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

* * * * * * * *

IN THE MATTER OF APPLICATIONS FOR)
BENEFICIAL WATER USE PERMIT NOS.) FINAL ORDER
69638-s76H BY UNIFIED INDUSTRIES)
AND 69659-s76H BY CITY OF PINESDALE)

* * * * * * * *

The Proposal for Decision in this matter was issued on January 15, 1991, and served upon all parties of record on January 16, 1991. Letters in reaction to the Proposal for Decision were received from Objectors Leslie B. and Agnes M. Golden, Miles S. Knutson, Pam Gouse, and Ray and Darlene Gramza. The submissions by Objectors Gramzas, Knutson, and Gouse are clearly intended to be exceptions to the Proposal for Decision; the intent of Objectors Golden's submission is not so clear. None of the parties filing exceptions requested an opportunity for oral argument. Responses to Objectors' exceptions were received from Applicant on February 26, 1991.

Objectors Gramza's Exceptions

Administrative Rule of Montana 36.12.229 provides that parties have twenty days from the date of service of a Proposal for Decision to file exceptions; ARM 36.12.209 provides that service by mail is complete upon postmarking. Page 34 of the Proposal for Decision in this matter specifically and distinctly notified all parties of the procedure for filing exceptions. The deadline for filing exceptions in this matter was February 5, 1991. The postmark on the exceptions filed by Objectors Gramza

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is dated February 6, 1991. Therefore Objectors Gramza's exceptions were not timely and are stricken. See In re Application No. 70584-g41B by Petersen Livestock.

Objectors Golden's "Exceptions"

While the letter received from Objectors Golden is clearly in disagreement with what would be the result of a Final Order adopting the Proposal for Decision, i.e., water rights for the Applicants, it does not set forth the portions of the Proposal for Decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, or specific citations to the record. It is not practically possible to interpret the generalizations in the Goldens' letter as exceptions requiring consideration by the Department in reaching a final decision. See Mont. Admin. R. 36.12.229(1) (1989); In re Application No. 14295-g41F by Yolanda Blakely; In re Application No. 49371-g43Q by Gregory C. MacDonald; In re Application No. 39786-g76H by Western Water Co.

Objector Knutson's Exceptions

Objector Knutson submitted a letter which generally asserts that the amount of flow requested by Applicants is excessive and therefore not a beneficial use of water. The Hearing Examiner's findings on the proposed flow rate were based on uncontroverted evidence that Applicants are under pressure to meet Montana Department of Health and Environmental Sciences (DHES) guidelines requiring a minimum of 250 gallons per minute (gpm). The Department recognizes the expertise and authority of DHES to set

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standards in this area. Furthermore, the alleged and unsubstantiated "state standard" that Objector Knutson offers is not in the record and cannot be identified for further consideration in this analysis. In addition, it appears to be based on the daily water needs of individuals and may not include valid ancillary uses of water by municipal water systems which must be taken into account in analyzing this application, and were by the Hearing Examiner. The Hearing Examiner's findings on the proposed flow rate were based on substantial credible evidence, are clearly not in error, and consequently 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; see also In re Application No. G05081 and G05083 by Neil W. Moldenhauer.

Objector Gouse's Exceptions

Objector Gouse contends that Applicants' exhibits and testimony were not corroborated by any independent and impartial third party, and therefore are not substantial credible evidence. There was corroborating evidence for much of Applicants' evidence such as the testimony of Chief Water Commissioner Tom Gale, the reports from Department of Natural Resources and Conservation's staff and Hydrometrics. The statutory provision § 85-2-311(4), MCA, that hydrologic and other evidence be independent means that applicants for permits must not expect the Department to develop information in support of water right

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permit applications, they must develop such evidence independently. Applicants in this case did develop their evidence independently. The statute is not a requirement that all evidence be developed by "independent and impartial third parties." Such an interpretation would make applying for a beneficial water use permit an unworkably complex and expensive process which could in many cases exclude otherwise legally sufficient, substantial and credible materials.

Objector Gouse contends the Hearing Examiner failed to discount Applicants' evidence in light of "a history of deceit by the Applicants." There being no evidence in the record of a history of deceit on the part of Applicants, there are no grounds to alter the Findings of Fact. See citations under Objector Knutson's Exceptions, supra.

Objector Gouse contends Objectors' past verbal complaints to the Department are proof of the lack of unappropriated water in the source. The Hearing Examiner's conclusions on the availability of unappropriated water in the source, i.e., Conclusion of Law 9, are based on several Findings of Fact. The Findings of Fact upon which Conclusion of Law 9 is based are themselves based upon several sources of evidence. The Hearing Examiner's findings on the availability of unappropriated water in the source were based on substantial credible evidence, are clearly not in error, and consequently will not be modified. See citations under Objector Knutson's Exceptions, supra.

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Objector Gouse takes exception to the condition in paragraph A on pages 29 and 32 of the Proposed Order which requires that Applicants pay their proportionate share of any court-authorized fees, compensation, and expenses related to water distribution by a court-appointed water commissioner. Objector Gouse appears to have misinterpreted this condition as somehow imposing a new fee on the objectors. The condition means that diversions under Applicants' Permits will be controlled by the same court-appointed water commissioner that controls, and has for years controlled, the diversions of all Sheafman Creek water users, and that Applicants will be charged their share of the costs of this control just as all past water users have had to pay their share. Furthermore, the Department can not and does not impose conditions through permits on anyone other than permittees. Condition A on pages 29 and 32 of the Proposed Order will not be modified.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law of the Hearing Examiner are hereby adopted by the Department.

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

ORDER

Application No. 69638-s76H

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 69638-s76H is hereby granted to Unified Industries to appropriate 10 gallons per minute up to 6.6 acre-feet from November 1 through

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March 31 and 90 gallons per minute up to 30.2 acre-feet from April 1 through June 15 of water from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE¼NW¼NW¼ of said Section 28. The place of use shall be in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water No. 69659-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 60 gallons per minute up to 39.99 acre-feet from November 1 through March 31, and shall not exceed a total of 140 gallons per minute up to 9.25 acre-feet from April 1 through April 15, and shall not exceed 290 gallons per minute up to 78.16 acre-feet from April 16 through June 15.

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C. This permit is used in conjunction with Certificate of Water Right No. 4858-g76H which authorizes the certificate holder to divert ground water only. The combined appropriation under Permit No. 69638-s76H and Certificate No. 4858-g76H shall not exceed 90 gallons per minute.

D. This permit is supplemental to 45 Statements of Claims to Existing Water Rights (listed below) and Permit to Appropriate Water No. 69659-s76H which means they are for the same purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

The Statements of Claims to Existing Water Rights are:

76H-W002106-00
76H-W002107-00
76H-W002661-00
76H-W002663-00
76H-W002664-00
76H-W002665-00
76H-W002666-00
76H-W002677-00
76H-W002678-00
76H-W002679-00
76H-W002681-00
76H-W002682-00
76H-W002683-00
76H-W002684-00
76H-W002685-00
76H-W002686-00
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76H-W002696-00
76H-W002697-00
76H-W002698-00
76H-W006474-00
76H-W026964-00
76H-W026965-00
76H-W152093-00
76H-W152094-00
76H-W152095-00
76H-W152096-00
76H-W152097-00
76H-W152098-00
76H-W152099-00
76H-W152101-00
76H-W152102-00
76H-W152104-00
76H-W152106-00
76H-W152107-00
76H-W152108-00
76H-W152109-00

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E. 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.

F. The Permittee shall install and maintain a continuously reading flow measuring device on the diversion structure adequate to allow the flow rate and volume of water diverted by this infiltration gallery 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 to the Missoula Water Resources Division Field Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

G. 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.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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Application No. 69659-s76H

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 69659-s76H is hereby granted to City of Pinesdale to appropriate 50 gallons per minute up to 36.68 acre-feet from November 1 through April 15 and 200 gallons per minute up to 53.92 acre-feet from April 16 through June 15 of water from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE¼NW¼NW¼ of said Section 28. The place of use shall be in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water No. 69638-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 60 gallons per minute up to 39.99 acre-feet from November 1 through

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March 31, and shall not exceed a total of 140 gallons per minute up to 9.25 acre-feet from April 1 through April 15, and shall not exceed 290 gallons per minute up to 78.16 acre-feet from April 16 through June 15.

C. This permit is supplemental to Statements of Claims to Existing Water Rights Nos. 76H-W002662-00 and 76H-W002680-00 which means they are for the same purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

D. 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.

E. The Permittee shall install and maintain a continuously reading flow measuring device on the diversion structure adequate to allow the flow rate and volume of water diverted by this infiltration gallery 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 to the Missoula Water Resources Division Field Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

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F. 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.

G. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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 4 day of April, 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 5th day of April, 1991 as follows:

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City of Pinesdale
c/o Jess Nuttall
P.O. Box 73
Pinesdale, MT 59841

Unified Industries
c/o Jess Nuttall
P.O. Box 73
Pinesdale, MT 59841

Ted Doney
Doney, Crowley & Shontz
P.O. Box 1185
Helena, MT 59624-1185

Patricia E. Moore
and Eleanor G. Moore
341 Bourne Lane
Victor, MT 59875

Dwayne D. and
Evelyn V. Klinger
345 Knapweed Lane
Victor, MT 59875

Walter, Leonard and
Ruth Easley
1329 Red Crow Road
Victor, MT 59875

Charles I. Hendricks
P.O. Box 946
Hamilton, MT 59840

Henry M. Winters and
Jeannette E. Winters
423 Sheafman Creek Road
Hamilton, MT 59840

John and Donna Bertolero
688 NW Sheafman Creek Road
Hamilton, MT 59840

Norman E. Allison
350 Sheafman Creek Road
Victor, MT 59875

Cindy C. Lindskog
1509 Driftwood Drive
Bozeman, MT 59715

Charles V. and
Rhonda Gividen
351 Knapweed Lane
Victor, MT 59875

Randy L. & Sharon K. Matthews
355 Knapweed Lane
Victor, MT 59875

Pamela B. Gouse
856 NW Sheafman Creek Road
Hamilton, MT 59840

O.M. Lord Investment Co.
c/o Otis E. Kline, Jr.
NW 422 Sheafman Creek Road
Hamilton, MT 59840

Charles K. & Shirley A. Wheat
447 Sheafman Creek Road
Hamilton, MT 59840

Raymond and Darlene Gramza
18 Meadow View Lane
Victor, MT 59875

Miles S. Knutson
17A Meadow View Lane
Victor, MT 59875

Leslie B. & Agnes M. Golden
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Luverne E. McIlree
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Linda Scanlon
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Victor, MT 59875

Kevin T. Horton
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Corvallis, MT 59828

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Hamilton, Mt 59840

Robert J. Halvorson
P.O. Box 117
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Charles and Nina Prause
411 Sheafman Creek Road
Hamilton, MT 59840

James and Dorothy Quinn
1108 Choteau St.
Helena, Mt 59601

Kent and Laura Olson
1419 Bourne Ln. Lp.
Victor, MT 59875

Walter Congdon
Attorney at Law
520 Brooks
Missoula, MT 59801

Mike McLane, Manager
Missoula Water Resources
Regional Office
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Missoula, MT 59806

Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * * * * *

IN THE MATTER OF APPLICATIONS FOR)
BENEFICIAL WATER USE PERMIT NOS.)
69638-s76H BY UNIFIED INDUSTRIES)
AND 69659-s76H BY CITY OF PINESDALE)

PROPOSAL FOR
DECISION

* * * * * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on August 17, 1990, at 9:00 a.m. in Missoula, Montana, to determine whether the above Applications should be granted to Applicants Unified Industries and City of Pinesdale under the criteria in § 85-2-311(1), MCA.

Applicants were represented by Ted Doney, attorney. Applicants called the following witnesses who appeared in their behalf: Jess Nuttall, Water Resources Manager for Applicants and resident of Pinesdale; Tom Gale, Head Water Commissioner on Sheafman Creek; Sam Allred, former Water Resources Manager for Applicants and resident of Pinesdale; Marvin Jessop, Pinesdale Building Inspector and resident of Pinesdale; Oris A. Olsen, former Ranch Manager and Water Master for Applicants, and resident of Pinesdale; and Ronald Reynolds, former Ranch Manager for Applicants, and resident of Pinesdale.

Objectors Raymond and Darlene Gramza were represented by Walter Congdon, attorney, and testified in their own behalf. Objectors Gramza called the following witnesses who appeared in their behalf: Howard Newman, Hydrologist, Missoula, Montana; Tom Gale; and Sam Allred.

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Objector O.M. Lord Investment Co. (hereafter O.M. Lord) appeared by and through Otis E. Kline, Jr., Corporate Representative.

The following objectors appeared pro se: Charles V. and Rhonda Gividen, Randy L. and Sharon Matthews, Miles S. Knutson, Pamela Gouse (formerly Pamela Barrett Young), John and Donna Bertolero, Charles K. and Shirley Wheat, Leslie B. and Agnes Golden, and Luverne E. McIlree.

Mike McLane, Manager of the Department of Natural Resources and Conservation (Department) Missoula Water Resources Division Field Office, appeared as the Department's staff witness.

EXHIBITS

Applicants offered the following exhibits which were accepted into the record without objection.

Applicants' Exhibit 1 consists of four pages. The first is a photocopy of Certificate of Water Right No. 4858-g76H issued to Zion's Investment Corporation. The two middle pages constitute a photocopy of Notice of Completion of Groundwater Development No. 4858-g76H filed February 18, 1975 by Zion's Investment Corporation. The last page is a letter dated September 28, 1988, greeting "To Whom It May Concern" signed by Morris Y. Jessop.

Applicants' Exhibit 2 consists of photocopies of ten pages from a report by Hydrometrics, Consulting Scientists & Engineers, Helena, Montana, titled "City of Pinesdale Phase 1 Water Supply and Water Storage Improvements Ravalli County, Montana" and subtitled "Infiltration Gallery Construction".

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Applicants' Exhibit 3 is a photocopy of a map made by Hydrometrics titled "Pinesdale, Montana" and subtitled "Plan Map Showing Water Supply Line".

Applicants' Exhibit 4 is a photocopy of a sketched plan of Applicants' existing infiltration galleries and power plant diversion structures on Sheafman Creek. The stilling pond and drain pipe of the power plant diversion were drawn onto this exhibit in pencil at the hearing.

Applicants' Exhibit 5 is a 16 inch by 34 inch topographic map of much of the Sheafman Creek drainage and having a scale of approximately eight inches to the mile. Certain diversion systems, ponds, roads, and structures have been drawn in and labelled in ink.

Applicants' Exhibit 6 is a photocopy of a schematic titled, "Figure 1. Schematic map of Sheafman Creek with diversions, monitoring stations and flumes, and points of withdrawal, Community of Pinesdale, Montana."

Applicants' Exhibit 7 consists of four pages. Each page is a photocopy of a graph, all titled "Sheafman Creek Streamflow", there being one for each of the years 1987, 1988, 1989, and 1990.

Applicants' Exhibit 8 consists of three pages, each being a table compiled by Tom Gale. The first two are titled "Sheafman Creek Measurements Summary 1990". The last is titled "Sheafman Creek Lake Measurements Summary 1990".

Objectors Gramza offered the following exhibit which was accepted into the record without objection.

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Gramza's Exhibit 1 consists of four pages. The first is a photocopy of a letter dated August 7, 1990, from Howard Newman to Walter E. Congdon. The remaining three pages are photocopies of water analysis reports, all dated June 14, 1990, for samples from Sheafman Creek and Applicants' two existing infiltration galleries.

Objector O.M. Lord asked that the record be left open for submission of an exhibit. After some discussion, a deadline for submission and system of response were agreed upon by all parties. Without objection, the exhibit received from O.M. Lord on August 21, 1990, is accepted into the record.

O.M. Lord's Exhibit 1 consists of two pages. The first is a photocopy of what is purportedly a handout composed by Applicants; it is titled "Sheafman Water Users" and is dated April 13, 1987. The remaining page is a yellow sheet titled "Sheafman Water Users Meeting 4-13-87" on which are hand-written the names and addresses of 17 people.

Applicants requested that the Hearing Examiner take notice of the following materials: all water rights, and applications for rights and changes on Sheafman Creek; the Frank T. Williams objection to Application No. 15479-s76H by C. Ivan Hendricks; and the Department's file on In re Application No. G15928-76H by Samuel T. Allred. As no objection to Applicants' request was expressed, official notice has been taken of these materials which were all reviewed by the Hearing Examiner in the process of reaching the decision in this matter. The Hearing Examiner also

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takes official notice of the New Appropriations Verification Policy, Department of Natural Resources and Conservation; February 2, 1987 (as revised August 7, 1987); Page 111 (hereafter Department's policy manual). This technical manual in general use by the Department contains standards used by the Department in determining amounts of water reasonably required for specific purposes.

The Department made two items available to the Hearing Examiner at the hearing: a photocopy of a memorandum dated May 16, 1990, from Larry A. Schock, Civil Engineer Specialist III, to "Pinesdale File Folder" and photocopies of eight pages from indexes of the Department's water rights database. Labels were affixed to these items at the hearing identifying them respectively as Department's Exhibits 1 and 2. Neither item, however, was formally offered or accepted as an exhibit, and therefore they are not part of the record as such. The index pages, being part of the Department's records on Sheafman Creek, were used by the Hearing Examiner as a tool in taking notice of the rights and applications on said creek.

The Department's files on the present Applications were made available to all parties for review prior to the hearing. Without objection, the files were entered into the record at the hearing by the Hearing Examiner.

PRELIMINARY MATTERS

At the beginning of the hearing, Roger Ryan indicated that he wanted to object to these Applications. The Hearing Examiner

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noted Mr. Ryan as an untimely objector, and hereby dismisses the objections of Roger Ryan as not in conformity with the requirements of § 85-2-308, MCA.

Applicants moved at the beginning of the hearing that objectors or non-objectors who did not appear at the hearing be found in default and their interests in the proceeding dismissed. The Motion was granted with exception for those parties who notified the Hearing Examiner prior to the hearing of their inability to attend, and for any parties who appeared during the day such that there would have been opportunity for them to make presentation. No parties appeared during the day other than those present when the Motion was made and granted. The following objectors notified the Hearing Examiner prior to the hearing that they would be unable to appear: Henry and Jeannette Winters, Cindy C. Lindskog, and Norman E. Allison. Therefore, pursuant to ARM 36.12.208, the following persons are in default, and their claims and interests in this proceeding are dismissed: Patricia E. and Eleanor G. Moore; Dwayne D. and Evelyn V. Klinger; Walter, Leonard, and Ruth Easley; Robert J. Halvorson; Charles I. Hendricks; James and Dorothy Quinn; Luverne McIlree; Kristy A. Allison; Linda Scanlon; Kent and Laura Olson; Charles and Nina Prause; Robert Takle; and Kevin T. Horton.

FINDINGS OF FACT

1. Unified Industries filed Application for Beneficial Water Use Permit No. 69638-s76H on October 4, 1988, at 9:00 a.m. City of Pinesdale filed Application for Beneficial Water Use

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Permit No. 69659-s76H on October 14, 1988, at 4:28 p.m. (Department's file)

2. Application No. 69638-s76H proposed to appropriate water at 90 gallons per minute (gpm) up to 36.1 acre-feet (AF) from April 1 through June 30, 40 gpm up to 5.4 AF from July 1 through July 31, and 10 gpm up to 10.7 AF from August 1 through March 31 from an unnamed tributary of Sheafman Creek by means of an infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana, referred to as the "north gallery". Water would by stored in a 13,500 gallon storage tank in the NE¼NW¼NW¼ of said Section 28. The appropriation was proposed for municipal use in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana. (Department's file)

3. Application No. 69659-s76H proposed to appropriate water at 50 gpm up to 60.7 AF from July 15 through April 15 and 200 gpm up to 79.5 AF from April 16 through July 14 from Sheafman Creek by means of an infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana, referred to as the "creek gallery". Water would ~~by~~ be stored in a 13,500 gallon storage tank in the NE¼NW¼NW¼ of said Section 28. The appropriation was proposed for municipal use in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana. (Department's file)

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4. Pertinent portions of both Applications were published in the Ravalli Republic, a newspaper of general circulation in the area of the proposed source, on February 22, 1989. 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. Timely objections were received on both Applications: 17 on 69638-s76H and 18 on 69659-s76H. In addition, seven untimely objections were filed on objection forms, these by: James and Dorothy Quinn, Kent and Laura Olson, Charles and Nina Prause, Robert J. Halvorson, Robert Takle, and Linda Scanlon. (See Preliminary Matters, supra.) The principal issues raised by Objectors on their objection forms were: insufficient unappropriated water is available in Sheafman Creek to allow new appropriations, therefore the proposed appropriation would adversely affect the existing water rights on Sheafman Creek; Applicants' illegal installation and operation of the diversion works should preclude them from obtaining a permit; and, past actions of Applicants, including the aforementioned, indicate their tendency to operate without regard to restrictions and limits, which is likely to make administration of any permit issued to Applicants impossible. (Department's file)

6. According to the water rights records of the Department, Objectors remaining as parties in this matter own rights to the use of waters from Sheafman Creek.

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7. On March 23, 1990, Marvin Jessop, Loren D. Herbert, and Jesse L. Nuttall, as representatives of Applicants, amended their respective applications splitting each into two separate applications primarily by period of use and volume. The periods of use were divided such that two applications are for appropriations limited to "summer use", which retained nos. 69638-s76H and 69659-s76H, and the two others, which were assigned nos. 74310-s76H and 74311-s76H, are limited to "winter use." Applications 69638-s76H and 69659-s76H have remained consolidated in the present case; the two "summer use" applications, nos. 74310-s76H and 74311-s76H, will be consolidated into a separate case. The course of further proceedings on Applications Nos. 74310-s76H and 74311-s76H will be determined at a later date.

The sources, points and means of diversion, places of storage, places of use, and purpose remain the same on all Applications. The flow rate, volume, and periods of appropriation on Application No. 69638-s76H were amended to be: 10 gpm up to 6.6 AF from November 1 through March 31 and 90 gpm up to 30.2 AF from April 1 through June 15. The flow rate, volume, and periods of appropriation on Application No. 69659-s76H were amended to be: 50 gpm up to 36.68 AF from November 1 through April 15 and 200 gpm up to 53.92 AF from April 16 through June 15.

Notice of the amendments was sent, certified mail, to all parties on May 16, 1990. The amendments involved no increases in the elements of the proposed appropriations or increase in the

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proposed burden on the source. No formal objections to the amendments, per se, were received. (Department's file)

8. In uncontradicted statements on their application forms, Applicants state they have possessory interest in the lands on which the proposed appropriation would be put to use. In uncontradicted testimony, Jess Nuttall stated that the City of Pinesdale is an incorporated municipality. The boundaries of the City of Pinesdale encompass the proposed place of use. (Department's file and Applicants' Exhibit 3)

9. Applicants' have been experiencing shortages in the supply of water for existing municipal demand and have had to ration water. The Montana Department of Health and Environmental Sciences, Water Quality Bureau, has been pressuring Applicants to improve their municipal water supply system and increase the amount of water available to a minimum of 250 gpm.

Hydrometrics identified Applicants' municipal needs as based on the water service requirements of 750 persons residing in 86 homes, plus 19 existing building lots and eight community-type buildings. The standards adopted by the Department for such uses are one acre-foot per household (a household consists of each five people, or portion thereof, in a dwelling and one dwelling may contain more than one household) plus a minimum of 0.5 AF per dwelling for lawn and garden purposes. Given 105 dwelling units of two households each (750 divided by 86 equals 8.7 persons or two households), Applicants' municipal needs are greater than 262.5 AF as this does not include the community-type buildings or

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other functions normally associated with municipal systems such as fire protection and parks. The total volume applied for under both applications combined is 192.4 AF.

An attempt was made in 1987 to develop a source of water for municipal use. A well field was drilled and tested for productivity. This well field proved inadequate. (Department's file, Department's policy manual, and testimony of Jess Nuttall)

10. Both Applicants combined have 222 Statements of Claim to Existing Water Rights on record with the Department as part of the statewide adjudication of water rights. Fifty of these claims are to existing water rights for municipal use from many sources, including wells. Just the total flow rate of the claims for municipal use from wells far exceeds the 250 gpm identified by the Water Quality Bureau. (Department's water rights records)

It was the testimony of Sam Allred and Jess Nuttall that the wells represented by the claims were either dry or nonproductive, and that only 30 gpm are reliably available for municipal use from Applicants' wells.

11. Applicants installed two infiltration galleries in 1986. The first gallery installed, the "north gallery", lies about 50 feet north of the Sheafman Creek stream bed, and is the subject of Application No. 69638-s76H. It replaced and is located on the site of a collection ring diversion system operated under Certificate of Water Right No. 4858-g76H for 90 gpm with a priority date of February 18, 1975. The second gallery, the "creek gallery", lies under the Sheafman Creek stream bed.

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Both galleries are from 10 to 15 feet below the land surface. The galleries were designed by Applicants' consultant, Hydrometrics, Consulting Scientists and Engineers, Helena, Montana. Construction of the galleries was done by Pines Construction. The systems were installed prior to Applicants' filing for water right permits, and without prior Department review of the systems' designs or inspection of construction. (Applicants' Exhibits 1 and 2, Department's file, and testimony of Jess Nuttall)

12. The north gallery has been operating continuously since its construction, and is diverting the same quantity of water as the prior collection ring system. It diverts water at rates ranging from a high of 90 gpm to a low of 10 gpm. The flows vary within this range in relation to the amount of water flowing in Sheafman Creek.

Applicants contend operation of the north gallery at those levels is fully authorized under Certificate of Water Right No. 4858-g76H, and that Application No. 69638-s76H has been filed as an accommodation to other Sheafman Creek water users and the Department. Documents in the Department's file indicate that Application No. 69638-s76H is intended to pursue authorization to operate the north gallery regardless of whether it diverts surface water, ground water, or a commingling of both.

There is no evidence in the record of calls for water from senior water right holders against Applicants' past operation of the north gallery, or of complaints filed by senior water users

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during Applicants' past use of the north gallery alleging that its operation was adversely affecting their water rights. (Department's file, Applicants' Exhibit 1, Department's water rights records, and testimony of Jess Nuttall)

13. The creek gallery has been operated for municipal purposes and testing since its construction in 1986. It was operated for a little over a year. It was closed by Order of Judge Brownlee, District Court of the Fourth Judicial District, issued August 10, 1989. The Order states the gallery was being operated "without a 310 permit from the State of Montana and without any water right or permit from the Department Of Natural Resources and Conservation." Applicants were reminded in an October 19, 1989, letter from Mike McLane that the gallery must not be operated even after the water commissioner vacates his position for the season. Subsequently, Department discovered Applicants to be operating the gallery, purportedly for fire protection purposes.

While the record shows that action was taken to prevent the operation of the creek gallery without proper authorization, there is no evidence of past complaints from senior water right holders alleging that when it was operated it adversely affected their water rights.

Flows through the creek gallery have varied from lows of 37.5 gpm, when the stream bed of Sheafman Creek was empty due to diversions of the entire creek flow into Applicants' hydropower system, to highs of about 200 gpm in the spring when surface flow

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in Sheafman Creek was high. (Department's file and testimony of Jess Nuttall)

14. Sheafman Creek is a "flashy" stream, i.e., it has very high flows during spring runoff (or other major snow melt) and major precipitation events, followed by rapidly declining flows. Two separate stream flow forecasts for Sheafman Creek calculate flows ranging from lows of 5.99 cubic feet per second (cfs) and 5.45 cfs in January to highs of 146.63 cfs and 133.51 cfs, respectively, in June. Measurements at the parshall flume in the NE¼SE¼NE¼ of Section 28 (the "Wildflower" or "creek" flume) show much the same pattern with lows in October and February, and the runoff period from the beginning in April and continuing to July. (Applicants' Exhibits 5, 6, and 7, Department's file, and testimony of Tom Gale and Jess Nuttall)

15. The north gallery diverts surface water during periods of high flows. Chemical analysis of water samples taken by Howard Newman established that during high water runoff in Sheafman Creek, the north gallery diverts water, albeit beneath the land surface, which is essentially identical to the water flowing above ground in the stream channel. Mr. Newman stated in Gramzas' Exhibit 1 and testified at the hearing that this level of similarity between the samples leads to the conclusion that at the time the samples were taken, the water in Sheafman Creek, the creek gallery, and the north gallery was the same.

16. Water always flows in Sheafman Creek at the bridge on what was called "Lower Sheafman Creek Road", i.e., in the N½N½SW¼

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of Section 25. Water also always flows where the creek crosses the boundary of the City of Pinesdale, i.e., the section line separating the NE¼ of Section 28 and the NW¼ of Section 27. There are statements in the record that Sheafman Creek was once a perennial stream and that it has now become intermittent. There was, however, consistent testimony by both sides that Sheafman Creek has had surface flows in it in all years during the months of November through April. While not a plotting of simple stream flow measurements from April 1987 through December 1988, Jess Nuttall's graphs do indicate water was flowing down Sheafman Creek throughout this period. In addition, records of stream flow through the Wildflower flume show the flow staying above 350 gpm from January 1989 through July 1990. By this evidence, Sheafman Creek fits the description of a perennial stream found in § 85-2-306(3), MCA: a stream which historically has flowed continuously at all seasons of the year, during dry years as well as wet years. (Applicants' Exhibits 5, 6, and 7 and testimony of Sam Allred, Marvin Jessop, Oris Olsen, Ron Reynolds, and Ray Gramza)

17. Sheafman Creek varies along its length between being a gaining stream and a losing stream. The stream gains flow between the infiltration galleries and the power plant tailrace. Between the boundary of the City of Pinesdale and the bridge on lower Sheafman Creek Road, the stream loses flow. During periods of low flows, there are reaches of stream bed that have no

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surface flow while areas above and below these reaches do have surface flow.

Objectors contend that appropriating more of the flow out of Sheafman Creek at the proposed point of diversion could cause longer reaches of the stream bed to become dry as a result of the natural losing phenomenon. The specific reaches of stream that would happen on were not identified, nor was a correlation made between the length of the reaches without surface flow and amount of flow in the upstream reaches with surface flow. (Testimony of Tom Gale, Randy Matthews, Ray Gramza, and Darlene Gramza)

18. Several Objectors use the flows of Sheafman Creek during the proposed period of diversion for watering stock, most under existing rights exempted by § 85-2-222, MCA, from filing requirements. The objectors who testified to the use of Sheafman Creek for watering stock stated that Sheafman Creek was used during Applicants' proposed period of diversion in conjunction with other sources of water. The stock drink directly from the creek, and water has always been available in Sheafman Creek for stock. The record contains no evidence of past shortages of Sheafman Creek water for stock use during the proposed period of diversion.

During the winter of some years, some Objectors have had to break through a layer of ice to provide their stock with access to liquid water. These Objectors contend that any additional appropriation of water from Sheafman Creek during the winter, including the proposed appropriation, could reduce flows to the

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point that the stream could freeze solid in the winter and not be available to the stock. (Department's file, Department's water rights records, and testimony of Otis Kline, Miles Knutson, Pamela Gouse, Ray Gramza, and Darlene Gramza)

19. The gross sum of the flow rates of all rights to water from Sheafman Creek and Sheafman Lakes on record with the Department is approximately 170 cfs. This figure, however, contains nonconsumptive rights and rights with multiple uses. If these redundant and nonconsumptive flows are factored out, the net sum of all rights to consumptive use of water from Sheafman Creek and Sheafman Lakes is approximately 111 cfs. (Department's water rights records)

The sum of flow rates recorded for water rights owned by Objectors which have periods of use from November 1 to April 1, of which there are six, is 0.6 cfs (including a claim filed by Charles K. and Shirley A. Wheat to a flow of 0.4 cfs for watering 22 animal units of stock directly from the creek). All of these rights are for stockwater use only; Objectors have no water rights on record for irrigation earlier than April 1. The sum of flow rates recorded for water rights, owned by Objectors, which have periods of use between April 1 and April 15 is 3.6 cfs. (Department's water rights records)

The water commissioner on Sheafman Creek does not begin distributing Sheafman Creek water earlier than June, and ceases distributing Sheafman Creek water around the first of October. (Testimony of Tom Gale)

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20. Objector Ray Gramza testified that the proposed appropriation could reduce flows in Sheafman Creek during the period immediately preceding high spring runoff such that it would create a problem getting his irrigation water through Burke Ditch. Objectors Gramza own a portion of the first and fourth rights on Sheafman Creek. According to Department's water rights records and the record in Allred, supra, the full first and fourth rights on Sheafman Creek together total 320 miners' inches or eight cfs.

Spring runoff in Sheafman Creek begins with a very rapid and substantial increase in stream flow between April 1 and April 12. Ninety gpm has been diverted in the spring and early summer by Applicants through the collection ring/infiltration gallery systems since 1975. Given the 90 gpm has been diverted, Applicants are proposing to appropriate an additional 50 gpm from stream flows in the period of April 1 through April 15 when stream flows are rapidly rising into the tens of cubic feet per second. (Applicants' Exhibit 7, Department's file, and testimony of Jess Nuttall)

No evidence in the record indicates that Objectors Gramza have had to call for water during this period in the past, nor has Commissioner Gale been required to allocate water during this period. Commissioner Gale's figures on the lack of water to fulfill the rights on Burke Ditch do not cover the period of April 1 through April 15. (Applicants' Exhibit 8 and testimony of Tom Gale)

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21. Objectors expressed widespread concern about enforcement of the limitations of any permit issued to Applicants, contending that Applicants have acted in the past without regard to the rights of prior appropriators or the water right regime on Sheafman Creek. Applicants made statements that they have no intention of operating their system in a way contrary to limits and conditions of whatever permit may be granted, or contrary to the regime on the stream. Applicants agreed to placing monitoring devices on the system, and said they have no objection to placing a continuously reading measuring device on the system. (Department's file, and testimony of Otis Kline and Jess Nuttall)

22. Applicants agreed to a condition addressing administration of the proposed appropriation by the court-appointed water commissioner along with the other rights in the Sheafman Creek water rights regime. Loren D. Herbert, on behalf of Unified Industries, agreed on January 30, 1989, to placing the condition on Application No. 69638-s76H. Marvin M. Jessop, agent of Unified Industries acting on behalf of City of Pinesdale, agreed on January 30, 1989, to placing the condition on Application No. 69659-s76H. (Department's file)

23. Department's water rights records show no planned uses or developments for which a permit has been issued for water from Sheafman Creek. Neither do they show any reservations of Sheafman Creek water, or of water in the mainstem sources of the major drainage basin to which the proposed sources are tributary.

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CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989).

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, 3, 4, 5, 6, and 7.

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 at the proposed point of diversion:
> (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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and
> (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in

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§ 85-2-311(1), MCA, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. After July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Applicants diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. See Findings of Fact 1 and 13; see also Finding of Fact 12 (Note Applicants' contention).

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application No. 61978-s76LJ by Town.

6. The proposed use of water, municipal, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a). Applicants have provided substantial credible evidence that the use of the water will benefit them. The amounts of water proposed for appropriation

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are within the guidelines identified by regulating agencies. See Findings of Fact 2, 3, 9, and 10.

While Applicants have rights on record[1] to other sources which total, as claimed, an amount adequate to satisfy their identified need, they are not bound to the use of the alternate sources, and are not precluded from establishing a new appropriation of water for precisely the same purpose from an additional source. See Boyd v. Huffine, 44 Mont. 306, 120 P. 228 (1911); In re Application No. G65713-76N by Fred Fagan. See generally In re Application No. 54911-g42M by Sackman, Inc.; In re Application No. 38719-s43Q by Duane and Vicki L. Bender.

7. Applicants have proved by substantial credible evidence that they have possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 2, 3, and 8. The City of Pinesdale has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use of its city or inhabitants. Mont. Code Ann. Title 7 Chapter 13 (1989). A corporation is a person for purposes of determining compliance of an application for a benefi-

[1] The very high number of claims for municipal use on record for Unified Industries and City of Pinesdale, when taken in context with the other materials and testimony in the record of this proceeding, strongly suggest to the Hearing Examiner that the water rights filings submitted by these entities do not accurately reflect the present or historical use of water. The Hearing Examiner urges Unified Industries and City of Pinesdale to work with the Department's Adjudication Program staff and the Montana Water Court to establish an accurate and precise record of their water rights.

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cial water use permit with the criteria in § 85-2-311, MCA. See Mont. Code Ann. § 85-2-102(12) (1989).

8. Applicants have proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 11, 12, 13, 21, and 22. The law, § 85-2-311(1)(c), MCA, requires this proof which has generally been interpreted to mean an applicant must show that their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Applicant fulfilled this criteria by providing the design plans (original and amended) and data of past use coupled with commitments to independent and impartial operational controls (see Conclusion of Law 12).

While it is true that the diversion system design plans were not reviewed by the Department prior to construction, as would normally happen in the course of processing a permit application, there is no evidence in the record that the system shown on any of the design drawings would be inadequate. Nothing the Hearing Examiner could find in statutes, rules, case law, or Department precedent requires Department supervision of the construction of diversion devices.

Objectors' contention that operation of the diversion and conveyance systems will not be adequate because a permit issued

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to this Applicant would be impossible to administer is not within the scope of determining whether Applicant has met the relevant criterium as it does not involve questions of efficiency, prevention of waste, or lack of control devices. Objectors contention goes, rather, to the issue of enforcement because it raises questions about the potential for operation in excess of the limits of the permit. Other than proving the system is capable of controlling the amount of water it diverts, showing that a permit can be enforced is not a criterion for issuance of a permit. The potential to exceed the limits of a water right exists in any system with a capacity larger than the limits of the permit; a very common occurrence, especially when one considers period of use limitations on ditch systems. Nevertheless, the system proposed by Applicant contains elements of control on the operation of the system which facilitate the application of enforcement mechanisms. See Findings of Fact 21 and 22; Conclusion of Law 12.

9. Applicants have proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed points of diversion in the amount applied for, and throughout the proposed period of diversion. See Findings of Fact 12, 13, 14, and 16. The test for availability of unappropriated water consists of proving the physical presence of water at the intended points of diversion. See § 85-2-311(1)(a); In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-g42M by Crisafulli; Department of Natural

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Resources and Conservation, Summary Report: Clark Fork Basin Water Use (1990).

10. Applicants produced substantial credible evidence that the proposed appropriation would not adversely affect the water rights of prior appropriators. See Findings of Fact 14, 19, and 20.

Upon Applicants' 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: Objectors must 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 Houston.

Objectors have asserted that the entire flow of Sheafman Creek which is not already diverted must remain undiverted in order for there to be sufficient surface flow to prevent the creek from freezing solid and avoid more reaches of stream bed from becoming void of surface flows. See Findings of Fact 17 and 18. Priority of appropriation, however, does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the decrease of stream flow, if the prior appropriator can reasonably exercise his water right under the changed conditions. Mont. Code Ann. § 85-2-401(1) (1989);

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See generally In re Application No. 61293-s40C by Mike Goffena. The evidence in the record is that flowing water has always been available in Sheafman Creek for Objectors' stock. See Finding of Fact 18. Objectors failed to provide specific information to substantiate their assertions and raise them above the level of speculation. For example, they did not identify areas presently or historically used by stock to access Sheafman Creek water which would be eliminated by the reduction of flows in Sheafman Creek likely to result from Applicants' proposed appropriation; nor did Objectors identify the extend of their use of Sheafman Creek for stock, e.g., the amount of flow that appears to be necessary for their stock to obtain water during the proposed period of appropriation, along with estimations or measurements of flows in Sheafman Creek that were low enough to threaten that required minimum. See Findings of Fact 17 and 18. Furthermore, Applicant provided water measurement data and projected stream flow calculations showing that the additional amount of water that would be diverted under the proposed permits would not adversely affect prior appropriators. See Finding of Fact 14 and 16. In addition, Applicants' past use of the diversion systems did not result in adverse effects to prior appropriators. See Findings of Fact 12, 13, and 18.

As to irrigation use between April 1 and April 15, there is no record of insufficient flows to satisfy existing rights, need for regulated distribution of water, or calls for water during that period. To the contrary, evidence in the record shows that

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the additional amount Applicants propose to appropriate would not significantly reduce the water available for irrigation during that period. See Finding of Fact 20. Furthermore, past operation of Applicants' diversion systems did not result in adverse effects to senior appropriators. See Findings of Fact 12, 13, and 20.

Applicants have provided substantial credible evidence on the question of adverse effect adequate to overcome the allegations of potential adverse effect raised by Objectors, therefore it is concluded that § 85-2-311(1)(b), MCA, is met.

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 10; Finding of Fact 23.

12. The Department has the authority to place conditions on permits necessary to satisfy the criteria listed in § 85-2-311, MCA. Mont. Codes Ann. § 85-2-312(1) (1989). The diversion structures installed by Applicants are capable of diverting amounts of water greater than what would be permitted during certain periods, and, being closed underground systems, they cannot be readily observed. See Findings of Fact 7 and 11. The proposed appropriation contemplates different flow and volume limits for each of the separate infiltration galleries and during different periods of diversion. These factors, highlighted by the atmosphere of distrust (see Findings of Fact 5 and 13), make it reasonable and prudent to require an impartial, consistent,

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and thorough record of the operation of the system. The continuously reading monitoring device referred to by Applicants' counsel and agreed to by Jess Nuttall would provide such a record. See Finding of Fact 21. Therefore, a condition must be placed on any permit issued for appropriation through the present infiltration galleries requiring a continuously reading monitoring device(s) be installed capable of recording the specific amounts of water diverted by each of the infiltration galleries, and that Applicants maintain the record generated by the device(s) for submission to the Department.

As the north gallery diverts Sheafman Creek surface water, and since from that it is the logical conclusion that the creek gallery is also capable of diverting Sheafman Creek surface water, operation of both diversion systems must be regulated along with all rights to appropriate water from the surface flows of Sheafman Creek. Therefore, the condition agreed to by Applicants stating this appropriation is under the control of the court-appointed water commissioner must be placed on the permit. See Findings of Fact 15 and 22.

A certificate of water right exists under which Applicants have been appropriating groundwater through the north gallery. A permit issued for appropriation of surface water through the north gallery would not be for an increase in the total amount diverted, but rather to establish the right to appropriate water from either source at the rates identified an the respective permit or certificate. See Findings of Fact 11 and 12. There-

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fore, a condition must be placed on the permit relating the permit applied for in Application No. 69638-s76H to Certificate of Water Right No. 4858-g76H, and limiting the amount of water that can be diverted under them.

PROPOSED ORDER

Application No. 69638-s76H

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 69638-s76H is hereby granted to Unified Industries to appropriate 10 gallons per minute up to 6.6 acre-feet from November 1 through March 31 and 90 gallons per minute up to 30.2 acre-feet from April 1 through June 15 of water from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE¼NW¼NW¼ of said Section 28. The place of use shall be in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay its proportionate share of the fees and

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compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water No. 69659-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 60 gallons per minute up to 39.99 acre-feet from November 1 through March 31, and shall not exceed a total of 140 gallons per minute up to 9.25 acre-feet from April 1 through April 15, and shall not exceed 290 gallons per minute up to 78.16 acre-feet from April 16 through June 15.

C. This permit is used in conjunction with Certificate of Water Right No. 4858-g76H which authorizes the certificate holder to divert ground water only. The combined appropriation under Permit No. 69638-s76H and Certificate No. 4858-g76H shall not exceed 90 gallons per minute.

D. This permit is supplemental to 45 Statements of Claims to Existing Water Rights (listed below) and Permit to Appropriate Water No. 69659-s76H which means they are for the same purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

The Statements of Claims to Existing Water Rights are:

76H-W002106-00	76H-W002664-00
76H-W002107-00	76H-W002665-00
76H-W002661-00	76H-W002666-00
76H-W002663-00	76H-W002677-00

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76H-W002678-00
76H-W002679-00
76H-W002681-00
76H-W002682-00
76H-W002683-00
76H-W002684-00
76H-W002685-00
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76H-W002687-00
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76H-W002698-00
76H-W006474-00
76H-W026964-00
76H-W026965-00
76H-W152093-00
76H-W152094-00
76H-W152095-00
76H-W152096-00
76H-W152097-00
76H-W152098-00
76H-W152099-00
76H-W152101-00
76H-W152102-00
76H-W152104-00
76H-W152106-00
76H-W152107-00
76H-W152108-00
76H-W152109-00

E. 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.

F. The Permittee shall install and maintain a continuously reading flow measuring device on the diversion structure adequate to allow the flow rate and volume of water diverted by this infiltration gallery 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 to the Missoula Water Resources Division Field Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

G. Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does

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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.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

Application No. 69659-s76H

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 69659-s76H is hereby granted to City of Pinesdale to appropriate 50 gallons per minute up to 36.68 acre-feet from November 1 through April 15 and 200 gallons per minute up to 53.92 acre-feet from April 16 through June 15 of water from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW¼NW¼NW¼ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE¼NW¼NW¼ of said Section 28. The place of use shall be in the SW¼ of Section 27, the E½ and NW¼ of Section 28, the NE¼NE¼ of Section 33, and the NW¼NW¼ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled.

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The Permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water No. 69638-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 60 gallons per minute up to 39.99 acre-feet from November 1 through March 31, and shall not exceed a total of 140 gallons per minute up to 9.25 acre-feet from April 1 through April 15, and shall not exceed 290 gallons per minute up to 78.16 acre-feet from April 16 through June 15.

C. This permit is supplemental to Statements of Claims to Existing Water Rights Nos. 76H-W002662-00 and 76H-W002680-00 which means they are for the same purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

D. 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.

E. The Permittee shall install and maintain a continuously reading flow measuring device on the diversion structure adequate

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to allow the flow rate and volume of water diverted by this infiltration gallery 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 to the Missoula Water Resources Division Field Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

F. 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.

G. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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.

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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 15th day of January, 1991.

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 as duly served upon all parties of record at their address or addresses this 16th day of January, 1991, as follows:

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Unified Industries
c/o Jess Nuttall
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Cindy G. Campbell
Hearings Unit Secretary

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