

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMITS NOS. )  
66459-76L, Ciotti; )  
62935-s76LJ, Crop Hail Management; )  
63574-s76L, Flemings; )  
64965-s76LJ, Gray; )  
63023-s76L, Rasmussen; )  
64988-g76LJ, Starner; )  
and )  
APPLICATION FOR CHANGE OF APPROPRIATION )  
WATER RIGHT NO. )  
G15152-S76L, Pope. )

ORDER

\* \* \* \* \*

The Confederated Salish and Kootenai Tribes and the United States Department of Interior have appeared in the seven captioned proceedings to contest the jurisdiction of the Montana Department of Natural Resources and Conservation to issue water use permits for the use of non-reserved water by non-Indians on fee lands on the Reservation. Their motion to dismiss for lack of jurisdiction was certified to the Director, pursuant to ARM 36.12.214.

ORDERED that, as described in the attached Memorandum, the Montana Department of Natural Resources and Conservation maintains that it has regulatory jurisdiction over new appropriations of non-reserved water by non-Indians on fee lands within the Reservation.

DATED this 30<sup>th</sup> day of April, 1990.

  
Karen L. Barclay  
Director

**CASE #**

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MEMORANDUM

\* \* \* \* \*

The Confederated Salish and Kootenai Tribes ("Tribes") and the United States Department of Interior ("United States") have appeared in the seven captioned proceedings to contest the Montana Department of Natural Resources and Conservation ("DNRC") jurisdiction to issue water use permits on the Flathead Reservation.

Among the arguments raised by the Tribes and the United States are:

- because the DNRC permit process involves a piecemeal adjudication of existing rights, the DNRC lacks jurisdiction under the McCarren Amendment, 43 U.S.C. § 666; further, state statutes have suspended the DNRC permit process while negotiation of federal reserved rights is pending;
- federal law requires that federal reserved rights be finally adjudicated before Montana can regulate surplus water on the Reservation; and,
- absent express Congressional authorization, Montana's water use statutes are inapplicable on the Reservation.

**CASE #**

Having carefully considered the arguments and authorities offered by the Tribes and the United States, the DNRC continues to assert its regulatory jurisdiction over the use of non-reserved water by non-Indians on fee lands within the Reservation.

1. The McCarren Amendment is not applicable because the DNRC permit process is not an adjudication of existing rights.

In the McCarren Amendment Congress consented to the joinder of the United States in any suit for the "adjudication of rights to the use of water of a river system or other source". The Amendment requires Indian Tribes, and the United States as trustee for tribes, to submit claimed federal reserved water rights to a state's general water rights adjudication. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). Contrary to the assertions of the Tribes and the United States, the McCarren Amendment does not apply to the DNRC water use permit process. Montana statutes make a clear distinction between the DNRC process and the State's general water rights adjudication.

Montana's general water rights adjudication applies only to "existing" water rights, which are those with a priority date earlier than July 1, 1973. Mont. Code Ann. § 85-2-102(9). Formal adjudication of the priorities, scope, and extent of existing rights is the exclusive function of district court water judges. See Mont. Code Ann. Title 3, Chapter 7. Montana's general adjudication is currently pending in the Montana state

courts. Mont. Code Ann. §§ 85-2-201 et seq. Federal reserved rights are included in the adjudication process and will either be decreed by the state court or negotiated with the Reserved Water Rights Compact Commission. Mont. Code Ann. § 85-2-217.

In contrast to the adjudication of existing rights, the DNRC permit process is a method of reviewing proposed new uses of water. Since July 1, 1973, a person planning to appropriate water must apply for and receive a permit from the DNRC. Mont. Code Ann. § 85-2-302. To obtain a permit, the applicant must demonstrate, among other things, that there is unappropriated water at the point of diversion, and that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311.

Contrary to the Tribes' argument, in determining whether there is unappropriated water the DNRC does not adjudicate existing water rights, but simply requires the applicant to present evidence of water physically available at the proposed point of diversion. See Mont. Code Ann. § 85-2-311(1)(a). Similarly, the DNRC does not determine the validity of existing rights when it reviews for adverse effect on existing water rights. If a question is raised concerning the validity of an existing right, the DNRC may certify the question to a water judge. Mont. Code Ann. § 85-2-309(2). This distinction between the adjudication and the DNRC process is also clearly shown by Mont. Code Ann. § 85-2-313, which provides that permits issued by the DNRC are "provisional", and are subject to the final determination of existing rights by a water judge.

Thus, because the DNRC permit process is not an "adjudication", the provisions of the McCarren Amendment are inapplicable. The clear distinction between the DNRC process and the adjudication also makes inapplicable the statute suspending "proceedings to generally adjudicate" federal reserved water rights while negotiation of those rights is pending. Mont. Code Ann. § 85-2-217.

2. The State of Montana has regulatory jurisdiction over the use of non-reserved water by non-Indians on fee land within the Reservation. The State has a strong interest in developing a comprehensive water regulation system for state citizens. By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal or federal water rights are given adequate protection in Montana's permitting process, even though the federal rights have not been finally adjudicated.

DNRC water use permits are issued only for surplus water, which is water available after existing rights, including reserved rights, are satisfied. Federal courts have long recognized that the state has jurisdiction over water in excess of that needed for federal reserved rights. See, eg: Conrad Investment Co. v. United States, 161 F. 829, 834 (9th Cir. 1908); United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956). The more specific question of when a state may exercise its jurisdiction over surplus water on a reservation has been addressed in two recent federal decisions: Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) and United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). These cases adopted a balancing test to weigh the state, federal, and

tribal interests involved in extending state regulatory jurisdiction onto a reservation:

[Where] a state asserts authority over the conduct of non-Indians engaging in activities on the reservation [the court must make a] particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law.

Anderson, supra at 1365, quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

Both the Walton and Anderson courts recognized that states have a strong interest in developing a comprehensive water regulation system for state citizens. Congress also has recognized this interest, and has adopted a policy of deference to state water law:

In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. California - Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L. Ed. 2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. United States v. New Mexico, 438 U.S. 696, 702, 98 S. Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

Walton, supra, at 53. See also: Anderson, supra, at 1365.

Walton and Anderson also established that a state's interest in water regulation does not necessarily end at a reservation boundary. The weight of the state's on-reservation regulatory interest depends on the extent to which on-reservation water use has off-reservation effects. See Anderson, supra, at p. 1366. In Walton, the stream in question was small, non-navigable, and began and ended entirely on the Reservation. 647 F.2d at 52. The court found that tribal control of the stream would have "no

impact on state water rights off the reservation." Id at p. 53. Accordingly, the Walton court concluded that the state's regulatory interest was limited and that the policy of federal deference to state water law did not apply. The court also noted that validation of the state permits at issue could have jeopardized the agricultural use of downstream tribal lands as well as the existence of the tribal fishery. Id at p. 52.

In Anderson, on the other hand, the stream in question formed a reservation boundary, and was a tributary to the Spokane and Columbia Rivers. 736 F.2d at p. 1366. This fact gave the state a strong interest in extending its regulatory authority to surplus waters on-reservation. Id. at 1304. The court then considered whether tribal rights would be adversely affected by state regulation, and found that tribal water rights were adequately protected by quantification in a federal decree and oversight by a federal master. Id at p. 1365, 1366. Finally, the court noted that some of the affected non-Indian lands on-reservation had been opened for settlement under the Homestead Act. Id at pp 1365-66. These factors led the court to rule in favor of state jurisdiction on-reservation.

Of the seven DNRC permits and change authorizations at issue here, three projects are entirely off-reservation. Crop Hail Management, Permit Application No. 62935-s76LJ; Gray, Permit Application No. 64965-s76L; Rasmussen, Permit Application No. 63023-s76L. None of the legal authorities cited by the Tribes or the United States suggests that the DNRC lacks jurisdiction to issue these off-reservation water use permits.

The three remaining permit applications and one change authorization application all have points of diversion on fee land on the Reservation. In each case, the diversion is from a tributary of the Flathead River system, one of the major river systems in northwest Montana, which in turn is a major tributary of the Clark Fork of the Columbia River. None of the streams involved has the unusual closed-basin hydrology that led the Walton court to depart from the federal rule of deference to state water regulation. Because these on-reservation streams are tributary to waterways that transcend the reservation boundaries, the state has a strong regulatory interest in this case, pursuant to Anderson. This case also resembles Anderson in that the Flathead Reservation contains substantial lands opened to non-Indian settlement under homestead laws. See Joint Board of Control of Flathead, Mission v. U.S. 646 F.Supp. 410, (D. Montana 1986), rev'd on other grounds 832 F.2d 1127 (9th Cir. 1987).

By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal power to regulate the conduct of non-Indians on land no longer owned by or held in trust for the Tribes has been impliedly withdrawn as a necessary result of tribal dependent status. Montana v. United States, 450 U.S. 544, 564 (1981). Absent express Congressional delegation, the Tribes lack authority to regulate non-Indian activities on fee land. Brendale v. Confed. Tribes and Bands of Yakima Indian Nation, 57 USLW 4999, 5005 (1989). Even where tribal interests are affected, tribes have been directed to seek

recognition and protection of their rights in the state forum, rather than to challenge the jurisdiction of that forum. Id.

In this case, tribal or federal interests are adequately protected by Montana's permitting process. In the first place, DNRC permits are issued only for surplus water available after federal reserved rights are satisfied. The permits contain the following condition subordinating them to Indian water rights:

This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. The permittees are hereby notified that any financial outlay or work they may choose to invest in their project pursuant to this Permit is at their own risk, since the possibility exists that water may not be available for their project once tribal reserved water rights are quantified by a forum of competent jurisdiction.

Montana statutes also emphasize that DNRC permits are subject to existing water rights. See Mont. Code Ann. §85-2-313. Both by express condition and by statute, then, DNRC permits are valid only to the extent that the prior federal reserved rights are adequately protected. Thus, as a matter of law, federal reserved rights will not be harmed by the DNRC permitting process.

Second, actual conflicts with existing uses of federal rights can be screened in the DNRC permit process. Advance public notice is given of every proposed permit, and claimants of existing water rights have the opportunity to present evidence to the DNRC concerning the specific requirements of their senior water use. The DNRC may not issue the permit unless the applicant proves that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). The United States in fact presented evidence in two

of the instant permit application hearings. In Flemings, supra, the BIA offered data about instream flows needed to sustain a claimed tribal fishing right. In Rasmussen, supra, the BIA testified concerning the proposed permit's effect on the water requirements of the Flathead Irrigation Project. Under the Supreme Court's recent decision in Brendale, the availability and flexibility of the DNRC process makes it the preferred forum to regulate use of non-reserved waters on reservation fee lands.

Contrary to the argument of the United States, federal law does not require final adjudication of reserved rights before states can exercise their authority over surplus water on-reservation. Although the Anderson court indicated that quantification of federal rights and their administration by a federal master was "central" to its decision, later decisions in the Ninth Circuit have not shared that concern. Holly v. Totus, 655 F.Supp. 548 (E.D. Wash. 1983), aff'd in part unpub. opin., 749 F.2d 37 (9th Cir. 84); and Holly v. Conf. Tr. and Bands of Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), aff'd unpub. opin. 812 F.2d 714 (9th Cir. 1987), cert. den. 108 S.Ct. 85 (1987). In Holly, the court held that the Yakima Tribe lacked jurisdiction to regulate non-Indian use of surplus water on fee land on-reservation. The court declined to rule whether the state had such jurisdiction, finding that the absence of the United States as a party precluded a "particularized inquiry into the nature of the state, federal, and tribal interests at stake". 655 F. Supp. at 599. As in Montana, the tribal and federal water rights in Holly were still in the process of a state

adjudication. See 655 F. Supp. at 554-55; 655 F.Supp. at 559 n.2. Significantly, however, the Holly court did not treat the lack of a final adjudication as increasing the tribal regulatory interest or as jeopardizing tribal water rights. This suggests that federal courts may not require a final adjudication, but will consider other mechanisms that protect federal rights. In this case, adequate protection is provided by subordination of DNRC permits to senior federal rights, and by the case-by-case review of the DNRC permit process. Thus, both Holly and the present case show the artificiality of the adjudication "requirement."

Under state law as well, federal rights need not be adjudicated before they can participate in the DNRC permit process. Most existing water rights in Montana are still only in the preliminary stages of adjudication. Nevertheless, the DNRC has been reviewing existing rights in permit proceedings since 1973, pursuant to the State Water Use Act. See Mont. Code Ann. Title 85, ch. 2. The drafters of the Act recognized that the DNRC process rarely requires that the ultimate scope of an existing right be known. Rather, the DNRC review focuses more upon specific operation practices of existing rights, such as normal diversion rates and schedules, field rotations, and location and timing of return flow. This detailed information is not considered in the adjudication, but it is the primary basis for determining whether a new water use is compatible with practices of existing users. Thus, state law is designed to allow the permit and adjudication processes to run concurrently.

3. Congressional approval is not required for Montana water use statutes to apply to surplus water on the Reservation.

The Tribes and the United States also argue that, absent express Congressional authorization, Montana's water use statutes are invalid on the Reservation. The parties cite language to that effect in United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939), and United States v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942). However, the cited language is derived from very early Supreme Court cases, e.g., Worcester v. Georgia, 31 U.S. 515 (1832), and is no longer a correct statement of federal Indian law. The present rule is that Indian reservations are subject to state jurisdiction except as preempted by federal law or by tribal sovereignty. As outlined above, federal courts now use a balancing test to determine whether federal, state, or tribal regulatory interests are paramount. White Mountain Apache Tribe v. Bracker, *supra*, 448 U.S. at 143. See also, Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). If Walton appeared to endorse the McIntire rule, it has been implicitly overruled on that point by the analysis in Anderson, *supra*.

In any event, a closer reading of McIntire shows its actual holding to be that Montana appropriation statutes do not apply to reserved water on the Reservation. The issue concerned the validity of a state notice of appropriation filed by an Indian allottee while the allotted land was still in trust status. See 22 F. Supp. at 319, 101 F.2d at 652. Federal law is clear that

General Allotment Act allotments, while still in trust status, share in the tribal reserved rights. United States v. Powers, 305 U.S. 527 (1939), 25 U.S.C. § 331 et seq. Consequently, the attempted state appropriation of reserved water was invalid. Later federal decisions confirm that the McIntire ruling pertained to reserved water rather than surplus water. United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942); United States v. Ahtanum Irr. Dist., supra at 340. See also, In re Rights to Use Water in Big Horn River, 753 P.2d 76, 114 (Wyo. 1988), cert. den. 109 S.Ct 3265 (1989).

As emphasized above, the DNRC is not asserting jurisdiction over reserved water, but only over surplus water available when reserved rights are satisfied. Federal courts have long recognized that such surplus water falls under state jurisdiction. Conrad Investment Co., supra.

#### CONCLUSION

In conclusion, under federal law Montana has regulatory jurisdiction over water in excess of that needed for federal reserved rights. Given the State's strong interest in comprehensive water regulation, Montana's jurisdiction over surplus water extends to fee land on the Reservation. Tribal and federal water rights, although not yet adjudicated, are adequately protected by the DNRC permit process.

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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. 63574-s76L BY CECIL AND )  
JANE FLEMINGS )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on September 22, 1988 in Missoula, Montana.

Applicants Cecil and Jane Flemings appeared at the hearing in person.

Objector U.S. Department of Interior appeared 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.

The Confederated Salish and Kootenai Tribes made a special appearance at the hearing, by and through counsel Daniel F. Decker, to contest jurisdiction in this matter.

Michael McLane, Field Manager of the Missoula Water Rights Bureau Field Office, appeared at the hearing as staff witness for the Montana Department of Natural Resources and Conservation (hereafter, the "Department").

**CASE # 63574**

PRELIMINARY MATTERS

Objector U.S. Department of Interior moved to have the present application dismissed on the basis that the Department of Natural Resources and Conservation does not have authority to administer or regulate waters within the exterior boundaries of the Flathead Indian Reservation. The Confederated Salish and Kootenai Tribes also contest Department jurisdiction to act in the matter of the present Application, the point of diversion and place of use of which are located within the exterior boundaries of the Flathead Indian Reservation.

The Department hereby asserts jurisdiction in this matter. A complete discussion of this determination is contained in the Memorandum which accompanies this Decision.

EXHIBITS

The Applicants offered one exhibit for inclusion in the record in this matter:

Applicants' Exhibit 1 is a handwritten report of water measurements taken in June, July, August, and September of 1987 and in August of 1988, with accompanying descriptions of the weather conditions.

Applicants' Exhibit 1 was accepted for the record without objection.

The Objectors offered three exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1, offered by Daniel F. Decker, is a brief entitled "Entry of Special Appearance to Contest

Jurisdiction" (10 pages of text, plus signature page and Certificate of Service).

Objectors' Exhibit 2, offered by John C. Chaffin, consists of two U.S.G.S. quad maps (of the Arlee and Evaro quadrangles) taped together to show the general area of the Application and the locations of Flathead Indian Irrigation Project and other diversions on Finley Creek.

Objectors' Exhibit 3, offered by John Chaffin, is a photocopy of a project map showing "Area 2" of the Flathead Indian Irrigation Project, which indicates lands watered by the project in the vicinity of the Application in this matter.

Objectors' Exhibits 1, 2, and 3 were accepted for the record without objection.

The Department file was made available at the hearing for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The record in this matter was left open for submission of a brief by John Chaffin, and to allow the Applicants and the Confederated Salish and Kootenai Tribes a chance to respond to the brief. Mr. Chaffin filed a Memorandum in Support of Motion to Dismiss on October 6, 1988. No responses were received. The record closed on October 21, 1988.

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, MCA, do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 63574-s76L was duly filed with the Department of Natural Resources and Conservation on August 19, 1986, at 3:30 p.m.

3. The pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on January 21 and January 28, 1987.

4. The source of water for the proposed appropriation is surface water from a tributary of Finley Creek known locally as Kitty Girl Creek.

5. The Applicants have applied for 10 gallons per minute ("gpm") up to 5.0 acre-feet of water per year for irrigation of 2.0 acres from April 1 through October 1 of each year, and 2 gpm up to .10 acre-feet of water per year for stockwatering uses from January 1 through December 31 of each year. Water would be diverted from Kitty Girl Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 12 for stockwatering and irrigation of two acres in the

S½NW¼SE¼ of Section 12, all legals in Township 15 North, Range 20 West, Missoula County, Montana.

The Applicants' project consists of a small on-stream pond with a capacity of approximately 15,640 gallons (Site Visit Report of Michael McLane), which is used as a sump and as storage. The pond is approximately 41.5 feet by 50 feet in measurement, with a full pool depth of about 29". (Site Visit Report.) The pond stores only a couple of days' supply of water. It is not intended to capture runoff or other high water events. (Testimony of Applicants.)

Water presently is pumped from the pond through a 2" diameter pipe by use of a one-half horsepower pump, and used with handline and sprinklers for irrigation of a half-acre of lawn and garden. Additional areas around the property are also irrigated during dry periods, to minimize fire danger. (Testimony of Applicants; January 6, 1988 Site Visit Report by Michael McLane.) The Applicants testified that they intend to replace the present pump with one of three-quarter horsepower capacity. Water flows out of the pond through a 26" culvert, down a spillway, and then into the natural channel. (See photos accompanying Site Visit Report.) Pond depth is controlled by the use of flashboards.

Counsel John Chaffin stated that it appears to the Objector Department of Interior that the diversion, construction, and operation of the appropriation works are adequate.

6. The Applicants testified that they do not presently have any stock on the place of use, nor were any livestock present at

the time of the August 11, 1987 site visit in this matter. (See Site Visit Report.) The Applicants stated that they would be willing to terminate the proposed stock use and just use the water for irrigation during the summer.

The Applicants further testified that they probably do not use the full requested volume of water for irrigation, since they irrigate only three or four times a week beginning "around May" and continuing through September. They originally applied for a volume of 3.31 acre-feet of water per year. See Site Visit Report. However, they amended the volume to five acre-feet of water based on advice that their two-acre place of use potentially could utilize this much volume under certain (unspecified) conditions.

The Applicants have been issued a Certificate of Water Right (No. 25904-g76M) for 8 gpm up to 1.5 acre-feet of water from a groundwater well for domestic use, including lawn and garden. However, they do not want to pump water from the well for irrigation purposes, since pumping more water than is needed in the house induces clay and dirt into the well and "messes up" the water used for household purposes. (Testimony of Cecil Flemings, Jane Flemings.)

7. During high water stages, Kitty Girl Creek flows into a drainage along the west side of the railroad right-of-way. This drainage passes under the railroad tracks approximately one-quarter mile north of its junction with Kitty Girl Creek and

joins Finley Creek. (Site Visit Report; testimony of Michael McLane, Cecil Flemings.)

From June throughout the rest of the year until the next spring, however, the surface flow of Kitty Girl Creek begins to dry up. The drainage begins drying at the bottom by the middle of June; by July, the surface flow does not extend more than 50 feet downstream from the Applicants' property boundary.

(Testimony of Cecil Flemings.) Mr. Flemings testified that surface water reaches Finley Creek only during times of high flow. At the time of the site visit, there was a flow of 5 gpm above the pond, and no surface flow below the pond. Some water was visible along the railroad right-of-way where the railroad grade was cut steep enough to intercept the groundwater table.

(Testimony of Mike McLane.) Kitty Girl Creek normally flows 12 to 15 gpm during July, August, and September (testimony of Cecil Flemings), with higher flows during spring irrigation months.

Testimony of Cecil Flemings; see Site Visit Report.

8. Mike McLane testified that the Applicants' project results in evaporative and consumptive losses of approximately two acre-feet of water per year, about 50% of the water diverted. The other 50% returns to the groundwater table by deep percolation, although it is not possible to determine the timing of the recharge. (Testimony of Mike McLane, Cecil Flemings.)

Objector's witness Doug Oellermann testified that, based on a 1955 geologic map, the area is filled with glacial drift. Based on this, waters of Kitty Girl Creek which go subsurface

should continue down gradient, filling up the groundwater "reservoir" first, then reemerging at some point as surface flow if and when the water table is full. Mr. Oellermann stated that he believes taking water out of the proposed source will eventually affect Finley Creek, although he does not have any specific information on the hydrologic connection between Kitty Girl Creek and Finley Creek.

9. Objector Department of Interior alleges that the Applicants' project will have adverse effect to the water rights of the Tribes and the Flathead Irrigation Project.

In response to court decisions requiring maintenance of the tribal fisheries, the Bureau of Indian Affairs has established an instream flow in Finley Creek to prevent the fishery in Finley Creek from being dried up by Flathead Irrigation Project's water use. At the present time, there is no definite flow amount set for the fishery, since that determination is part of the ongoing process of negotiations between the tribes and the state. However, by using various methodologies (the Tennant method, wetted perimeter method, instream flow/incremental methodology method), the BIA has arrived at a tentative figure of 7.5 cfs for the necessary instream flow. This amount of water must be maintained over and above the water use demands of the irrigation project and secretarial water right holders. (Testimony of Oellermann; statements of John Chaffin.)

Due to the instream flow requirement, the Flathead Irrigation Project has had to shut down irrigation diversions in

mid-August in the Jocko District for the last three years, although the irrigation period of diversion runs from April 15 through October 1. (Statements by Chaffin, Dan Decker.) There is a "chronic shortage" of water in the Jocko River system, taken as a whole, although the irrigation system is designed to move water around the area based on supply and demand at various locations. (Testimony of Oellermann.) Therefore, the Objectors argue, any additional water lost to Finley Creek will have an impact on the fishery and/or the irrigation project.

The loss of water in Finley Creek and in the Jocko River, to which Finley Creek is tributary, will have an adverse effect on the tribal economy as well as the irrigation per se, the Objectors allege: reduction of water in the reservation watercourses can have an impact on stream aesthetics, and therefore on tourism; on the fishery used by tribal members; and on the economics of selling fishing permits to non-tribal members. (Testimony of Doug Oellermann.)

The Objectors did not present any specific information concerning the income derived, or the tribal fishery rights preserved, by maintaining an instream flow of 7.5 cfs.

10. The Department records do not show any other planned uses or developments on Kitty Girl Creek for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record 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 all 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 set forth in § 85-2-311(1), MCA, 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 Applicants do not have any present intent to use the proposed stockwater appropriation (see Finding of Fact 6), nor does their testimony indicate any probable plans to water stock in the foreseeable future; therefore, the requested 2 gpm up to .10 acre-feet of water per year for stockwatering cannot be granted.

5. The proposed use of water for irrigation is a beneficial use. See § 85-2-102(2), MCA.

6. The Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5. However, any permit issued in this matter will be conditioned to ensure that the Applicants' applied-for flow rate of 10 gpm for irrigation is not exceeded (since the Applicants intend to install a larger pump), and that any flows in excess of 10 gpm are passed through the pond. The Applicants will also be required to maintain diversion records to ensure that the permit volume is not exceeded.

7. The Applicants have provided substantial credible evidence that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicants, in the amount the Applicants seek to appropriate. See Finding of Fact 7.

Whether unappropriated waters are available in the source of supply can be determined on the basis of (a) whether there is water physically available at the Applicants' proposed point of diversion throughout the period of diversion, in at least some years (water is not 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 usable downstream to fulfill senior users), and the Applicants therefore can utilize the requested

amount of water throughout the period of appropriation in some years without being called by a senior user. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March 21, 1988 Proposal for Decision).

The Applicants' testimony, together with the Site Visit Report, indicate that water is physically available in Kitty Girl Creek in the amounts requested (10 gpm) during the proposed April through September period of diversion. Although the flow taken during the site visit on August 11, 1987 shows a flow of only 5 gpm, Mr. Flemings' uncontradicted testimony is that the creek normally flows 12 to 15 gpm during July, August, and September, and higher in the spring months. (See Finding of Fact 7, Site Visit Report.) Therefore, the full requested amount of water is available throughout the requested period of diversion in most years.

The record also provides substantial credible evidence that the Applicants can utilize the requested amount of water throughout the period of appropriation without being called by a senior user. There is no evidence that a call by a senior user would result in any water reaching Finley Creek (see Finding of Fact 7), at least within any time frame when it would be useful to the downstream user. Prior case law has held that a junior use may not be enjoined by a senior use when the call would be futile since the released water would not reach the senior. See Beaverhead Canal Co. v. Dillon Electric Light and Power Co., 84 Mont. 155, 85 P. 880 (1906); Raymond v. Wimsette, 12 Mont. 551,

31 P. 537 (1892); See generally, Thrasher v. Mannix, 95 Mont. 273 (1933). Since the evidence indicates that there is no surface flow during the Objectors' times of shortage in August and September, and therefore the Applicants' water would not reach a downstream senior appropriator, the requested amount of water is also legally available for use by the Applicants.

8. There is no factual basis for granting the Applicants the proposed volume of five acre-feet per year for irrigation purposes.

The Applicants testified that they most likely do not use the full requested volume of water, since they irrigate only three to four times a week from May to September on two acres. (See Finding of Fact 6.) Even if the Applicants ran their pump 24 hours a day each day they pumped, and pumped four times a week for the five months, the total volume would only be 3.54 acre-feet of water per year. Therefore, any permit granted in this matter will have a volume limited to the 3.54 acre-feet which is the Applicants' maximum use based on their own testimony.

9. There is substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

There is no information in the record to establish the extent of a hydrologic link between Kitty Girl Creek and Finley Creek at such times as no surface flow exists in Kitty Girl Creek. Since the Applicant testified that Kitty Girl Creek dries up at its mouth beginning in June, and extending into the fall, and that the creek has surface connections with Finley Creek only

during high flows (see Finding of Fact 7), it appears that no surface water is available to Finley Creek from Kitty Girl Creek during the time period specified by the Objectors as the time of water shortage. (See Finding of Fact 9.) The Objectors allege that water from Kitty Girl Creek will "eventually" reach Finley Creek, but provided no information which shows that water does go subsurface, or data to establish a hydrologic connection, other than the general statement that the area is characterized by glacial fills and therefore the water which moves down gradient from Kitty Girl Creek will eventually re-emerge as surface flow. (See Finding of Fact 8.)

Even assuming arguendo that water goes subsurface in Kitty Girl Creek in the late summer/fall rather than completely drying up, and that whatever water does go subsurface eventually ends up in Finley Creek rather than some other surface source, however, there is no evidence that the water rights of the Objectors will be adversely affected by the Applicants' proposed appropriation. Only approximately 50% of the water diverted by the Applicants and used for irrigation will be lost (consumptively used by plants or evaporation). The rest of the water will recharge the aquifer. (See Finding of Fact 8.) Even assuming that there is a direct correlation between water in Kitty Girl Creek and water in Finley Creek (which has not been shown), so that one gallon of consumptive use from Kitty Girl Creek equals one gallon of water lost to Finley Creek, the

Applicants' diversion would result in no more than a de minimus effect to senior water rights in Finley Creek.

A consumptive withdrawal of two acre-feet of water per year would result in a maximum loss to Finley Creek of less than 1/1000 of the volume of water which would run in Finley Creek during the Applicants' proposed period of diversion, even assuming that Finley Creek did not run in excess of the 7.5 cfs minimum instream flow.<sup>1</sup> These figures represent the "worst case scenario", since the likelihood is that there is no such direct effect on the flow of Finley Creek (see Finding of Fact 8), and since the Objectors' testimony indicates that there is water in excess of the minimum instream flow until at least mid-August. (See Finding of Fact 9.) Counting periods of higher flow in Finley Creek, the effect would be even smaller.

Based upon the tenuous nature of the hydrologic connection between the source creek and Finley Creek, and upon the de minimus effect to the flow in Finley Creek even if there is a hydrologic connection, it is unlikely that the Applicants' proposed diversion would have a noticeable or even measurable effect upon water availability in Finley Creek. Therefore, there can be no finding of adverse effect.

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<sup>1</sup> The Objectors did not present any evidence which indicates that the flow in Finley Creek ever falls below the 7.5 cfs minimum instream flow.

10. 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.

The Hearing Examiner takes administrative notice of the fact that the Confederated Salish and Kootenai Tribes claim reserved rights to all waters arising on, flowing through, or lying under the Flathead Reservation. (See tribal objection, Department file.) However, nothing in the record in this matter, or in Department records, indicates that the Tribes have any planned uses or developments on Kitty Girl Creek, or that a condition making any permit issued to the Applicants subject to all prior Indian reserved water rights in the source (as determined by a proper forum) will not prevent "unreasonable" interference with such uses or developments as may arise in the future. See Memorandum.

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

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 63574-s76L is hereby granted to Cecil and Jane Flemings to divert 10 gpm up to 3.54 acre-feet of water per year for irrigation of one acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 12, and one acre in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 12, Township 15 North, Range 20 West, Missoula County, Montana.

The water is to be diverted from Kitty Girl Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 12, Township 15 North, Range 20 West, where the Applicants' .048 acre-foot on-stream reservoir is located. Water will be pumped from the reservoir for sprinkler irrigation of the place of use. The period of diversion shall be April 1 through October 1 of each year. The priority date for this Permit is August 19, 1986, at 3:30 p.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. This Permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. The Permittees are hereby notified that any financial outlay or work they may choose to invest in their project pursuant to this Permit is at their own risk, since the possibility exists that water may not be available for their project once tribal reserved water rights are quantified by a forum of competent jurisdiction.

C. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this

Permit, even if such damage is a necessary and unavoidable consequence of the same. Furthermore, the Department does not acknowledge liability for any losses that the Permittees may experience should they be unable to exercise this Permit due to the future exercise of reserved water rights.

D. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittees' Permit uses. A flow rate of no more than 10 gpm and a volume of no more than 3.54 acre-feet may be diverted by the Permittees, and any increased pump size must be adjusted or restricted to limit the diverted flow rate to this rate and volume.

E. The Permittees must install two staff gauges or other reasonably accurate measuring devices, one at the point where water enters the pond, and one at the point water reenters the natural channel. Flow measurements must be taken at both measuring stations at least once a week, and written records kept of the flow rates, volumes, and times of diversion. The Applicants shall maintain these records until the Permit is verified, and shall make them available to the Department upon request. Based upon these measurements, the Applicants must adjust the flashboard at the outlet of their reservoir to allow any flows in excess of 10 gpm to pass through the pond.

#### 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 7<sup>th</sup> 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

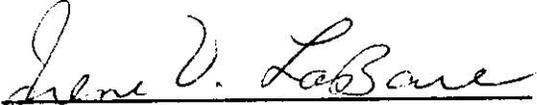
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 7 day of May 1990, as follows:

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Irene LaBare  
Legal Secretary