up to 200 acre-feet per year from Main Spring (Spring No. 1) for flood irrigation of 140 acres, including 25 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, and 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, all in Township 23 North, Range 24 West. A pro rata division of the total volume based on acreage yields approximately 36 acre-feet per year for use on said 25 acres; and approximately 57.2 acre-feet per year for use on the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.

Statement of Claim No. 46933-76L, priority date October 10, 1965, was transferred to the Applicant from Paul Howser. It claims 90 gpm up to 71 acre-feet per year from "Howser Spring No. 3" for flood irrigation of 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, between April 15 and October 15 each year. Proration of the total volume based on acreage yields 35.5 acre-feet per year for use on the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.

Statement of Claim No. 46935-76L, priority date October 10, 1965, was transferred to Applicant from Paul Howser, and claims 90 gpm up to 71 acre-feet per year from "Howser Spring No. 2" for flood irrigation of 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West between April 15 and October 15 each year. Proration of the volume based on acreage yields 35.5 acre-feet per year for use on 40 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.

Note: Also on record as appurtenant to the 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ are Water Right Certificate Nos. 40319-g76L and 40320-g76L, each certifying a water right very similar to those claimed under Statements of Claim Nos. 46935-76L and 46933-76L, respectively. The only differences between the Claims and the Certificates are that in each Certificate the volume is stated to be 71 acre-feet appurtenant to 40 acres, instead of 71 acre-feet appurtenant to 80 acres, as stated in each Claim; and that the Certificate priority dates are listed as November 3, 1981, instead of October 10, 1965. The similarity of the parameters stated in the Certificates to those stated in the Statements of Claim, as well as the inclusion of a "non-waiver of possible prior rights" condition on the Certificates, strongly indicates that the Certificates are intended to be duplicative of the Statements; that the Certificates were filed to preserve the water rights stated in the Claims, in case the Claims were ultimately found to be erroneous in the adjudication process; and that the Certificates therefore cover the same water rights as do the Claims.

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 27, 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 by William C. Houston, Application No. 60117-g76L, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

William C. Houston
Rt. 2
Niarada, MT 59852

Keith McCurdy
PO Box 1172
Polson, MT 59860

Carlton P. Cameron
Rt. 3
Hot Springs, Mt 59845

Lando R. & Bevra D. Bras
Box 3
Lonepine, MT 59848

John & Julia Malinak
Rt. 3
Hot Springs, MT 59845

Clayton White
Box 399
Hot Springs, MT 59845

Carl R. Christensen
H.T. Sampson
Lonepine, Mt 59848

Bill & Margalo Christensen
Rt. 3, Box 640
Hot Springs, MT 59845

Glenna M. Winebrenner
Carl V. Winebrenner
Rt. 3, Box 254
Hot Springs, MT 59845

Kemp Ranch
David R. Kemp Partner
Box K
Hot Springs, MT 59845

David R. Kemp
Box K
Hot Springs, MT 59845

Lando L. & Dorothy Bras
Box 56
Lonepine, MT 59848

Frank C. Carr
Rt. 3, Box 456
Hot Springs, MT 59845

Raymond J. Oberlander
Marian L. Oberlander
PO Box 142
Hot Springs, MT 59845

Dwight Preston
Box 636
Hot Springs, MT 59845

Douglas D. & Diane L. Page
2444 Hwy 28
Hot Springs, MT 59845

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Clayton Matt
Water Administrator
Confederated Salish
& Kootenai Tribes
Box 278
Pablo, MT 59855

Chuck Brasen
Manger
Kalispell Field Office
PO Box 860
Kalispell, MT 59901
(inter-departmental mail)

H. Clarke Powell
PO Box 14
Lonepine, MT 59848

Gary Fritz
Administrator
Water Resources Division
DNRC
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand-issue)

Mark Shapley
Hydrogeologist
DNRC
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand-issue)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Sally Martinez

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

On this 27th 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.

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

Jim P. Olman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/1/92

CASE # 60117

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

* * * * *

IN THE MATTER OF THE APPLICATION) MEMORANDUM
FOR BENEFICIAL WATER USE PERMIT) AND
NO. 60117-g76L BY WILLIAM C. HOUSTON) INTERLOCUTORY ORDER

* * * * *

Examination of Department files pertaining to the places of use proposed hereunder has revealed that there are claimed existing water rights and permits which are presently appurtenant to certain of said places of use, but which were not addressed at the hearing in this matter.¹ The following discussion concerns these rights and permits and their impact on this case.

Regarding the 40 acre place of use located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, Sanders County, Montana, Department records show that two appropriations, which were unaccounted for at the hearing, are presently appurtenant thereto. More particularly, Permit No. 3094 (as changed October 19, 1981), authorizes appropriation of a volume of 30 acre-feet per year for sprinkler irrigation appurtenant to the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 11; and a volume of approximately 36 acre-feet per year for sprinkler and/or flood irrigation is claimed appurtenant to an unspecified 25 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 under Statement of Claim No. 46932.²

¹For a description of these rights and permits, see Appendix, infra.

²The claimed volume, as here stated, reflects a pro rata division, based on acreage, of the total volume stated in the referenced claim. See Appendix, infra.

These appropriations, together with water appropriated under Permit No. 27618 (32.5 acre-feet per year) which has been accounted for by Applicant, indicate that a total of 98.5 acre-feet of water per year is presently appurtenant to above-said 40 acres.

Regarding the 40 acre place of use located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, Sanders County, Montana, Department records show that four appropriations (three Statements of Claim and one Permit),³ which were unaccounted for at the hearing, are presently appurtenant thereto. Particularly, a volume of approximately 35.5 acre-feet per year for flood irrigation is claimed under Statement of Claim No. 46933; a volume of approximately 35.5 acre-feet per year for flood irrigation is claimed under Statement of Claim No. 46935; a volume of approximately 57.2 acre-feet per year for flood and/or sprinkler irrigation is claimed under Statement of Claim No. 46932;⁴ and appropriation of a volume of 60 acre-feet per year for sprinkler irrigation is authorized under Permit No. 3094. Thus, according to Department records, there are presently 187.2 acre-feet of water per year appurtenant to this 40 acre tract either by claim or by permit.

Applicant's failure to address the existence of these rights and, more importantly, the intended disposition of these rights if the Permit is granted, is a serious lacuna in the presentation

³There were also two certificates. See Appendix, infra.

⁴The preceding three volumes, reflect a pro rata division, based on acreage, of the total volume stated in the referenced claim. See Appendix, infra.

of his case. As Applicant has described only the intended disposition of water presently appurtenant to the above-described lands under Permit No. 27618, i.e., that such water will continue to be appropriated under the terms of Permit No. 27618, and as there are other rights and permits presently appurtenant to said lands but with intended disposition unknown, no determination can be made as to whether the volumes of water requested hereunder are reasonably needed,⁵ because the total volume which will ultimately be appurtenant to the lands in question cannot be calculated.

There would appear to be several possibilities for future disposition of the unaddressed claimed rights and permits. For example, Applicant may presently have, under the claimed rights and permits, sufficient volume to irrigate the above-described lands; however, his present diversion and delivery system may be in some way deficient or otherwise undesirable. In such case, it may be Applicant's intent to move or to abandon all the existing rights and permits and to replace the volumes of water formerly appropriated thereunder with water appropriated pursuant to the Permit herein applied for. On the other hand, Applicant may intend that water diverted hereunder

⁵The Department may not issue a Permit for more water than can be beneficially used for purposes stated in the Application, § 85-2-312(1) MCA (1985); that is, the right may not be greater than the amount needed to serve the use. 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). Therefore the Department must determine whether the requested amount is reasonably needed to effect the desired benefit. In the Matter of the Application for Beneficial Water Use Permit No. 56738-s76M by Brookside Estates, Inc., (Final Order, August 26, 1986) Proposal for Decision, May 9, 1986, pp. 21-24.

be used to supplement the existing rights and permits, either because they do not presently provide sufficient flow or volume, or because he intends to abandon or move them in part, and needs water to replace that part abandoned or moved. Then again, Applicant's intent may be wholly otherwise.

There is of record one datum which is suggestive of Applicant's intent regarding the disposition of some of these unaddressed existing rights and permits. However, Applicant's intent cannot be accurately inferred from it.

In the Application, a request is made for water for "new irrigation" of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West. As a request for water for "new irrigation" means that there are no other rights presently appurtenant to the lands which are proposed as the places of use (as opposed to a request for water for "supplemental irrigation"), and as there are in this instance other rights presently appurtenant thereto, the use of the term "new irrigation" here may suggest that Applicant intends to abandon, or change the place of use of, the rights which are presently appurtenant to the proposed places of use.

However, the record contains absolutely no competent evidence which bears on the actual intent of the Applicant, and the designation "new irrigation" could just as easily be inadvertent. Further, even if the designation were found to be accurate, it is not dispositive of the question of the intended disposition of the existing rights and permits presently appurtenant to the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 23 North, Range 24 West, where the intended use hereunder is designated

"supplemental". In sum, Applicant's intent with regard to the future disposition of these present claimed rights and permits cannot be determined based on this record.

WHEREFORE, the Hearing Examiner hereby reopens the record for the limited purpose of receiving evidence pursuant to the following:

INTERLOCUTORY ORDER

Applicant shall, within 30 days of the date of service hereof, file with the Department an affidavit, accompanied by a certificate of service reflecting that true copies of the affidavit have been served on all parties hereto who appeared at the hearing, and setting forth with particularity the intended disposition of the unaddressed claimed water rights and permits herein above-described. Failure to do so will result in a presumption that Applicant uses, and intends to continue use of, said claimed rights and permits in the manner described in the Department records, and a Proposal for Decision will issue based, inter alia, on that presumption.

NOTICE

Objectors who appeared at the hearing may respond to Applicant's affidavit with questions to Applicant pertaining thereto, or may otherwise respond to the affidavit. Any responses must be filed with the Department and must be post-marked no later than 15 days from the date of service of

the affidavit upon the party. The Department will subsequently serve true copies of any such response upon the Applicant. The Applicant must file a counter-response to questions or issues raised by the other parties to this matter, within 15 days of the date of service upon him.

DONE this 20 day of February, 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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APPENDIX

The following contains descriptions of those claimed water rights, Permits (and Certificates) obtained from Department records.

Permit No. 3094, priority date July 23, 1974 was transferred to the Applicant from Paul Houser and allows (pursuant to an Authorization to Change dated October 19, 1981) the appropriation of 350 gpm from McClary Springs, a developed spring located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, Sanders County, Montana, between April 15 and September 15, inclusive, of each year, up to 30.00 acre-feet per annum for supplemental sprinkler irrigation of 20 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, and up to 60 acre-feet per annum for sprinkler irrigation of 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, all in Township 23 North, Range 24 West, Sanders County, Montana. (Permit 3094 states the places of use no more specifically than "in the SW $\frac{1}{4}$ " of Section 2. However, two maps, on file with the above-specified Authorization to Change, more particularly describe the places of use as they existed before the change, i.e., 40 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2 and 20 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2. The Change Authorization substituted the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ for the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ as one place of use; however, it did not move the other place of use, which evidently remained located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.)

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Statement of Claim No. 46932, priority date October 25, 1965, was transferred to the Applicant from Paul Houser and claims 2 cfs up to 200 acre-feet per year from Main Spring (Spring No. 1) for flood irrigation of 140 acres, including 25 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, and 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, all in Township 23 North, Range 24 West. A pro rata division of the total volume based on acreage yields approximately 36 acre-feet per year for use on said 25 acres; and approximately 57.2 acre-feet per year for use on the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.

Statement Claim No. 46933, priority date October 10, 1965, was transferred to the Applicant from Paul Houser. It claims 90 gpm up to 71 acre-feet per year from "Houser Spring No. 3" for flood irrigation of 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, between April 15 and October 15 each year. Proration of the total volume based on acreage yields 35.5 acre-feet per year for use on the 40 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.

Statement of Claim No. 46935, priority date October 10, 1965, was transferred to Applicant from Paul Houser, and claims 90 gpm up to 71 acre-feet per year from "Houser Spring No. 2" for flood irrigation of 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, between April 15 and October 15 each year. Proration of the volume based on acreage yields 35.5 acre-feet per year for use on 40 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2.



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Note: Also on record as appurtenant to the 80 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ are Water Right Certificate Nos. 40319 and 40320, each certifying a water right identical to those claimed under Statements of Claim Nos. 46935 and 46933, respectively, except for the priority dates (in the Certificates, the priority date is listed as November 3, 1981). The virtual identity of the parameters stated in the Certificates with those stated in the Statements of Claim, as well as the inclusion of a "non-waiver of possible prior rights" condition on the Certificates, strongly indicates that the Certificates are duplicative of the Statements; that the Certificates were filed to preserve the water rights stated in the Claims, in case the Claims were ultimately found to be erroneous in the adjudication process; and that the Certificates therefore reflect the same water rights as do the Claims.

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 February 20, 1987, she deposited in the United States mail, first class postage prepaid, a Memorandum & Interlocutory Order by the Department of Natural Resources & Conservation on the Application by William C. Houston, Application No. 60117-g76L, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

William C. Houston
Rt. 2
Niarada, MT 59852

Carl R. Christensen
H.T. Sampson
Lonepine, Mt 59848

Keith McCurdy
PO Box 1172
Polson, MT 59860

Bill & Margalo Christensen
Rt. 3, Box 640
Hot Springs, MT 59845

Carlton P. Cameron
Rt. 3
Hot Springs, Mt 59845

Glenna M. & Carl V. Winebrenner
Rt. 3, Box 254
Hot Springs, MT 59845

Lando R. & Bevra D. Bras
Box 3
Lonepine, MT 59848

Kemp Ranch
David R. Kemp Partner
Box K
Hot Springs, MT 59845

John & Julia Malinak
Rt. 3
Hot Springs, MT 59845

David R. Kemp
Box K
Hot Springs, MT 59845

Clayton White
Box 399
Hot Springs, MT 59845

Lando L. & Dorothy Bras
Box 56
Lonepine, MT 59848

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Sally Martinez

CASE # 60117

Frank C. Carr
Rt. 3, Box 456
Hot Springs, MT 59845

Raymond J. & Marian L. Oberlander
PO Box 142
Hot Springs, MT 59845

Dwight Preston
Box 636
Hot Springs, MT 59845

Douglas D. & Diane L. Page
2444 Hwy 28
Hot Springs, MT 59845

Clayton Matt
Water Administrator
Confederated Salish & Kootenai Tribes
Box 278
Pablo, MT 59855

H. Clarke Powell
PO Box 14
Lonepine, MT 59848

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

Gary Fritz
Administrator
Water Resources Division
(hand-deliver)

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

On this 25th day of February, 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.

CASE # 60117

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