

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. 62935-s76LJ BY CROP HAIL)
MANAGEMENT)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. Timely exceptions were received from Applicant, Objector United States Department of the Interior ("USDI"), and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation ("CS&KT").

The CS&KT submitted exceptions to the Proposal for Decision in this matter. The CS&KT, however, are not parties to this matter, i.e., they did not file an objection to the above entitled application and did not appear at the hearing in this matter, and therefore do not have the right to file exceptions. See Mont. Code Ann. § 2-4-621(1) (1979); see also Objection to Proposal for Decisions and Order, Preliminary Statement, submitted by the CS&KT on July 9, 1990. For this reason the exceptions submitted by the CS&KT are stricken.

Applicant's exceptions state that the Proposal for Decision is fundamentally flawed because it is based on an erroneous premise, i.e., the diversion is from the Flathead River rather than Flathead Lake. This apparently is in reference to Finding

of Fact 3 and Conclusion of Law 6. There is ample support in the record for Finding of Fact 3. The Application filed by Applicant (Form 600), the public notice of the present Application, and the Notice of Hearing all identify the proposed source of water to be the Flathead River. A finding of fact in a hearing examiner's proposed decision cannot be changed unless it is shown to be clearly erroneous, not based on competent substantial evidence, or that the proceedings did not comply with the essential requirements of law. On complete review of the record, the proceedings did comply with the essential requirements of law, there is competent substantial evidence supporting Finding of Fact 3, and Finding of Fact 3 is not clearly erroneous. Therefore, Finding of Fact 3 will not be modified. See Mont. Code Ann. § 2-4-621(3) (1989); In re Application No. 150741-41H by William Tietz; In re Applications Nos. 27941-s40A and 50642-s40A by Zinne Brothers; In re Application No. 12826-g76LJ by Ridgewood.

Applicant in its exceptions contends that even given the Flathead River as the proposed source, the Hearing Examiner's ruling in Conclusion of Law 6 that Applicant failed to prove the availability of unappropriated water is unreasonably harsh. This may be a misunderstanding by Applicant of the nature of the Hearing Examiner's ruling. She did not determine from the record that unappropriated water was not available, but only determined that Applicant had failed to meet its burden of proof. Conclusion of Law 6 is based on an analysis of the evidence summarized in Findings of Fact 7 and 8. The Hearing Examiner's

summary of the evidence accurately reflects the record, and her statement of the law is proper. Upon review of the complete record, the evidence provided by Applicant is incomplete and not open to clear interpretation, as shown by the conflicting testimony and documents provided by Objector USDI, and as such was not substantial or credible enough to carry Applicant's burden. Therefore, the Department finds that the Hearing Examiner correctly concluded that Applicant failed to provide sufficient substantial credible evidence to prove the availability of unappropriated water as is required by the statutory criteria for issuance of a permit.

Objector USDI filed an exception to the Proposal's determination of the issue raised by their original assertion that the Department of Natural Resources and Conservation ("Department") lacks jurisdiction to administer or regulate waters which arise upon or flow under or through, or the proposed use of which occurs within the exterior boundaries of, the Flathead Indian Reservation. Since the Proposed Order, adopted herein as the Department's Final Order, based on the evidentiary hearing in this matter denies the Application, this issue raised by Objector USDI is moot as to this Application.

Objector USDI also submitted exceptions to Findings of Fact 8 and 9, and Conclusion of Law 7. These exceptions individually or together do not alter the ultimate conclusion stated in the Proposed Order in the May 7, 1990, Proposal for Decision, i.e., denial of the Application. The Department is not required to

consider exceptions from parties that are not adversely affected by a proposal for decision. Mont. Admin. R. 36.12.229(1) (1984). Because the Department will be adopting the Proposal for Decision as written, Objector will not be adversely affected. Therefore, while they remain a part of the record in this matter, Objectors' exceptions to Findings of Fact 8 and 9, and Conclusion of Law 7 will not be addressed in this Final Order. See In re Application No. G45422-76M by Paul A. and Natalie L. Hanson dba Hanson Ranch; In re Application No. 72399-s41D by United States of America, United States Department of the Interior, Bureau of Land Management.

In denying the Application in this matter, the Department does not purport to have determined that the proposed appropriation could not be granted, given substantial credible evidence sufficient to prove all of the statutory criteria for the issuance of beneficial water use permit. It is the conclusion of the Department that with regard to this Application the statutory criteria have not been proven.

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 May 7, 1990, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

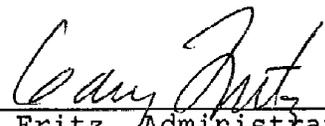
ORDER

Application for Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management hereby is denied without prejudice.

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 30 days after service of the Final Order.

Dated this 26 day of July, 1991.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 26th day of July, 1991 as follows:

Steve Felt
Crop Hail Management
P.O. Box 960
Big Fork, MT 59911

John Chaffin
United States Department
of the Interior
Office of the Solicitor
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Hearings Unit Legal Secretary

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. 62935-s76LJ BY CROP HAIL)
MANAGEMENT)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on August 11, 1988, in Kalispell, Montana.

Applicant Crop Hail Management appeared at the hearing by and through Stephen Felt, an officer of Crop Hail Management, and counsel Dean Jellison.

Objector United States Department of Interior appeared at the hearing by and through counsel John C. Chaffin.

Douglas Oellermann, an agricultural engineer with the Billings Area Field Office of the Bureau of Indian Affairs, appeared as a witness for Objector Department of Interior.

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

Objector Montana Department of Fish, Wildlife, and Parks did not appear at the hearing as a result of a stipulation by the Applicants as to certain permit conditioning. (See Preliminary Matters.)

PRELIMINARY MATTERS

A. Stipulation to permit condition

The Montana Department of Fish, Wildlife, and Parks filed an objection to the Application in this matter, but agreed to issuance of the permit if it is made subject to the following condition:

This Permit is subject to the existing rights of the Montana Fish and Game Commission established by appropriation made pursuant to Chapter No. 345, Montana Session Laws of 1969, for the preservation of fish and wildlife habitat, and also subject to the final determination of existing rights by a court of competent jurisdiction.

The Applicant agreed to this condition. (See Notice and Statement of Opinion signed on September 3, 1987 by Stephen Felt.) Therefore, Fish, Wildlife, and Parks did not appear at the hearing in this matter. Any permit issued in this matter will contain the agreed-upon condition set forth above.

B. Jurisdiction

Although the issue was not discussed at the hearing, the United States Department of Interior's initial objection to the Application in this matter was based upon its position that the Department of Natural Resources and Conservation does not have jurisdiction to administer or regulate waters which arise upon or flow under or through, or the proposed use of which occurs within the exterior boundaries of, the Flathead Indian Reservation. (See Department file.)

The Department asserts jurisdiction in this matter. A

complete discussion of this finding of jurisdiction is contained in the Memorandum which accompanies this Proposal for Decision.

EXHIBITS

The Applicant offered seven exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is a 2' x 3' chart purporting to show the average and minimum flows in the Flathead River and various tributaries at specified locations. The chart also includes an estimate of the total prior water rights of record in Flathead River.

Applicant's Exhibit 1 was accepted for the record for the limited purpose of illustrating the testimony given by Applicant's witness Stephen Felt.

Applicant's Exhibit 2 is a photocopy of page 233 from Part 1 of the 1973 USGS publication "Water Resources Data for Montana", with a photocopy of the publication cover attached.

Applicant's Exhibit 3 is a photocopy of page 237 from Part 1 of the 1974 USGS publication "Water Resources Data for Montana", with a photocopy of the publication cover attached.

Applicant's Exhibit 4 is two photocopied pages (pp. 105, 161) from Volume 2 of the USGS publication "Water Resources Data (Columbia River Basin), Montana, Water Year 1984", with a photocopy of the publication cover attached.

Applicant's Exhibit 5 is a photocopied page (page 174) from Volume 2 of the USGS publication "Water Resources Data, Montana,

Water Year 1985", with a photocopy of the publication cover attached.

Applicant's Exhibit 6 is two photocopied pages (pp. 127, 165) from Volume 2 of the USGS publication "Water Resources Data, Montana, Water Year 1986", with a photocopy of the publication cover attached.

Applicant's Exhibit 7 is a computer printout, generated by the Department (DNRC), of water rights of record on Flathead River upstream from the Applicant's proposed point of diversion.

Applicant's Exhibits 2, 3, 4, 5, 6, and 7 were accepted for the record without objection.

Objector Department of Interior offered two exhibits for inclusion in the record in this matter.

Objectors' Exhibit 1 is a photocopy of page 118 of the 1987 Northwest Power Planning Council report "Columbia River Basin Fish and Wildlife Program", with a photocopy of the report cover attached.

Objectors' Exhibit 2 is a photocopy of a document entitled "1980 Level Modified Streamflow, 1928-1978, Columbia River and Coastal Basins", issued in July, 1983, by the Columbia River Water Management Group Depletions Task Force (22 pages plus a photocopy of the document cover).

Objectors' Exhibits 1 and 2 were accepted for the record without objection.

At the end of the hearing, the Objector offered the Hearing Examiner, to review for "background information", two documents

which had not been offered as exhibits: a photocopy of flow measurements taken at the USGS gauging station on the Flathead River at Columbia Falls from 1939 through 1980, and a photocopy of Montana Power Company's water use summary for Kerr Dam from 1938 to 1980. The Applicant did not object to the Hearing Examiner accepting these two documents for review.

The Department did not offer any exhibits for inclusion in the record. The Department file was made available at the hearing for review. No party objected to the admission of any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

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

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306 do not apply in the present matter.

Application for Beneficial Water Use Permit No. 62935-s76LJ was duly filed with the Department of Natural Resources and Conservation on April 25, 1986 at 10:25 a.m.

2. The pertinent portions of the Application were published in the Big Fork Eagle, a newspaper of general circulation in the area of the source, on September 24 and October 1, 1986.

3. The source for the Applicant's proposed appropriation is surface water from the Flathead River.

4. The Applicant has applied for 1,500 gallons per minute ("gpm") up to 400 acre-feet of water per year for new sprinkler irrigation of 96 acres of land in the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 27, and 18 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26, Township 27 North, Range 20 West; and an additional 99.6 acre-feet of water per year for supplemental irrigation of 120 acres in W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 26, Township 27 North, Range 20 West, all legals in Flathead County, Montana. The Applicant proposes to divert water for irrigation by means of a pump from a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, Township 27 North, Range 20 West, from April 15 through October 31 of each year. (See Application.)

The Applicant proposes to use the applied-for water for irrigation of a golf course at Eagle Bend, a golfing resort and subdivision located near Big Fork, Montana. The first nine holes of the Eagle Bend Golf Course opened in 1984, and are irrigated pursuant to a water right which is unrelated to the application in this matter. The second nine holes, opened in 1988, were built in part on farmland which allegedly had been irrigated

previously, and for which a claim has been filed in the adjudication process. (Testimony of Steve Felt.) The claimed existing water right is for 900 gpm up to 300 acre-feet of water per year. (See Statement of Claim No. 104747-76LJ.) The Applicant was granted a change authorization on April 18, 1988 to change the place of use for the irrigation right to the golf course.

If the Applicant's Claim No. 104747-s76LJ is recognized in its entirety in the adjudication process, the Applicant's intent is to utilize only the 600 gpm up to 99.6 acre-feet of water requested for supplemental irrigation on this permit application. The Application is to ensure that the Applicant can obtain the full 1,500 gpm flow rate which allegedly is needed for full service irrigation of the golf course (900 gpm claimed + 600 gpm new use = 1,500 gpm). To the extent that the Applicant's Claim is not recognized, the Applicant's intent is to utilize the permit requested in this matter, up to a combined 1,500 gpm and 499.6 acre-feet of water per year. (Testimony of Steve Felt.)

Mr. Felt testified that the golf course superintendent in charge of maintaining the Eagle Bend Golf Course has indicated that, based on his experience and on past metering records, the full 1,500 gpm flow rate is required to service the golf course, but that perhaps the entire requested volume of 499.6 acre-feet of water per year is not needed. More water will be used during the hotter summer months of July and August, but it is not yet known whether the total requested volume will be utilized.

5. The Applicant proposes to divert water from the Flathead River by means of an 80 horsepower electric pump, with a pumping capacity of 1,500 gpm. (Department file, testimony of Steve Felt.) The pumping system, which already is installed and is being utilized to divert irrigation water pursuant to Claim No. 104747-76LJ, consists of a pump located approximately 300 yards inland from the Flathead River which pumps water through a pipe leading from the river. The same pump is used to distribute water through an underground irrigation system that was professionally engineered and constructed for the golf course. (Testimony of Steve Felt.) Although it was not discussed at the hearing, the Applicant has requested the option of pumping the water into a storage pond or lake located next to the pump site (see map accompanying Application), then repump the water from the pond to the golf course. (See Public Notice.) Mr. Felt testified that there is a meter on the pump at the present time which can be utilized for water measurement.

6. The Applicant presented evidence designed to show that there are unappropriated waters in the source of supply.

The Applicant has compiled data on water availability in Flathead River, utilizing a "standard reference book" entitled Surface Water Supply of the United States, 1961-65 and USGS water resources data (Applicant's Exhibits 2 through 6). From the information compiled, an estimate was made of the average and minimum flows at Holt, a location immediately upstream from the Applicant's point of diversion. (Testimony of Steve Felt.)

The Applicant estimates an average flow of 11,333 cfs at Holt, with a minimum flow during the period of June through September of 2,615 cfs, derived from Flathead River flows as measured at Columbia Falls, with contributions made by various tributaries such as the Whitefish and Stillwater Rivers. (See Applicant's Exhibit 1.) Based on the water rights on record with the DNRC (Applicant's Exhibit 7), the water rights upstream from the Applicant's point of diversion add up to 149 cfs claimed and permitted. The Applicant's point of diversion on Flathead River is located approximately one mile upstream from the River's junction with Flathead Lake. (See maps in Department file.) There is no information available as to the amount of water which actually is diverted pursuant to the listed rights. (Testimony of Steve Felt.)

Downstream from the Applicant, other tributaries enter Flathead Lake, including Swan River and 28 ungauged tributaries. Swan River contributes an average flow of 1,140 cfs to Flathead Lake, with a June-September minimum flow of 532 cfs. Steven Felt testified that the Applicant reviewed the June through September water measurements rather than those of the entire requested appropriation period of April through October because the lowest flows occur during the June-September time period, and therefore measurements from those months represent the worst case scenario with regard to water availability.

Mr. Felt testified that the Applicant's engineer obtained information from "the people at Kerr Dam" that their average

outflow was 3,200 cfs, with a minimum outflow during June through September of 2,400 cfs. Therefore, without even taking into account the waters contributed by Swan River and other tributaries to Flathead Lake, he stated, it appears that the minimum flow at Holt is approximately 215 cfs greater at all times than the minimum flow Kerr Dam needs to pass. By the Applicant's estimate, this amount of water leaves approximately 60 cfs available for appropriation over and above the water rights of record above the Applicant in Flathead River.

(Testimony of Steve Felt.) Therefore, the Applicant alleges, there are sufficient unappropriated waters in the source of supply during the proposed period of diversion, and there will be no adverse effect to prior appropriators on the source.

In response to questioning, Mr. Felt agreed that the flow figures set forth by the Applicant do not reflect any reserved tribal rights or the instream flow requirements imposed upon the Bureau of Reclamation by the Northwest Power Planning Council, nor do they include water uses by the landowners and municipalities along the shores of Flathead Lake. There are at least 135 claims for water out of Flathead Lake. (Testimony of Chuck Brasen.) He also stated that it was his understanding that the Kerr Dam "outflow" figures obtained by the Applicant's engineer represented the total flow, including the water going through the power plant.

7. Testimony of the Objectors' witness in conjunction with a review of the Montana Power Company water use summary for Kerr

Dam which was provided at the hearing as background information (see Exhibits), indicates that the figures on "outflow" at Kerr Dam presented by the Applicant are misleading.

Objectors' witness Doug Oellermann testified that MPC claims a flow rate of 14,540 cfs in the adjudication process, an amount which reflects the average peak water use from 1954 to 1980, plus or minus 100 cfs. For the same 1954-1980 time period, the average flow utilized by MPC has been approximately 9,200 cfs. A review of MPC's Claim No. 94408-76L and of the operational data confirms the claimed flow, and that the Objectors' average use estimate is reasonably accurate. Clearly, these figures do not correspond to the figures set forth by the Applicant if the Applicant's figures are meant to reflect the total outflow leaving Kerr Dam, especially since the 9,200 cfs average use does not include any spills (water bypassing the power plant).

It is possible that the figures which the Applicant alleges were provided by employees at Kerr Dam are meant to represent water being spilled at Kerr Dam; that is, flows over and above the amounts being utilized by MPC. If this is true, the overall average of the spills may be 3,200 cfs. However, a review of only the spill amounts (comparing the daily average flow used through the power plant to the total average outflow from Kerr) indicates that there is no "minimum" spill, since at many times all of the water reentering Flathead River below Kerr Dam has been run through the power plant (amount run through plants = total outflow).

Therefore, without further information as to what the data presented by the Applicant for Kerr Dam (Applicant's Exhibit 1, testimony of Steve Felt) represents, and how it is derived, it is not possible to utilize these figures for comparison to the other water availability data presented by the Applicant.

8. Objectors' witness Douglas Oellermann testified that the United States Bureau of Reclamation is required to maintain a minimum flow of 3,500 cfs in the Flathead River from Hungry Horse Dam to Flathead Lake, for maintenance of the fishery. The maximum flow allowed for the period of October 15 through December 15 is 4,500 gpm. The Bureau is required to maintain these flows pursuant to the 1987 Columbia River Basin Fish and Wildlife Program developed by the Northwest Power Planning Council; if necessary, by releasing stored water from Hungry Horse Dam. Bureau of Reclamation is not reimbursed for project water released to meet deficits in the minimum instream flow. (Testimony of Doug Oellerman; see Objectors' Exhibit 1.)

The minimum flow of 3,500 cfs (as measured at the USGS gauge at Columbia Falls) may actually exceed the natural flow of the Flathead River at certain times. From 1928 to 1979, the monthly average (natural) flow of the river dropped below 3,500 cfs approximately 30 to 40% of the time. (Testimony of Oellermann.) The Objector alleges that granting a permit in the present matter will adversely affect the rights of the Bureau of Reclamation by requiring additional releases from Hungry Horse Reservoir to make up for the reduction in flow rate.

Objector Department of Interior argues that the participation of the State of Montana in the Northwest Power Planning Council's 1987 agreement binds the State to recognize and protect the instream flows set forth in the agreements. The Bureau of Reclamation also has filed claims in the adjudication process for instream flows, and for power generation uses all the way downstream for Grand Coulee Dam pursuant to a federal regime of water release and use. (Statements of counsel John Chaffin.)

However, none of the Claims (filed in 1982) for pre-1973 uses reflect the 3,500 cfs instream flow maintenance implemented in 1987 pursuant to agreement. (Department records.) Furthermore, the Bureau of Reclamation claim for power generation from Hungry Horse Dam (Claim No. 134910-s76J) does not reflect use of the water for power generation anywhere other than at Hungry Horse: The Claim states, for place of use, "The power which is generated is put into the Bonneville Power Administration system and marketed in the Western U.S. . . ." (emphasis added). The June 9, 1947 Notice of Appropriation which accompanies the Claim specifies "The water will be returned to the river at the power plant below the dam."

9. The Bureau of Indian Affairs opposes the Application in this matter on the basis that additional water uses upstream of the Flathead Indian Reservation will be detrimental to irrigation uses by the Flathead Irrigation Project, as well as to the fishery rights claimed by the Confederated Salish and Kootenai Tribes.

The Tribes claim fishery rights in Flathead River and Flathead Lake, based on the Hellgate Treaty of 1855, for hunting and fishing at "the usual and accustomed places". The Tribe's fishery claim has not yet been quantified: it is not known at this time whether the amount of water which the Tribes will claim for fishery purposes will be greater or lesser than the 3,500 cfs instream flow presently set for these purposes under the Northwest Power Planning Council Agreement. (Testimony of Doug Oellermann.) Mr. Oellermann stated that he did not know whether the instream flow amount which the Tribes will claim might be greater than the naturally-occurring flow of Flathead River. The Tribes also have an interest in the operation of Kerr Dam, since a 1985 licensing agreement grants the Tribes the right to assume control of Kerr Dam and its FERC license in the year 2015. (Testimony of Oellermann.)

The Flathead Irrigation Project operates a pumping plant just above Kerr Dam, which diverts a maximum of 210 cfs of water to irrigate lands to the east of the Flathead River. Whenever Montana Power Company ("MPC") begins drafting on storage in Flathead Lake because incoming flows are not high enough, it is possible that the draft through the MPC power plants will draw the water level down below the bottom of the Project pumping plants.

Such drafting will occur unless the amount of water coming into Flathead Lake from the various sources such as Flathead River is approximately equal to the amount of water being

diverted through the MPC power plants. (Testimony of Doug Oellermann.) It is the Objectors' contention that the cumulative effects of the present Application will cause MPC to draft on the forebay more frequently, with the potential of leaving Flathead Irrigation Project's intake pipes at least temporarily above water level.

There is no testimony to indicate whether or not this alleged effect has ever occurred, or under what circumstances, nor was evidence presented as to what extent the Applicant's proposed project will change the water availability conditions at the forebay. The Objectors did not specify what drop in water level/loss of volume would have to occur before the intake pipes would not operate.

Based upon the foregoing Findings of Fact and upon the records in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

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

2. The Department has jurisdiction over the subject matter herein and the parties hereto. See Memorandum.

3. The Department must issue a Beneficial Water Use 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 of water, for irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 6. However, any permit which might be issued in this matter would have to be conditioned to ensure that the diversion system, which is capable of pumping 1,500 gpm, can be so valved or restricted that the pumping rate can be cut back to the 900 gpm flow rate of the existing right, to protect other water rights in the event the most junior uses (such as the one proposed here) were called upon to shut down.

6. The Applicant has not provided substantial credible evidence that there are unappropriated waters in the source of supply in the amount the Applicant seeks to appropriate, throughout the proposed period of diversion.

Whether unappropriated waters are available in the source of supply can be determined on the basis of whether at least in some years (a) whether there is water physically available at the point of diversion, in at least some years (water is not physically unavailable due to its being diverted, impounded, or withdrawn by upstream water users), and (b) whether the water which is physically available to the Applicants is legally available (not needed and usable downstream to fulfill senior water uses). See generally In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley, March 21, 1988 Proposal for Decision.

With a minimum of 2,615 cfs to more than 11,333 cfs in natural river flows passing Holt measuring station immediately above the Applicant's proposed point of diversion, clearly there is water physically available at the point of diversion. (See Finding of Fact 7.) However, the Applicant has not provided substantial credible evidence that the water which is physically available is not needed to fulfill senior water uses.

The Applicant provided testimony and information concerning water availability and water uses upstream from the proposed point of diversion. (See Finding of Fact 7.) However, an applicant for a beneficial water use permit also is required to show that, at least in some years, water uses downstream from his proposed project will not require the water which he seeks to divert. This the Applicant has failed to do.

The Applicant has calculated that there is water available for appropriation, based on a comparison of flows at Holt station with the "outflows" at Kerr Dam. However, as discussed in Finding of Fact 8, the figures used by the Applicant for Kerr Dam flows cannot be given any weight, or used for comparison purposes. In the absence of these, and other, important facts concerning existing water uses, no meaningful determination can be made on the issue of unappropriated water.

7. There is no evidence to suggest that the Objectors' water rights would be adversely affected by the Applicant's proposed appropriation.

Objections were made on behalf of Bureau of Reclamation to protect the 3,500 cfs minimum instream flow which the Bureau is obligated to maintain from Hungry Horse Dam to Flathead Lake, alleging that Montana's participation in the Northwest Power Planning Council preempts its ability to issue permits which might result in additional releases of water being made necessary. (See Finding of Fact 9.)

However, a review of the Columbia River Basin Fish and Wildlife Program, upon which the instream flow requirement is based, clearly refutes any argument that Montana is preempted from issuing a permit. Section 107 of the 1987 NWPPC agreement states, in relevant part, "Disclaimers, nothing in this program authorizes appropriation of water, affects rights to water or jurisdictions over water, or establishes the respective rights to

water of the United States, states, Indian tribes or individuals".

The Bureau has filed Claims in the adjudication process for several uses for Hungry Horse Reservoir water, including fish and wildlife purposes. (See Claim Nos. 134905- through 134912-76J.) However, the fish and wildlife Claim (No. 134911-76J) has been "no righted" (not recognized) in the temporary preliminary decree for the basin. ¹ Since, based on the most current information available, the Bureau of Reclamation does not have a recognized water right for fish and wildlife purposes, and since the Bureau has not applied for and been granted a change in use for any of its recognized Claims in order to establish the 3,500 cfs instream flow use it is charged with maintaining, the Bureau of Reclamation does not appear to have any protectible water right for the instream flow which could be adversely affected by the Applicant's proposed appropriation.

The Bureau of Reclamation also does not appear to have any protectible interest in the flows of Flathead River for power generation purposes, once the water is utilized at Hungry Horse Dam. The information and documentation provided for Bureau of Reclamation's Claim for power generation uses does not reflect

¹ Section 85-2-227, MCA, accords Claims prima facie status as proof of their contents until issuance of a final decree. However, the prima facie nature of Claims is recognized only for purposes of the adjudication process, as recent legislation makes clear. (See Chapter 604, Laws of Montana 1989.) For purposes of administering water rights, the prima facie status of a claim is superseded by issuance of a temporary preliminary decree or a preliminary decree.

any claim for, or right to, maintenance of flow in the river for use at downstream power generation facilities. (See Finding of Fact 9.)

Objections made on behalf of the Flathead Irrigation Project fail to meet the Objectors' burden of production. An objector has the obligation to describe the operation of the water rights upon which the objection is based with particularity, and allege why the right(s) could not be reasonably exercised under the change in water conditions which would be caused by the applicant's proposed appropriation, in order that the applicant has a fair opportunity to respond to the allegations of adverse effect. See In the Matter of the Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston, April 27, 1987 Proposal for Decision (Final Order, August 12, 1987).

In the present matter, the Objectors did not provide any evidence or information as to the amount of drawdown which would result in the alleged effect of exposing Flathead Irrigation Project's intake pipes for its pumping station. Therefore, there is no way to determine whether potential lowering of lake level, which at any rate could be no more than de minimus, would adversely affect the appropriation.

Objector Department of Interior also alleged that the tribal fishery right of the Confederated Salish and Kootenai Tribes could be impacted if the Applicant's diversion reduced the 3,500 cfs minimum instream flow presently maintained for fishery purposes. However, in the absence of any showing that the tribal

fishery right corresponds to the 3,500 cfs flow (since testimony indicates that this exceeds the natural flow of the Flathead River at many times), or how the proposed appropriation by the Applicant might impose on the (as yet unquantified) tribal fishery right, there is no basis for a finding of adverse effect.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management hereby is denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception

relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 7th day of May, 1990

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 7th day of May, 1990, as follows:

Steve Felt
Crop Hail Management
P.O. Box 960
Big Fork, MT 59911

United States Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Liter Spence and Fred Nelson
Montana Department of Fish, Wildlife, and Parks
1420 East 6th Avenue
Helena, MT 59620

Chuck Brasen, Field Manager
P.O. Box 860
Kalispell, MT 59603

Irene V. LaBare
Irene V. LaBare
Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT)
NOS. 66459-76L BY CIOTTI)
62935-76LJ BY CROP HAIL MANAGEMENT)
63023-76L BY RASMUSSEN)
63574-76L BY FLEMINGS)
64965-76LJ BY GRAY)
64988-76LJ BY STARNER)
AND)
APPLICATION FOR CHANGE OF APPROPRIATION)
WATER RIGHT NO. G15152-76L BY POPE.)

ORDER

* * * * *

On May 25, 1990, pursuant to the motion of the United States Department of Interior, the Department of Natural Resources and Conservation issued an order granting all parties to and including June 26, 1990, to file exceptions to the Proposals for Decision for Applications Nos. 66459-76L, 62935-76LJ, 63023-76L, 63574-76L, and 64965-76LJ. No extension of time was granted for Application for Beneficial Water Use Permit No. 64988-76LJ or for Application for Change of Appropriation Water Right No. G15152-76L because no Proposal for Decision had been issued in either case. On May 29, 1990, the Department received a motion for extension of time filed by the Confederated Salish and Kootenai Tribes of the Flathead Nation. The motion requested a 30 day extension from the date of receipt of the filing of the Proposal for Decisions on the Tribe. The request would extend the time to file exceptions beyond the time previously granted by the May 25, 1990 Order. In order to accord all parties sufficient time to

review the subject Proposal for Decisions and to file exceptions, if any, upon the motion by The Confederated Salish and Kootenai Tribes of the Flathead Nation, and for good cause shown,

IT IS HEREBY ORDERED that the time in which to file exceptions to the Proposals for Decision for Applications Nos. 66459-76L, 62935-76LJ, 63023-76L, 63574-76L, and 64965-76LJ is extended to July 9, 1990, for all parties.

IT IS FURTHER ORDERED that all parties have until August 10, 1990, to file responses to exceptions filed in these matters.

Dated this 31st day of May, 1990.

Gary Fritz for/_____
Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record at their address or addresses this 31st day of May, 1990, as follows:

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Water Administrator
Confederated Salish
Kootenai Tribes
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