

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. 63997-g42M BY JOSEPH F.)
CRISAFULLI)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 11, 1990 Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 63997-g42M is hereby granted to Joseph F. Crisafulli to appropriate 400 gallons per minute up to 48 acre-feet of water per year from a well for use in new sprinkler irrigation.

The well shall be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 19 North, Range 56 East, Dawson County, Montana. The period of appropriation and use shall be from April 1 through October 1 of each year. The place of use shall be on a total of 96 acres in the E $\frac{1}{2}$ of Section 10, Township 19 North, Range 56

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East, Dawson County, Montana. The priority date shall be June 2, 1987.

This permit is to be ranked in priority with and against all rights to surface water in Burns Creek and its tributaries as well as with and against all rights to the source aquifer, and shall be subject to calls for water by holders of senior rights to water in either source.

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 Permittee to the detriment of any prior appropriator.

The Permittee shall maintain adequate flow metering devices on the diversion system in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Glasgow Field Office of the Department of Natural Resources and Conservation.

This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately

measured.

Issuance of this permit 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.

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 10 day of October, 1990.


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 10th day of October, 1990 as follows:

Joseph F. Crisafulli
Box 1354
Glendive, MT 59330

Herbert F. and Ralph W. Allard
Savage, MT 59262

CASE # 63997

Eugene P. Allard
2733 Miles Avenue
Billings, MT 59102

Sharon P. Allard
1408 N. River Avenue
Glendive, MT 59270

Monte and Marie Jarvis
607 E. Dodge
Glendive, MT 59270

Adam Buxbaum and Son, Inc.
ATTN Adam L. Buxbaum
Intake Rt
Glendive, MT 59330

Mildred K. Spithoven
Box 156
Savage, MT 59262

Marjorie Murray
Rt 2, Box 364
Savage, MT 59262

Lewis Murray
ATTN Personal Representative
Rt 2, Box 364
Savage, MT 59262

James A. and Glenda Murray
Rt 2, Box 373
Savage, MT 59262

Richard L. Allard
Box 1227
Forsyth, MT 59327

George Rice, Jr.
Intake Rt
Glendive, MT 59330

Basta Ranches
ATTN James A. Basta
Rt 2, Box 331
Savage, MT 59262

Hatfield and Raudsep Inc.
ATTN Leida E. Hubing, Pres.
Box 339
Joliet, MT 59041

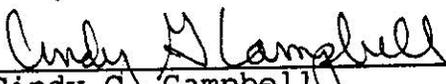
Fred, Warren & Walter Prevost
Intake Rt
Glendive, MT 59330

Rodney and Carolyn Sturgis
Box 385
Savage, MT 59262

Roy Jones, Manager
Glasgow Field Office
P.O. Box 1269
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Peter O. Maltese, Attorney
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P.O. Box 1914
Billings, MT 59103


Cindy G. Campbell
Hearings Unit 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. 63997-g42M BY JOSEPH F.)
CRISAFULLI)

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held on the above matter on July 24, 1990, at 9:30 a.m. in Glendive, Montana, to determine whether the above Application should be granted to Joseph F. Crisafulli under the criteria in § 85-2-311(1), MCA.

Applicant was represented by Chris J. Nelson, attorney. Applicant appeared as witness in his own behalf. Applicant called the following witnesses who appeared in his behalf: John Dawson, Jr., Culligan Company franchise owner; Mike Carlson, SCS District Conservationist; and, Joey Crisafulli, Applicant's son.

Objectors, as a group, were represented by Peter Maltese, attorney for Burns Creek Water Users Association, an informal organization whose membership includes all objectors in this matter. Objectors called the following witnesses who appeared in their behalf: Mark Shapley, Hydrogeologist for the Department of Natural Resources and Conservation (Department); Roy Jones, Manager, Department's Glasgow Water Resources Field Office; Adam Buxbaum, Objector and Burns Creek area farmer; Warren Prevost, Objector and Burns Creek area farmer; Sharon Allard, Objector and Burns Creek area farmer; and, Carolyn Sturgis, Objector and Burns Creek area rancher. Joey Crisafulli, Applicant's son, and Mike

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Carlson, SCS District Conservationist, were called by Objectors for further questioning.

The Hearing Examiner called Mark Shapley, who appeared as the Department's staff expert witness.

EXHIBITS

Applicant's Exhibit 1 is a jar of water, purportedly from Sturgis Spring, labelled "spring" on lid.

Applicant's Exhibit 1a is a Culligan Water Analysis slip on contents of Applicant's Exhibit 1.

Applicant's Exhibit 2 is a jar of water, purportedly from Applicant's well, labelled "well" on lid.

Applicant's Exhibit 2a is a Culligan Water Analysis slip on contents of Applicant's Exhibit 2.

Applicant's Exhibits 1, 1a, 2, and 2a were received into evidence over concerns expressed by Objectors that their relevance had not been established. Despite assurances from Applicant that their relevance would become apparent, no further testimony related to these exhibits appears in the record. Applicant's Exhibits 1, 1a, 2, and 2a were not considered in reaching a decision in this matter.

Applicant's Exhibit 3 is a USDA-SCS aerial photograph showing general area of the proposed point of diversion and place of use. Applicant's Exhibit 3 was used for illustrative purposes only and was not offered or received as evidence.

Applicant's Exhibit 4 consists of two packets of photographs of Burns Creek drainage from the proposed point of diversion to

its confluence with the Yellowstone River. Packet 1 consists of 19 photographs, taken with a 50 mm lens, numbered 1-1 through 1-19 on their reverse. Packet 2 consists of 36 photographs, taken with a telephoto lens, numbered 2-1 through 2-36 on their reverse. All photos are stamped on their reverse with the date July 16, 1988.

Applicant's Exhibit 5 consists of three photographs of Sturgis Spring with the date July 17, 1990, stamped on their reverse.

Applicant's Exhibit 6 consists of two pages: 1) a report titled "Elevations of Farmsteads and Water Developments in the South Fork of Burns Creek in Dawson County, Montana" written by Mike Carlson; 2) a copy of an undated letter from Mike Carlson to Joe Crisafulli reporting the results of a survey Mr. Carlson performed establishing elevations of points relative to the proposed diversion.

Applicant's Exhibit 7 is a copy of a June 21, 1988, letter from Joe Crisafulli to Marie Jarvis discussing placement of a weir in Burns Creek.

Applicant's Exhibit 8 is a USDI-BLM Public Lands in Montana map: Savage 20. South Fork of Burns Creek is drawn in red; North Fork, Middle Fork, and main stem of Burns Creek are drawn in green.

Applicant's Exhibits 4 through 8 were accepted into the record without objection.

The Department's file on this matter was reviewed by the parties prior to the start of the hearing. No objections to it being made a part of the record were expressed. The file was made part of the record.

Materials relating to the Department's decision on a prior application by Applicant, i.e., In re Application No. 50272-g42M by Joseph F. Crisafulli, are a part of the Department's file on the present Application. Objectors requested that facts and conclusions in the prior matter not be used by the Hearing Examiner as res judicata when reaching a decision on the present Application. The materials on the prior application were not used by the Hearing Examiner in reaching a decision in the present case.

PRELIMINARY MATTERS

As a result of data developed under the Interim Permit issued to Applicant, the Application was modified by the Department. Notice of the modification was sent to all objectors by certified mail. The notice also required a response from each objector as to whether they accepted or objected to the modified application. A response form was included with each notice. The notice stated lack of response would be interpreted as acceptance of the Application as modified and the withdrawal of previous objections.

A form stating the withdrawal of objection was received from Objector Ted E. Johnson. The notice sent to Lewis Murray was returned with the notation that addressee was deceased. No

response was received from Monte Jarvis, Marie Jarvis, Marjorie Murray, James A. Murray, Glenda Murray, Basta Ranches, George Rice, Jr., or from Peter Maltese, attorney for objectors, on behalf of any objector. Therefore, the following are not parties to this matter: Ted E. Johnson, Monte Jarvis, Marie Jarvis, Marjorie Murray, James A. Murray, Glenda Murray, Lewis Murray, Basta Ranches, and George Rice, Jr.

FINDINGS OF FACT

1. Applicant filed the above Application on January 30, 1987, at 11:06 a.m. (Department's file)

2. The Application as submitted was determined by the Department to be deficient and was returned to Applicant on March 3, 1987. The Application was resubmitted on March 11, 1987, but was again found to be deficient in that it lacked a completed Criteria for Issuance of Permit (Form 600A). It was returned to Applicant on April 13, 1987, with a letter stating: action on the Application was suspended; the priority date of the Application would be the date of receipt of a completed Form 600A, if received by June 3, 1987; and, if not received by June 3, 1987, the Application would be terminated. A completed Form 600A was received on June 2, 1987. (Department's file)

3. Applicant proposed in the Application to appropriate water by means of a system of three manifolded wells all in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 19 North, Range 56 East, Dawson County, Montana, at a flow rate of 500 gallons per minute (gpm) up to 404.36 acre-feet (AF) per year for new sprinkler irrigation

of 150 acres of grass for seed production. The place of use would be 80 acres in the NE¼ and 70 acres in the SE¼ of the same Section 10 which is property owned by Applicant. The period of diversion and use would be April 1 through October 1 of each year. (Department's file and testimony of Joey Crisafulli)

4. Pertinent portions of the Application were published in the Glendive Ranger-Review, a newspaper of general circulation in the area of the source, on August 13, 1987. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)

5. Sixteen timely objections were received from water rights owners in the Burns Creek drainage expressing a principal concern about the potential for adverse effects on nearby groundwater sources and the surface flows of Burns Creek. (Department's file)

At the hearing, Objectors raised the issue of potential adverse effects to their water rights from reduced water quality. Objectors alleged that reduced surface flows in Burns Creek would result in increased salinity and algae levels such that there would be inadequate clean water to satisfy their water rights.

6. On October 7, 1987, the Department sent written notification to all parties by certified mail of a proposal to issue an Interim Permit to Applicant for the purposes of drilling, testing the effects of pumping on flows in Burns Creek, and determining the amount of water available in the source. According to the

notice, the Interim Permit would be issued subject to several specified terms and conditions, including: an expiration date of October 1, 1988; instructions on taking measurements and keeping records; and a mechanism for modifying or revoking the permit which could be initiated by a written allegation of adverse effect.

No written responses adverse to the proposal were received. The Interim Permit was issued to Applicant December 7, 1987, subject to the terms and conditions that had been noticed. (Department's file)

7. Applicant had had a single well drilled December 6, 1986, at the proposed point of diversion to a depth of 42 feet having a diameter of 7 inches. Since it tested at 150 gpm, which was less than necessary for the proposed system, this well would serve only as an observation well.

A second well was constructed on April 5, 1988, also at the proposed point of diversion, to a depth of 41 feet having a diameter of 30 inches. It tested at 600 gpm and would, therefore, serve as the production well. (Department's file and testimony of Applicant)

8. Applicant, to the extent he was able, installed measuring devices in accordance with the conditions on the Interim Permit and instructions and recommendations from the Department as to type, number, location, design, and installation. Measuring devices were placed on the diversion system at the well head to record pressure, instantaneous flow, and cumulative volume. A

staff gauge was placed on the road bridge which crosses Burns Creek in the NE¼SE¼ of Section 10, Township 19 North, Range 56 East. A weir was placed in Burns Creek approximately 40 yards downstream from the bridge. Applicant also placed a staff gauge in the Sturgis Spring stock-watering pit which is about one-quarter mile up the drainage of the South Fork of Burns Creek from Applicant's well. (Department's file and testimony of Applicant and Carolyn Sturgis)

9. Applicant made attempts during the summer of 1988 to place a second, downstream, weir in Burns Creek at a location recommended by the Department, but was unable because of opposition from the owner of the site, Marie Jarvis, and her lessee, Adam Buxbaum. (Testimony of Adam Buxbaum and Applicant, Applicant's Exhibit 7, and Department's file)

10. The Interim Permit was exercised in June, July, August, and September of 1988. The single pre-existing well was pumped; measurements were taken and records kept by employees of Applicant of the amounts of water pumped and the flows through the above-mentioned weir on Burns Creek. (Department's file)

11. Measurements of surface flows in Burns Creek were taken and recorded by employees of Applicant during July, August, September, October, and November of 1989. These measurements were taken at a time water was not being diverted by Applicant's system as the Interim Permit issued to Applicant had expired. The records of these measurements were submitted to the Department as additional information to be used toward determining the

likelihood of adverse effects from the proposed appropriation.
(Department's file)

12. Mark Shapley stated, in undisputed testimony at the hearing, that there is clearly a relationship between the groundwater source proposed for appropriation by Applicant's well and the surface flows in Burns Creek.

13. Mark Shapley reported May 31, 1989, that the data collected during the 1988 pumping of Applicant's well showed some effect on stream flow from the groundwater withdrawals, but since there was only one measured location, there was no way to evaluate the significance of the effect on downstream users of Burns Creek. Based on the data collected during both 1988 and 1989, Mr. Shapley reported February 28, 1990, that it was unlikely the full amount of the Application (404.36 AF) could be satisfied without adversely affecting downstream appropriators. (Department's file and testimony of Mark Shapley and Roy Jones)

14. Upon being made aware of Mark Shapley's conclusions, Applicant proposed that the Application be modified to reflect the levels of water appropriated under the Interim Permit during the testing period of 1988: 400 gpm up to 48 AF per year. Mark Shapley and Roy Jones reviewed the request and agreed to make the modification based on their conclusion that in the modified form there was a supportable contention the Application could meet the criteria in § 85-2-311, MCA. The modification was formally agreed to by Applicant on March 27, 1990.

Notice of the modification was sent to all objectors by certified mail on March 28, 1990, requiring a response within 15 days indicating whether the objector intended to accept or continue object to the Application in its modified form. A response form was included with each notice. The notice stated lack of response would be interpreted as agreement with the Application as modified and withdrawal of previous objections.

Signed Domestic Return Receipts (U.S.G.P.O. Form 3811) were received for all notices except the notice sent to Lewis Murray, which notice was returned with the notation that addressee was deceased.

While many of the objectors who responded continued to object to the Application even with the modifications, none expressed an objection to modification of the Application.

(Department's file and testimony of Roy Jones)

15. Applicant requested at the hearing that the Application be amended to a single well as the means of diversion. Applicant stated that he no longer intended to develop the project as a diversion by means of three wells manifolded together. He has found that, with additional equipment that has been put in place, the single well already in existence can produce the proposed appropriation without interfering with the area's electrical power supply system. (Testimony of Applicant)

No objections to this amendment of the Application were expressed.

16. Forty-eight acre-feet is an adequate amount of water to irrigate grasses for seed production on up to 96 acres so long as the timing of the irrigation is right. (Testimony of Applicant and Mike Carlson)

Applicant stated that the amount of water proposed for appropriation by his Application (48 AF) could not irrigate more than 96 acres, and that the 150 acres applied for was what was contemplated in relation to the original flow rate and volume before the Application was modified.

17. The diversion and distribution system was operated successfully for 45 days during the summer of 1988 crop season to raise russian wild rye grass seed, which was harvested in August. Three hundred pounds of seed per acre were produced, even though 100 pounds per acre (as determined by Applicant's insurer) were lost in a hailstorm. (Applicant's testimony)

18. No evidence exists in the record establishing a causal relationship between Applicant's appropriations and problems with groundwater availability in the area. Two witnesses described problems they had been experiencing with water availability from groundwater sources in the general area of the Burns Creek drainage. Warren Prevost testified that in early June of 1989 he became aware that a well he owns, approximately three and a half miles downstream from Applicant's well, was dry. Sharon Allard testified that in November of 1988 her 15-foot deep well 3.2 miles upstream from Applicant's well started pumping sand and only a little bit of water, which had never happened before.

While this testimony may imply that Applicant's appropriations were the cause, nothing in the record provides facts to support the implication. To the contrary, these wells may be outside the proposed source aquifer. Furthermore, evidence of a possible alternative cause exists in testimony of seven years of drought in the Burns Creek area over the past eleven years. (Testimony of Warren Prevost, Sharon Allard, Mark Shapley, and Mike Carlson)

19. No evidence in the record indicates the quantity of water in Burns Creek during 1988 (a year of intense drought) was insufficient to satisfy the water rights of prior appropriators. In July 1988, during the times Applicant was pumping, there was standing or flowing water in 70% to 80% of the length of Burns Creek from Applicant's property to the Yellowstone River. Burns Creek was flowing in late July 1988 at the weir near the road bridge, but possibly at what from casual observation appeared to be the lowest level in twenty years. Burns Creek was also observed to be dry at the state highway bridge in Section 26, Township 19 North, Range 57 East, approximately 6½ air-miles down the Burns Creek drainage from the proposed point of diversion. Nevertheless, water levels were still sufficient at that time for cattle.

Objectors testified at the hearing that there had been no problems obtaining water from Burns Creek during 1988. (Applicant's Exhibits 4 and 8, testimony of Mike Carlson, Joey Crisafulli, Adam Buxbaum, Warren Prevost, and Carolyn Sturgis)

20. Burns Creek below the proposed point of diversion does not have salinity levels high enough to cause problems with livestock production. A 48 AF reduction in discharge of the Burns Creek drainage would not increase salinity in Burns Creek to a level that would be detrimental to livestock production. (Testimony of Mike Carlson and Mark Shapley)

21. The South Fork and main stem of Burns Creek do not have a history of blue algae blooms. These occur when water stagnates, such as when water levels in a stream drop to where there is no flow and the water stands in pools, and they can have a toxicity fatal to cattle. Mike Carlson testified that he is unaware of any problems with blue algae on the South Fork or main stem of Burns Creek in 1988, 1989, or 1990.

Objector Buxbaum testified to observing blue algae starting to surface in the main stem of Burns Creek in the summer of 1988 at the time that Applicant was pumping under the Interim Permit. There is no evidence in the record as to whether the cessation of pumping from Applicant's well, which occurred soon after Mr. Buxbaum's observation of the algae, improved conditions on the main stem of Burns Creek with respect to the impending algae bloom. Nor is there evidence of algae blooms later in the summer of 1988 as the flows in Burns Creek continued to seasonally decline or during the period of pumping by Applicant in mid-August.

When asked about any problems they may have had with Burns Creek water in 1988 (a year of intense drought), other objectors,

whose water rights are for diversions both upstream and downstream from Applicant and Objector Buxbaum, testified they had had none. (Department's file and testimony of Mike Carlson, Adam Buxbaum, Warren Prevost, Sharon Allard, and Carolyn Sturgis)

22. No written complaints were received by the Department at any time during the term of the Interim Permit alleging diversion under the Permit was adversely affecting a prior water right. The Department received no spoken complaints of possible adverse effects which they determined warranted recommending initiating the mechanism for modification or revocation of the Interim Permit. Applicant received no instructions from the Department during the term of the Interim Permit to stop diverting water under the Interim Permit. (Department's file and testimony of Roy Jones and Applicant)

23. No permits have been issued for planned uses or developments either of Burns Creek surface flow or of groundwater within the Burns Creek drainage area. Neither the groundwater within the Burns Creek drainage area nor the surface flows of Burns Creek have been specifically reserved.

The Board of Natural Resources and Conservation has reserved surface flows of the Yellowstone River downstream from its confluence with Burns Creek for the State of Montana, Department of Fish, Wildlife, and Parks (DFWP) and for the Richland County Conservation District. Both reservations have a priority date of December 15, 1978. Neither DFWP nor Richland County Conservation

District objected to the present Application. (Department's records and Department's file)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Title 85, Chapter 2, MCA.

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 4, 5, 6, and 14.

3. Section 85-2-302, MCA, states, in relevant part:

The department shall return a defective application for correction or completion, together with the reasons for returning it.... If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with corrections with the department.

Pursuant to this statute, the priority date of the present application must be June 2, 1987. See Findings of Fact 1 and 2.

4. An Application for Beneficial Water Use Permit may only be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amend-

ment to expand the period of diversion, increase the rate of diversion, increase the volume of water diverted, or increase other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc.

Amending the Application to change the means of diversion from a system of three manifolded wells to a single well, and modifying the Application to reduce the flow rate from 500 gpm to 400 gpm and volume from 404.36 AF to 48 AF do not suggest an increased burden on the source. They are, therefore, accepted and do not require notification of persons not parties to this proceeding. See Finding of Fact 14 and 15.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 7, 10, and 17.

6. The proposed use, irrigation, is a beneficial use of water. Section 85-2-102(2)(a), MCA. Furthermore, the specific proposed appropriation can be used in a manner that will increase yields of the crop intended for irrigation such that the water use would benefit the appropriator. See Findings of Fact 16 and 17.

7. The Department may require modifications of the specifications for the appropriation, and may issue a permit subject to limitations necessary to satisfy the criteria listed in

§ 85-2-311, MCA. Section 85-2-312(1), MCA. One of the criteria is the proposed use of water must be a beneficial use. Section 85-2-311(1)(d), MCA. The maximum area that can be beneficially irrigated by the proposed appropriation is 96 acres. See Finding of Fact 16. Therefore, the place of use must be limited to a total of 96 acres.

8. Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 3.

9. Applicant has shown that there are unappropriated waters in the source of supply at the proposed point of diversion in the amount Applicant seeks to appropriate. The test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion. See § 85-2-311(1)(a), MCA.

Applicant produced substantial credible evidence that clearly establishes the physical presence of water sufficient to his proposed purpose at the proposed point of diversion at the times it can be put to use. See § 85-2-311(4), MCA; Findings of Fact 7, 10, 14, and 17.

10. The proposed appropriation will not adversely affect the water rights of prior appropriators.

Applicant produced substantial credible evidence establishing that water is available at the intended point of diversion sufficient to his purposes which is not en route to downstream water right users. See § 85-2-311(4), MCA; Findings of Fact 8, 10, 11, 13, 14, and 17.

Upon Applicant's discharge of the burden to produce substantial credible evidence on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce: Objector must show they have water rights, describe with particularity the operation of their rights, state how they anticipate the proposed use will change the conditions of water occurrence in the source or how it will otherwise affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed conditions. See In re Application No. 60117-g76L by William C. Houston.

The evidence in the record is not adequate to determine how the proposed use will change the conditions in the water source in such a way that Objectors will not be able to reasonably exercise their water rights. Indeed, Objectors, by not allowing adequate stream flow measurements, prevented the availability of evidence which may have been sufficient to meet Objectors' burden to go forward.

Objectors provided many events as implications of adverse effect, but no evidence to substantiate a causal relationship between the events and Applicant's activities under the Interim Permit; to the contrary, evidence exists in the record which clearly implies these events were unrelated to Applicant's activities. Furthermore, all objectors agreed that water quantity was adequate during the summer of 1988 when Applicant was pumping, a time of intense drought. The evidence of adverse effect

on water quality is one objector's unsupported allegation of an impending water algae bloom. Lastly, the lack of evidence of effort on the part of Objectors to exercise their seniority by activating the mechanism for revoking or modifying Applicant's Interim Permit to obtain water to which they have valid rights raises additional questions about the occurrence, extent, and adversity of any alleged impacts. See Findings of Fact 9, 18, 19, 20, 21, and 22.

Applicant has provided substantial independent and credible evidence on the question of possible adverse effects. Objectors failed to meet their burden of producing evidence that, contrary to Applicant's evidence, shortages had occurred such that Objectors were required to exercise their water rights by calling for water. Weighing Applicant's evidence against the lack of evidence on the part of the objectors, the preponderance of the evidence in the record is that the water rights of prior appropriators will not be adversely affected.

11. 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. See Conclusion of Law 9; Finding of Fact 23.

12. The Department has the authority to place conditions on permits. Section 85-2-312(1), MCA. Since there is a relationship between surface flows in Burns Creek and the groundwater source proposed for appropriation, and since diversion by Applicant's well appears to influence surface flows in Burns Creek,

the ranking of the proposed appropriation in priority must be as against all rights to surface water in Burns Creek and its tributaries as well as against all rights to the groundwater source. See Findings of Fact 12 and 13. Placing a condition on the Permit to recognize the interrelationship between the source aquifer and Burns Creek surface flows ensures that the avenue of relief for senior water right holders provided by statute will apply to this junior right. See § 85-2-406, MCA. Such a condition also establishes that a call for water from a senior right holder to water in either Burns Creek or the source aquifer must be heeded.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 63997-g42M is hereby granted to Joseph F. Crisafulli to appropriate 400 gallons per minute up to 48 acre-feet of water per year from a well for use in new sprinkler irrigation.

The well shall be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 19 North, Range 56 East, Dawson County, Montana. The period of appropriation and use shall be from April 1 through October 1 of each year. The place of use shall be on a total of 96 acres in the E $\frac{1}{2}$ of Section 10, Township 19 North, Range 56 East, Dawson County, Montana. The priority date shall be June 2, 1987.

This permit is to be ranked in priority with and against all rights to surface water in Burns Creek and its tributaries as

well as with and against all rights to the source aquifer, and shall be subject to calls for water by holders of senior rights to water in either source.

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 Permittee to the detriment of any prior appropriator.

The Permittee shall maintain adequate flow metering devices on the diversion system in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Glasgow Field Office of the Department of Natural Resources and Conservation.

This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

Issuance of this permit 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.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 11th day of September, 1990.



John E. Stults, 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 11th day of September, 1990, as follows:

CASE # 63997

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2733 Miles Avenue
Billings, MT 59102

Sharon P. Allard
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Glendive, MT 59270

Monte and Marie Jarvis
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Adam Buxbaum and Son, Inc.
ATTN Adam L. Buxbaum
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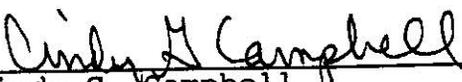
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Cindy G. Campbell
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