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

* * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) INTERLOCUTORY ORDER
69739-g76L BY DENNIS McDONALD)

* * * * * * * *

The Proposal for Decision in this matter was entered on May 23, 1991. Applicant filed timely exceptions to the Proposal, but did not request an oral argument.

The Proposal for Decision recommended granting a modified conditional permit to Dennis McDonald to appropriate 250 gallons per minute up to 68.49 acre-feet of water per year from a well located in the SE¼SE¼SE¼ of Section 5, Township 24 North, Range 23 West, Flathead County, Montana, for the purpose of irrigation. The period of appropriation would be from April 1 through June 1 of each year. The place of use would be on a total area not to exceed 88 acres, specifically within the following land descriptions: 36 acres in the SE¼SE¼ and 26 acres in the NE¼SE¼ of Section 5, and 26 acres in the NE¼NE¼ of Section 8 of Township 24 North, Range 23 West, Flathead County, Montana. The priority date would be 1:30 p.m., September 21, 1988.

Applicant excepted to Findings of Fact 7, 9, and 14, as well as Conclusion of Law 10 and all other conclusions of law which include and/or adopt findings that there is an undisputed connection between the Applicant's proposed source and the sources of water for Objectors McCoy or Herman at their points of diversion; that the appropriation proposed by Applicant would in

any way impact McCoy, Herman, and other appropriators' rights to Sullivan Creek; and any conclusion of law which limits Applicant's time to utilize said pump solely from April 1 through June 1. Applicant also excepted to the proposed order limiting Applicant's rights to appropriate water from April 1 through June 1 solely each year.

Applicant proposed the Department issue a temporary order granting Applicant the right to appropriate from April 1 through June 15, from July 4 through August 7, and from September 7 through October 1 for a period of two consecutive irrigation seasons. Applicant proposed to install monitoring facilities to measure the amount of waters pumped from the source, the flow of Sullivan Springs, and the impact of pumping at the McCoy point of diversion. Applicant proposed the monitoring facilities would be coordinated between a hydrologist for the Department and Applicant's consultant and that at the end of the second irrigation season, a report would be filed with the Department as to whether the pumping of the Sullivan Flats aquifer had any impact on the waters available at the McCoy/Herman points of diversion. At that point a final order would be issued based upon the factual analysis. Applicant followed his recommendation with reasons supporting such a proposal.

On September 23, 1991, the case was remanded to the Hearing Examiner to reopen the record based on *In re Application 71133-g41B by Hildreth*. In *Hildreth* the Department ruled it is not reasonable to prohibit further diversions from an extensive

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groundwater source so that existing water right holders can continue to enjoy that portion of the water that surfaces naturally and it is not unreasonable to issue a groundwater permit even though it may lower the level of the groundwater source to the point that it is no longer available in the form of surface water. This ruling was based on facts relating to the geometric configuration of the subject groundwater source and on the relationship of the location of the surface water outlet to the overall geometry. The Department reviewer found the record not sufficient to establish the geometric configuration of the Sullivan Flats aquifer and that although the record contained frequent references to the Briar Report, the report was not a part of the record. The remand ordered the Hearing Examiner to reopen the record to take official notice of the Briar Report and reconvene the hearing for presentation of oral and documentary evidence and arguments by the parties with respect to the question of whether the ruling in *Hildreth* is controlling on the facts of the instant case.

On December 5, 1991, the record was reopened to allow the aforementioned evidence into the record. On March 24, 1992, a Proposal for Decision Revised on Remand (Revised Proposal) was entered. The Hearing Examiner revised Finding of Fact 7 and Conclusions of Law 10 and 11.

The Hearing Examiner again recommended granting a modified conditional permit to Dennis McDonald to appropriate 250 gallons per minute up to 68.49 acre-feet of water per year from a well

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located in the $SE\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$ of Section 5, Township 24 North, Range 23 West, Flathead County, Montana, for the purpose of irrigation. The period of appropriation would be from April 1 through June 1 of each year. The place of use would be on a total area not to exceed 88 acres, specifically within the following land descriptions: 36 acres in the $SE\frac{1}{4}SE\frac{1}{4}$ and 26 acres in the $NE\frac{1}{4}SE\frac{1}{4}$ of Section 5, and 26 acres in the $NE\frac{1}{4}NE\frac{1}{4}$ of Section 8 of Township 24 North, Range 23 West, Flathead County, Montana. The priority date would be 1:30 p.m., September 21, 1988.

Applicant filed timely exceptions to the Revised Proposal, but did not request an oral argument. In Applicant McDonald's Request for Modification of Proposal for Decision Revised on Remand (exception to Revised Proposal), Applicant reiterates exceptions to certain Findings and Conclusions and the Proposed Order set forth in the March 24, 1992, Proposal for Decision, identified in Applicant McDonald's Request for Modification to Proposal for Decision of June 17, 1991.

Applicant's exceptions to the March 24, 1992, Proposal are set forth and addressed below.

Applicant excepted to Finding of Fact 7, specifically the statement that almost all apparent discharge from the Sullivan Flat aquifer occurs via Sullivan Springs and to the references indicating Marc Spratt agreed with this statement.

The Hearing Examiner, in the Revised Proposal, revised that part of Finding of Fact 7 as stated in paragraph VI of the Revised Proposal (p. 12). Applicant did not, in his exceptions

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to Revised Proposal, except to any part of paragraph VI of the Revised Proposal.

Applicant excepted to Finding of Fact 9, specifically to the finding that a significant portion of the surface flow of Sullivan Creek at the crossing of the county road is water contributed by Sullivan Springs and that Sullivan Springs is the source of 75-90 percent of the surface flows in Sullivan Creek. Applicant argued the flows of Sullivan Creek have not been measured at the county road crossing and the amount of flow at the county road crossing has not been related to Sullivan Springs' discharge. Applicant further contended there is testimony before the Hearing Examiner which established the flow in Sullivan Creek at the county road was greater than the flow existing at Sullivan Springs. Applicant pointed out there has been no study of the impact of Sullivan Springs and the amount of discharge therefrom as it relates to the amount of available water at the McCoy/Herman point of diversion. Applicant also argued the alleged impact of the spring determined in the Proposal for Decision by Applicant's pumping is an estimate only and that it has not been measured. Applicant contended all experts at the hearing indicated the impact from the proposed appropriation would be so minor that it would probably be immeasurable and that if an impact is immeasurable, in scientific terms, the impact does not exist.

It is true the surface flow of Sullivan Creek at the crossing of the county road has not been measured and the amount

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of surface flow at the county road crossing has not been related to Sullivan Creek discharge. Mark Shapley estimated Sullivan Springs to be 75 to 90 percent of the flow of Sullivan Creek. Since Sullivan Springs contribute to the flow of Sullivan Creek at a point approximately one-half mile upstream from the crossing at the county road with only minor springs contributing to the flow of Sullivan Creek in that reach of the stream, an experienced hydrogeologist such as Mr. Shapley is able to view the area and make a reasonable estimate as to the percentage of flow contributed at that point. It is also true there is evidence in the record that indicates there may be more flow in Sullivan Creek at the crossing of the county road than the flow existing at Sullivan Springs. Applicant's Exhibit 1 and testimony by Applicant establish there are several springs which contribute to the flow of Sullivan Creek in this reach of the stream. The stream has not been measured at this point and the experts at the hearing did indicate the effect of the proposed pumping would be minor. However, none of these observations render Finding of Fact 9 incorrect. Neither can this reviewer state with particularity Finding of Fact 9 was not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3) (1991) and Mont. Admin. R. 36.12.229 (1991). Whether there has been a study of the impact of Sullivan Springs on the amount of available water at the McCoy/Herman points of diversion has no bearing on Finding of Fact 9.

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Applicant excepted to Finding of Fact 14 to the extent that it infers there will be an impact on Sullivan Springs if pumping is allowed and the impact at the spring will affect the waters available at the McCoy and Herman points of diversion. Applicant argued this finding assumes a reduction in the flow of Sullivan Creek at the points of diversion for Objectors Herman and McCoy has a direct relationship to an anticipated reduction in the flow of Sullivan Springs. Applicant believes this has not been established by any evidence and the only fact before the Hearing Examiner is if there is such a reduction in flow, it is so minuscule as to be immeasurable.

Applicant's consultant testified that, based on the Coca Mines pump test, the potential reduction in the flow of Sullivan Springs could be in the neighborhood of 52 gallons per minute. Mr. Spratt acknowledged that the contribution of Sullivan Springs to Sullivan Creek was certainly measurable. Logically if the flow of Sullivan Springs is reduced, the flow of Sullivan Creek would also be reduced. Finding of Fact 14 merely sets forth the contention by Objectors Herman and McCoy that around the beginning of June and certainly after the middle of June, any reduction in the flow of Sullivan Creek would adversely affect them. This finding of fact is based upon competent substantial evidence and will not be rejected or modified.

Applicant excepted to all conclusions of law which include and/or adopt findings that there is an undisputed connection between the Applicant's proposed source and the sources of water

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for McCoy or Herman at their points of diversion; that the appropriation proposed by Applicant would in any way impact McCoy's, Herman's, and other appropriators' rights to Sullivan Creek; and any conclusion of law which limits Applicant's time to utilize said pump solely from April 1 through June 1, specifically Conclusion of Law 10.

There is an undisputed connection between Applicant's proposed source and Sullivan Creek. All four hydrogeologists on record testified to that fact. There was no doubt set forth by any party to the hearing that there is a connection between the groundwater that feeds Sullivan Springs and Sullivan Creek. The contention concerns the amount of flow in Sullivan Creek at objectors' points of diversion which can be attributed to Sullivan Springs. This amount or percentage has not, as far as can be ascertained from the hearing record, been measured. The contention also concerns whether a reduction in the flow of Sullivan Springs would cause an adverse effect to Objectors McCoy and Herman. Conclusion of Law 10 will not be modified.

Applicant's exceptions to the Revised Proposal are set forth and addressed below.

Applicant excepts to Paragraph III, specifically the statement that this case involves the reduction of the amount of water in an identified course of flow due to the interception of the flow upstream from prior appropriators who have fully appropriated that flow at a down-gradient point in its natural course. Applicant argues the evidence of all experts at both

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hearings specifically indicated there was no proof of reduction in flow of surface water if the pumping as proposed was allowed.

This case does involve the possible reduction of the amount of flow in an identified course of flow due to the interception of the flow upstream from prior appropriators who have fully appropriated that flow at a down-gradient point in its natural course. The experts at the hearings did not conclude there would be no reduction in the flow of surface water if the proposed pumping was allowed. One expert predicted the reduction "would be modest" and another predicted the reduction would be immeasurable. To better understand those terms, Mr. Spratt predicted a reduction in the flow of Sullivan Springs of 52 gallons per minute while Mr. Shapley predicted a reduction of 63 to 125 gallons per minute. This apparent conflict was declared a "general agreement" by these experts. (Proposal for Decision at p. 10.)

Applicant excepts to a finding that there is no involvement of an unreasonable or inefficient means of diversion such as a shallow well. (Revised Proposal at p. 7.) Applicant argues that no evidence was before the Hearing Officer that any prior appropriator did or did not have reasonable means of appropriation. Applicant further contends the Hearing Examiner's findings on pages 7 through the top of page 10 of the Revised Proposal reject the concept set forth in Mont. Code Ann. § 85-2-402(1) (1989) and *State ex rel Crowley v. District Court*, 108 Mont. 89, 88 P.2d 23 (1939).

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It is true the objectors' means of diversion were never questioned and are not in controversy; however, the concept is the same as *Hildreth*. If further diversion from the Sullivan Flats aquifer is not allowed because such use may reduce the flow of Sullivan Springs, 4.5 billion cubic feet or approximately 103,000 acre-feet of water would be set aside (wasted, not available for use) to protect the flow of Sullivan Springs, 1,701.4 acre-feet per year from the aquifer, into Sullivan Creek. (Revised Proposal at p. 12.) However, to require the objectors to find a means of appropriation that would allow a reduction in the flow of Sullivan Springs, if indeed a reduction in flow occurred as a result of Applicant's appropriation, may not be reasonable. Fortunately, in this case we have an offer by Applicant, at "Applicant's expense and cost" to be responsible to develop the means of supplementation of Sullivan Springs in the event of measured impact. This suggestion was acknowledged in the Revised Proposal as a viable means of avoiding adverse effects, but was not adopted. (Applicant's exception to Revised Proposal at pp. 4 and 5.)

Applicant excepts to the conclusion that subsequent appropriators cannot diminish flows in Sullivan Creek proper, arguing that testimony indicated Sullivan Creek is a surfacing groundwater aquifer and pursuant to the ruling in *Hildreth*, there is no such precluding requirement in Montana law.

As the Hearing Examiner stated in his Revised Proposal, "there is no distinction in Montana statutes or case law between

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surface water and ground water in the operation of that element of the prior appropriation system of water use which is adverse effect." (Revised Proposal at p. 4.) Whether the water in Sullivan Creek is "a surfacing of a groundwater aquifer" or a surface water source has no bearing on the interpretation of the statutes. Mont. Code Ann. § 85-2-401(1) (1991) states in relevant part,

> ". . . Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions."

Nevertheless, if that change in the condition of water occurrence affects a prior appropriator to the point that prior appropriator can no longer reasonably exercise a prior water right, the proposed appropriation cannot be approved. In the instant case, it is not clear from the record that the proposed appropriation will adversely affect the water rights of prior appropriators and in the event that it does, Applicant is prepared to develop an augmenting system to mitigate that effect.

Applicant excepts to the conclusion on page 11 of the Revised Proposal that Briar's theories of glaciation and deposition were unchallenged alleging that Marc Spratt specifically discounted those theories.

Mr. Spratt did challenge certain portions of Briar's theories; however, Briar's basic theories of glaciation and deposition remain unchallenged. Mr. Spratt discounted Briar's

conclusion that the plug at Niarada is impermeable. Mr. Spratt believes and William Uthman agreed that the plug is of a finer member through which water can pass at a much slower rate than through the aquifer itself, thus the plug is not impermeable. Mr. Spratt further challenged the theory that the Lonepine aquifer and the Sullivan Flats aquifer are two separate aquifers. However, the Hearing Examiner concluded and this reviewer agrees there is insufficient information in the record to conclude the Lonepine and Sullivan Flats aquifers are a single unified system to the extent that a loss of availability of surface water could be replaced by accessing groundwater in the Lonepine area. (Revised Proposal at p.11.)

Finally, Applicant excepts to the Proposed Order, specifically the order limiting the period of time for appropriation to April 1 through June 1. Applicant argues no evidence was found that the proposed appropriation would in any way affect the water flow of Sullivan Springs to the detriment of earlier appropriators. Further Applicant argues that pursuant to the doctrine of *Hildreth* and the multiple discussions in both the hearing and the findings made by the Examiner, there is more than adequate water in the source to supply the appropriation requested.

Applicant resubmitted his proposal contained in the Objection and Proposal for Modification dated June 17, 1991, and proposed in addition that prior to implementation and actual utilization of the appropriation, post-June 1st of each year,

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methods of impact assessment and methods of supplementing Sullivan Springs shall be in place. Applicant further proposed at Applicant's expense and cost to be responsible to develop the means of supplementation of Sullivan Creek in the event of a measured impact.

One bit of information overlooked by everyone except Objector McCoy is that Sullivan Springs flow 2.2 to 2.5 cubic feet per second year round, even when Sullivan Creek flow has diminished to the point that it is no longer feasible to irrigate from it, usually around July 15 through Labor Day. (Testimony of Objector McCoy at remand hearing.) How then will the use of Sullivan Flats aquifer water by Applicant during that time period affect Mr. McCoy or Objector Herman? As long as Sullivan Springs is flowing within the aforementioned range, there would be no adverse effect to the downstream users because Sullivan Springs is still contributing the same amount of water to Sullivan Creek even though Sullivan Creek is going dry. The problem as set forth by Mr. McCoy at the remand hearing is not that Sullivan Springs has a reduced flow from July 15 to Labor Day. The problem is the flow of Sullivan Creek, inclusive of the Sullivan Springs has declined so much that the upstream users are taking all of it. The flow from Sullivan Springs is still contributing between 2.2 to 2.5 cubic feet per second of water to the creek as it always does, but after approximately July 15 of each year, this in itself is not sufficient to reach objectors' diversions in a usable form. So any call on the flow from Sullivan Springs

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would be futile because the flow of Sullivan Springs under those circumstances is not usable by the objectors. As long as Sullivan Springs flows at a rate of 2.2 to 2.5 cubic feet per second, pumping from the Sullivan Flats aquifer will not adversely affect any prior water users.

If the flow of Sullivan Springs is diminished by Applicant's proposed appropriation, there could be an adverse effect to downstream users during the period those users can appropriate water from Sullivan Creek unless the flow of Sullivan Springs is artificially augmented. However, once the flow of Sullivan Creek subsided to the point it is no longer feasible to pump from it, Applicant could then pump from the aquifer without adversely affecting the water rights of downstream users because the creek is not flowing enough to support irrigation use and those users are not appropriating at that time.

Applicant proposed the Department issue a temporary permit for a period of two irrigation seasons during which Applicant would monitor certain points to evaluate the effect of pumping on Sullivan Springs and Sullivan Creek.

If the Department were to grant such a temporary permit, that permit would expire at the end of the second irrigation season and Applicant would be required to file another application and go through the entire procedure again. The objectors would be required to file new objections and pay the required objection fee. However, the Department has the authority to issue an interim permit authorizing an applicant for

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a regular permit to begin appropriating water immediately, pending final approval or denial by the Department of the application for a regular permit. Mont. Code Ann. § 85-2-113(2)(a) (1991); Mont. Admin. R.36.12.104 (1991) The Department also has the authority to require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices and to require said owner or operator to report to the Department the readings of the measuring devices at reasonable intervals and to file reports on appropriations. Mont. Code Ann. § 85-2-113(2) (1991).

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below and upon receipt of the required fee of $10.00 for an interim permit, Interim Permit 69739-g76L is hereby granted to Dennis McDonald for Application for Beneficial Water Use Permit 69739-g76L. Failure to submit the $10.00 filing fee within 30 days of the service date of this Order will cause the above-entitled Application to be denied.

This interim permit is granted to appropriate groundwater at a rate of 250 gallons per minute (gpm) up to 218.24 acre-feet (AF) per annum by means of a pumped well in the SE¼SE¼SE¼ of Section 5, Township 24 North, Range 23 West, Flathead County, for the purpose of irrigating 88 acres. The proposed place of use is specifically described as 36 acres in the SE¼SE¼ and 26 acres in the NE¼SE¼ of Section 5, and 26 acres in the NE¼NE¼ of Section 8

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of said township and range. The proposed period of use is April 1 through October 15 of each year.

A. The Permittee shall submit a monitoring program to the Department's Kalispell Water Resources Regional Office for approval within 60 days after receipt of this Order setting forth methods of impact assessment and methods of supplementing the flow of Sullivan Springs in the event of an adverse impact. Failure to submit the monitoring and supplementation program in the aforementioned time period, will cause the above-entitled Application to be denied.

B. This Interim Permit shall be valid through October 15, 1995, for purposes of monitoring to determine the effect of Applicant's pumping from the existing well at a flow rate of 250 gallons per minute on Sullivan Springs and, in the event there is an effect on Sullivan Springs, to monitor the effectiveness of Applicant's augmentation system.

C. Within 30 days after expiration of this Interim Permit, Applicant shall present the data to the Department's Hearing Unit and shall serve copies on the Kalispell Water Resources Regional Office, Objectors Patricia A. Mullen, Leigh and Judith Herman, Alan J. McCoy, Confederated Salish and Kootenai Tribes, and the Office of the Solicitor. All the aforementioned persons will then be allowed to comment on the data within 30 days after the service date of said data. After presentation of evidence and timely comments by the aforementioned persons and due consideration of the entire record, the Proposal for Decision and

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the Revised Proposal, a Final Order will be prepared either granting or denying a Provisional Permit.

D. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Interim Permit, nor does the Department in issuing the Interim Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Interim Permit.

E. This Interim Permit is subject to Mont. Code Ann. § 85-2-505 (1991) requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water 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.

F. Applicant shall not obtain any vested right to an appropriation attained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the provisional permit is denied or is modified from the terms of the interim permit.

G. Applicant shall closely monitor Sullivan Springs. If the discharge diminishes to less than 2.2 cubic feet per second, Applicant shall implement his augmenting system so that no less than 2.2 cubic feet per second of water is entering Sullivan Creek from either a combination of the natural flow of Sullivan Springs and the augumenting system or the augmenting system alone.

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Dated this 10th day of August, 1993.

Vivian A. Lightizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Interlocutory Order was duly served upon all parties of record at their address or addresses this 10th day of August, 1993, as follows:

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324 Kopp Road
Hot Springs, MT 59845

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 69739-g76L BY DENNIS MCDONALD)

PROPOSAL FOR DECISION
REVISED ON REMAND

* * * * * * * * * * *

Pursuant to the September 23, 1991, Remand to Reopen Record, a hearing was held on December 5, 1991, in Hot Springs, Montana. The expressed and limited scope of the hearing on remand was to reopen the record in this matter for the following purposes.

1. To take official notice of the December 5, 1989, Proposal for Decision and June 1, 1990, Final Order issued by the Department of Natural Resources and Conservation ("Department") in deciding In the Matter of Application for Beneficial Water Use Permit No. 71133-g41B by Clayton and Ray Hildreth.

2. To take official notice of the document "Water Resource Analysis of the Sullivan Flats Area Near Niarada, Flathead Indian Reservation, Montana" by David W. Briar, 1987 ("Briar Report").

3. To receive oral and documentary evidence and hear arguments from the parties relevant to the question of whether the ruling in Hildreth is controlling on the facts in the present case.

APPEARANCES

Applicant appeared at the remand hearing in person and through Leonard L. Kaufman, attorney at law. Appearing as

witness for Applicant was Marc Spratt, Consulting Hydrologist, Kalispell, Montana.

Objector Alan J. McCoy appeared at the remand hearing on his own behalf. Objector Patricia A. Mullen was present in person at the remand hearing. Objector Confederated Salish and Kootenai Tribes ("CS&KT") was present at the remand hearing in the person of Clayton Matt, Water Administrator for Objector CS&KT.

Appearing at the hearing as spokesman for the Department was Chuck Brasen, Manager of the Department's Kalispell Water Resources Regional Office. Bill Uthman, Hydrogeologist with the Department's Water Management Bureau, appeared as the Department's staff witness.

Objector United States of America ("USA") was not present at the remand hearing but had given prior notification to the Hearing Examiner that they would not be but wished to remain a party. Objectors Leigh and Judith Herman did not appear at the remand hearing and made no prior arrangement with the Hearing Examiner. There having been no sanctions identified for failure to appear at the remand hearing, Objector USA and Objectors Leigh and Judith Herman retain their status as parties to this matter. As was noted in the May 23, 1991, Proposal for Decision, Brown Ranch and Daniel C. and Cheryl M. Jackson are no longer parties to this matter.

EXHIBITS

This Proposal for Decision on Remand is based on the entire record in this matter, including all oral and documentary

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evidence received and all materials officially noticed at both the original hearing and the hearing on remand.

At the hearing on remand the Hearing Examiner took official notice of the Briar Report and the Proposal for Decision and Final Order in Hildreth, as referenced above. No objections were expressed. The Hearing Examiner also took official notice of the water rights records maintained by the Department. No objections were expressed.

Applicant offered the following exhibit at the hearing on remand which was accepted into the record without objection.

Applicant's Exhibit 100 is a twenty-one page report entitled "Geometric Configuration and Relation of Sullivan Springs to Source Aquifer, Application for Beneficial Water Use Permit 69739-g76L" dated December 4, 1991, and prepared by Spratt & Associates, Consulting Hydrogeologists, Kalispell, Montana, for Dennis McDonald, Niarada, Montana.

DISCUSSION

I. The Final Order in Hildreth (issued June 1, 1990) states on page one:

> [T]he Proposal for Decision incorrectly included findings of fact as conclusions of law. Although this error is not outcome determinative it has been corrected in this Final Order. In some cases this correction required editorial changes and adding supplemental information from the record. However, essential findings of fact and conclusions of law in the Proposal for Decision have not been altered except where specifically noted in this Final Order."

Conclusion of Law 10 of the Proposal for Decision in Hildreth (issued December 5, 1989) states on pages 23 and 24:

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> In this specific case the Hearing Examiner finds that it is not unreasonable to issue a groundwater permit even though it may lower the level of the groundwater source to the point that it is no longer physically available in the form of surface water. The rationale behind this decision is as follows:
> . . . The question and concern is whether a diversion means that taps the top one foot, of said extensive aquifer, has the right to prevent future diversions from lowering the aquifer at all, even though the aquifer is at least 60 feet deep.
> In similar situations the Department's position has been to determine that a well is improperly completed if it only taps a groundwater aquifer within the top few feet, while said aquifer has sufficient water to satisfy the existing and proposed demand placed upon it. In re Application No. 31441-g41R by McAllister, Final Order, 7-15-85. The Hearing Examiner finds no statute or legal precedent that requires a different determination of adverse impact to an existing water right when the existing uses involve surface water rights instead of groundwater rights.

I agree that there is no distinction in Montana statutes or case law between surface water and ground water in the operation of that element of the prior appropriation system of water use which is adverse effect. To the contrary, Montana recognizes that the only distinction in the operation of law between groundwater and surface water is our ability to understand the factual circumstances, and that our ability to comprehend the facts is always improving with the development of increasingly sophisticated data collection techniques and with the amount of data collected. See Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966). With regard to the Sullivan Flats aquifer we have substantially more data and analysis than we have on the great majority of groundwater resources in Montana. Furthermore, the

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statutory definition of groundwater in Montana was amended by the 52nd Legislature. The former definition was:

> "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water. Mont. Code Ann. 85-2-102(10) (1989).[1]

The present definition is:

> "Groundwater" means any water beneath the ground surface. Mont. Code Ann. 85-2-102(10) (1991).

Deleting the phrase "and which is not a part of that surface water" removed language that was sometimes interpreted to imply there was a separation between groundwater and surface water in the operation of the law.

II. The establishment of a tributary relationship is a question of fact. See Loyning v. Rankin, 118 Mont. 235, 165 P.2d 1006 (1946); see generally Granite Ditch Co. v. Anderson, 204 Mont. 10, 662 P.2d 1312 (1983). It has been established clearly and without challenge that Sullivan Springs is tributary to Sullivan Creek. Although not expressly stated in the materials in the record, it is apparent from discussion in the various hydrogeological reports that the flows from Sullivan Springs are naturally occurring. They are not artificially developed flows which would make them an entitlement of the developer. The natural discharge of the springs form a large part of the flows of Sullivan Creek. Experts have determined that the perennial portion of Sullivan Creek (Lower Sullivan Creek) originates at

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[1] 1989 Mont. Laws, ch. 658, sec. 1.

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the natural flow from Sullivan Springs which contributes 75 to 90 per cent of the surface flows in Lower Sullivan Creek. See Finding of Fact 9, Proposal for Decision. Nothing in the record on remand contradicts this fact.

Prior appropriators of waters of a stream gain the right to natural flows of all tributaries in so far as the flows may be necessary to afford the amount of water to which they are entitled. See Loyning, supra; Granite Ditch, supra; Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 85 P. 880 (1906); Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 P. 47 (1904). Furthermore, feeder springs that naturally form a part of the flows of a stream belong to that stream as a part of its source of supply. See Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944); Smith v. Duff, 39 Mont. 382, 102 P. 376 (1909); see also Fellauer v. People, 167 Colo. 320; 447 P.2d 986 (1968); Templeton v. Pecos Valley Artesian Conservancy District, 65 N.M. 59, 332 P.2d 465 (1968); see generally Ryan v. Quinlan, 45 Mont. 521, 124 P. 512 (1912). The waters of a tributary may not be diverted to the injury of prior appropriators on the main stem. See Dern v. Tanner, 60 F.2d 626 (D. Mont. 1932).

Under the circumstances of this case (which at present are somewhat unique), wherein an unusually high degree of hydrogeological research has comprehended and defined the parameters, characteristics, and dynamics of the Sullivan Flats aquifer, the tributary relationship of the proposed groundwater source to Sullivan Springs and hence to Sullivan Creek is an established

fact. Sullivan Flats aquifer has exceptionally high transmissivity values throughout its breadth. See Finding of Fact 7, Proposal for Decision.[2] The nature of this aquifer is to transmit water at an exceptionally high rate of "flow". Furthermore, it has been proven that there is a relationship between the amount of water passing the proposed point of diversion and the flow from Sullivan Springs. See Findings of Fact 10 and 11, Proposal for Decision.[3] Therefore, the underground flow at Applicant's proposed point of diversion has been specifically and scientifically established to be tributary to Sullivan Creek via Sullivan Springs.

III. The evidence in the record indicates that this case is not a matter involving the lessening of artesian pressure in an aquifer or the lowering of the water level in an aquifer. This case involves the reduction of the amount of water in an identified course of flow due to interception of the flow upstream from prior appropriators who have fully appropriated that flow at a down-gradient point in its natural course. It does not involve an unreasonable or inefficient means of diversion such as in the case of a shallow well. This analysis of the evidence in the record of this matter is consistent with case law interpretation,

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[2] This finding is consistent with all evidence in the entire record, including the additional evidence obtained on remand. The typical value for Montana aquifers is about 1600 ft^2/day, whereas values in the Sullivan Flats aquifer are as high as 65000 ft^2/day. (Briar Report and testimony of Marc Spratt)

[3] See VII, below, for further discussion of this finding.

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discussed above, that prior appropriators are entitled to the flows of factually established tributaries. It is clearly distinct from the factual situation in Hildreth which rests on a correspondingly distinct line of case law interpretation of § 85-2-401, MCA, relating to adequacy of prior appropriators' diversion works.

Hildreth is a recent case in a line of Department decisions interpreting how § 85-2-401(1) relates to the rights prior appropriators may have to their historic reliance on a surface manifestation of groundwater or artesian pressure as a delivery mechanism in their diversion works. But in all those decisions, as in the court cases that produced the case law they cite, a specific tributary connection between the groundwater being appropriated and a surface water source which is fully appropriated by a number of prior appropriators has not been scientifically and factually established. Rather, they involve the question of whether water is being wasted for the convenience of prior appropriator's historical means of diversion. Hildreth carries forward a well established principle that an appropriator is not entitled, by priority, to command the whole of a source merely to facilitate his taking a fraction of the whole to which he is entitled. See City of Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961); State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939); Schodde v. Twin Falls Land & Co., 224 U.S. 107 (1912). The facts in the line of cases behind Hildreth all pertain to an unreasonably inefficient means

of diversion wherein a large percentage of the water at the point of appropriation is a necessary element of the historical means of acquiring the portion to which the prior appropriator has a water right. In Schodde the entire flow of a stream had been integrated into the means of diversion because the means of diversion was a water wheel that required the force of the full flow to operate. Hildreth cites the previous Department decision In re Application 31441-g41R by McAllister where the appropriator was relying on the artesian force of an underground water resource to lift the water to the surface at the point where they conveniently took control of it. These factual situations clearly require questioning the reasonableness of allowing the prior appropriators to extend the protections inherent in their water rights to include the use of the uncontrolled existence of the water resource as their method of diversion.

They are all relying on the force of an uncontrolled body of water to act as the element of force or lift necessary for their historical means of diversion to function. This is distinct from reliance on a clearly identified and clearly traceable tributary system. In such a tributary system appropriators are not relying on the body of water to be a part of their diversion apparatus; rather, they rely only on the force of gravity to cause the amount of their entitlement to flow past the geographical point at which their reasonably efficient diversion works have been established to take control of that entitlement.

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In this matter, the reasonableness of objectors' means of diversion was never questioned and is not a subject of controversy. Even so, testimony by Objector McCoy about objectors' diversion works indicated they are pumping stations, and contained sumps to facilitate the ability to collect and pump water even in unfavorable natural stream flow conditions. Objectors divert surface water (which has arrived at their diversions by a factually established main stem and tributary system) from Sullivan Creek by means of diversion works that are reasonable.

IV. Objectors herein are entitled to that amount of Sullivan Creek necessary to fulfill their senior water rights. As the amount of flow declines to less than the amounts of their existing water rights, they become entitled to the entire flow of the creek. Likewise, they are then also entitled to the entire flow of Sullivan Springs because it is the point of origin of the vast majority of the flows in Sullivan Creek when flows in Sullivan Creek fall below Objectors' collective entitlement. Subsequent appropriators cannot diminish those flows such that the existing rights are adversely affected. As a result of the study and analysis that has been done, we know with assurance that water at the proposed point of diversion reaches the Objectors in a time frame that would provide relief from shortage. If they were to call for it, such a call would not be futile.

V. Applicant contends that water to supplement the diminished flows from Sullivan Springs could be obtained by wells into the aquifer beneath the Sullivan Creek appropriators' places of

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use. He contends the Sullivan Flats aquifer is not distinct from the Lonepine aquifer because there is permeability to the subsurface strata at Niarada, commonly called the "plug." The extensive study by Briar and the analysis by Shapley have concluded that there is a significant enough retardation of permeability in the subsurface strata at the Niarada Gap to form a subsurface dam. Bill Uthman agreed with Marc Spratt that characterization of the "plug" as impermeable does not reflect the composition of the subsurface materials found in Briar's test well 8 or the drawdown in well 8 when well 6 was pumped during Briar's tests. Bill Uthman, however, characterized the amount of water that appears to pass through the "plug" as small enough that the "plug" serves as a substantial impediment to subsurface flow. Furthermore, the very steep declining potentiometric gradient from north to south through the Niarada gap and Briar's theories of glaciation and deposition were unchallenged. This formed much of the basis for Briar's conclusion about the nature of the subsurface lithology at Niarada. The true permeability of the subsurface materials at Niarada is a matter of enough expert dispute that it is not clear how much water from the Sullivan Flats aquifer moves through it. The information in the record is insufficient to conclude that the Sullivan Flats aquifer and the Lonepine aquifer are a single, unified system to the extent that a loss of availability of surface water from Sullivan Flats aquifer could simply be replaced by accessing groundwater in the Lonepine area.

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VI. Only a portion of the water moving through the Sullivan Flats aquifer flows out through Sullivan Springs, approximately 1701.4 acre-feet per year given the average flow of approximately 2.35 cubic feet per second. Another portion, estimated at 175 million gallons per year (537 acre-feet per year) leaves the aquifer by other means such as flow through the Niarada low transmissivity region. The majority of the groundwater in the Sullivan Flats area leaves that area as discharge through Sullivan Springs into Sullivan Creek. Given these estimates (agreed to by Bill Uthman and Marc Spratt), Sullivan Springs discharges approximately 68.4 percent of the volume of groundwater that is flowing out of the Sullivan Flats area. This revises Finding of Fact 7, Proposal for Decision, which found Sullivan Springs to be almost all of the discharge from the Sullivan Flats aquifer.

VII. At the remand hearing, Marc Spratt expressed doubts about the estimated reduction of flow from Sullivan Springs that would result from the proposed appropriation. These doubts were not substantiated by analysis or additional data. Therefore, the estimated decline in discharge of 50 to 125 gallons per minute, generally confirmed by Marc Spratt in testimony at the initial hearing, stands. Nevertheless, the Briar report does identify a large amount of water in storage in the aquifer, 4.5 billion cubic feet of water residing in the basin at any one time. The report concludes that further withdrawals of water from the aquifer could be made with impacts being reduction of levels in wells, failure of some smaller springs, and reduction of

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discharge from the basin to down-gradient bodies of water. The Briar Report notes that impacts would eventually reach the point of "mining" the aquifer which Briar identifies as when Sullivan Springs stops flowing. As shown by Marc Spratt and agreed to by Bill Uthman, Briar may have erroneously estimated the percentage of discharge that exits the aquifer via Sullivan Springs, and that therefore the failure of Sullivan Springs could not be used as a single indicator of when aquifer mining starts. Based on all the evidence in the record, including that developed on remand, water in the Sullivan Flats aquifer is available for appropriation as long as prior appropriators will not be adversely affected; which confirms Finding of Fact 8 and Conclusion of Law 8 in the Proposal for Decision.

VIII. There may well be ways of obtaining water from the proposed source that do not significantly reduce the flows of Sullivan Springs and, in turn, Sullivan Creek. Expert analysis concluded the system as proposed by Applicant is not. Precedent does allow, however, for a subsequent appropriator to acquire a water right in just these circumstances. If adequate means of providing sufficient supply can be made available to the senior, whose present adequate facilities cannot be operated to obtain his full entitlement because of the acts of the junior appropriator, provision for such should be made at the expense of the junior, it being unreasonable to require the senior to supply such means out of his own financial resources. See State ex rel Crowley v. District Court, supra; City of Colorado Springs v.

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Bender, supra; In re Application 39786-g76H by Western Water Co.; In re Application 25170-g41B East Bench Grain & Machinery, Inc. To compensate for the impact from operating his well that would adversely affect prior appropriators on Sullivan Creek and to avoid diverting water that is en route to senior water rights, Applicant could prevent a decline in the steady discharge of Sullivan Springs. This could be accomplished by inducing flow from Sullivan Springs or its source aquifer (most likely by pumping) in proportion to the decline in the natural flow, and releasing it immediately into Sullivan Creek. From the evidence in the record, this would need to be done whenever prior appropriators enter into their informal system of rotating use, or whenever prior appropriators place a call on Sullivan Creek.

IX. Applicant would not be appropriating water that was en route to downstream senior water rights and would not be adversely affecting prior appropriators if the proposed diversion were not operated after June 1, or Applicant artificially stabilized the Sullivan Flats aquifer contribution to Sullivan Creek by inducing discharge from Sullivan Springs, or its source groundwater, into Sullivan Creek at or immediately proximate to the natural confluence of the Sullivan Springs outflow and Sullivan Creek. Finding of Fact 12 and Conclusion of Law 10, Proposal for Decision, established that the effects of the proposed appropriation on wells in the aquifer would not diminish the capability of existing wells to divert the amounts of water allotted by water rights appurtenant to them. Stabilizing the discharge from

Sullivan Springs ensures that the water withdrawn by Applicant's well comes solely from the reserves in the aquifer and not from Sullivan Creek and its proven tributaries. It ensures that the impacts of Applicant's proposed appropriation would remain within the aquifer.

X. Applicant has not proposed a system to stabilize the discharge of Sullivan Springs so that the impacts of the proposed appropriation would be confined to the groundwater system and not extend to the surface water system that has been fully appropriated. Such a system would not be an additional appropriation of water, however, and therefore would not necessarily require a separate water right or the change of an existing water right. There would not be an additional amount of water withdrawn from reserves of the source aquifer, there would be no withdrawal or diversion outside of the natural course of flow, and there would be no use. Nevertheless, a discharge stabilization system would need to be an element of the proposed appropriation so that it could be regulated and protected as a part of that appropriation scheme. See Mont. Code Ann. § 85-2-312(1) (1989); Western Water, supra; East Bench, supra.

As stated in Conclusion of Law 11 of the Proposal for Decision, the Department can condition permits to ensure that the statutory criteria are satisfied. However, the spring discharge stabilization system would be a fairly complex plan. It would require locating and sizing the inducement mechanism (most likely a pump), along with providing assurance that the system could

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function successfully. Some means of assessing the actual functioning of the system would also need to be designed, such as by periodic measurements or measuring devices. When a relatively complex plan is necessary, and the Applicant does not provide that plan, the Department will not unilaterally impose its own plan as a condition placed on the permit. See In re Application 58133-s41O by Lloyd DeBruycker; In re Application G(P)3049-01-s76D By Montana Department of Fish, Wildlife and Parks; In re G(W)3049-00-s76D by Glen P. and Rose J. Wood. Therefore, a permit cannot be granted for diversion after June 1.

XI. Finding of Fact 7 and Conclusions of Law 10 and 11 in the May 23, 1991, Proposal for Decision are revised and/or supplemented by the findings and conclusions in the discussion above. Nothing in the record undermines or compels the alteration of Findings of Fact 1 through 6 and 8 through 14 or Conclusions of Law 1 through 9 in the May 23, 1991, Proposal for Decision which are therefore incorporated herein by this reference.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 69739-g76L is hereby granted to Dennis McDonald to appropriate 250 gallons per minute up to 68.49 acre-feet of water per year from a well for the purpose of irrigation.

The well shall be located in the SE¼SE¼SE¼ of Section 5, Township 24 North, Range 23 West, Flathead County, Montana. The

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period of appropriation shall be from April 1 through June 1 of each year. The place of use shall be on a total area not to exceed 88 acres, specifically within the following land descriptions: 36 acres in the SE¼SE¼ and 26 acres in the NE¼SE¼ of Section 5, and 26 acres in the NE¼NE¼ of Section 8 of Township 24 North, Range 23 West, Flathead County, Montana. The priority date shall be 1:30 p.m., September 21, 1988.

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

B. 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 water 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.

C. The permittee shall install and maintain a measuring device on the diversion structure adequate to allow the flow rate and volume of water diverted by this well 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 Kalispell Water Resources Regional

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Office of the Department of Natural Resources and Conservation upon demand.

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. 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.

F. 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.

G. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes position that economic investments made in reliance upon this permit do not create in the permittee any equity or vested right against the Tribes. The permittee is hereby notified that any financial outlay or work invested in a project pursuant to this permit is at permittee's risk.

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NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Only parties present at the remand hearing, or who made prior arrangements with the Hearing Examiner, may object to any part of the record developed as a result of the remand hearing or except to this Proposal for Decision on Remand. Any such party adversely affected by this Proposal for Decision on Remand may file exceptions with the Hearing Examiner. 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.

Parties may not file exceptions based solely on the May 23, 1991, Proposal for Decision; however, exceptions properly filed in response to the May 23, 1991, Proposal for Decision remain as a part of the record.

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

Dated this 24th day of March, 1992.

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

CASE # 69939

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision on Remand was duly served upon all parties of record at their address or addresses this 24th day of March, 1992, as follows:

Dennis McDonald
324 Kopp Road
Hot Springs, MT 59845

Leonard L. Kaufman
Murray & Kaufman, P.C.
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Kalispell, MT 59903-0728

Clayton Matt
Water Administrator
Confederated Salish &
Kootenai Tribes
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Alan J. McCoy
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Lonepine, MT 59848

Leigh and Judith Herman
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Niarada, MT 59852

Brown Ranch
Calvin and Elsie Brown
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Daniel C. Jackson and
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Alan W. Mikkelson
Joint Board of Control
P.O. Box 639
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(For Notification Only)

Jon Metropoulos
Browning, Kaleczyc,
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Department of Natural
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Kalispell Water Resources
Regional Office
P.O. Box 860
Kalispell, MT 59903-0860

Cindy G. Campbell
Hearings Unit Legal Secretary

Case# 69739

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION) FOR BENEFICIAL WATER USE PERMIT) NO. 69739-g76L BY DENNIS MCDONALD)	REMAND TO REOPEN RECORD

* * * * * * * * * * *

In June 1990 the Department of Natural Resources and Conservation decided In the Matter of Application for Beneficial Water Use Permit No. 71133-g41B by Clayton and Ray Hildreth. The Hildreth case has factual similarities to the present case. In deciding the case, the Department ruled that it is not reasonable to prohibit any further diversions from an extensive groundwater source so that existing water right holders can continue to enjoy that portion of the water that surfaces naturally, and that it is not unreasonable to issue a groundwater permit even though it may lower the level of the groundwater source to the point that it is no longer physically available in the form of surface water. Hildreth, December 5, 1989, Proposal for Decision at pages 22 and 23. This ruling was based on facts relating to the geometric configuration of the subject groundwater resource, and the relationship of the location of the surface water outlet to the overall geometry.

In the present matter, the record contains insufficient evidence to establish the geometric configuration of the Sullivan Flats aquifer. The record, however, does contain frequent references to a report which was not in the record but relates

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directly to the resource under consideration, and which was the subject of much of the expert analysis that is in the record: "Water Resource Analysis of the Sullivan Flats Area Near Niarada, Flathead Indian Reservation, Montana" by David W. Briar, 1987 (Briar Report). The reviewer has examined this document and finds that it may have information bearing on the issues in this case, particularly as they may relate to the geometry of the Sullivan Flats aquifer.

It appears that the material in the Briar report may be essential to understanding all the facts bearing on the decision in this matter. To ensure that the facts in this case reflect the fullest understanding of the resource under consideration, and that the application of law follows, this matter is remanded to the Hearing Examiner to reopen the record to take official notice of the Briar Report and reconvene the hearing for presentation of oral and documentary evidence and arguments by the parties with respect to the question of whether the ruling in Hildreth is controlling on the facts in the present case, and for the Hearing Examiner to develop such additional findings of fact and conclusions of law as he deems necessarily result from the further evidence and arguments. Evidence and argument not related to said question shall not be allowed. The time and place of the hearing shall be set by the Hearing Examiner with adequate notice to be given to all parties.

Copies of the Briar Report and the Hildreth Proposal for Decision are available for viewing or copying at the Department's

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Kalispell Water Resources Regional Office (3220 Highway 93 South, phone: 752-2288), or copies may be obtained from the Hearings Unit Legal Secretary in Helena (Cindy Campbell, phone: 444-6615).

Dated this 23 day of September, 1991.

Laurence Siroky,
Assistant Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Remand to Reopen Record was duly served upon all parties of record at their address or addresses this 23rd day of September, 1991, as follows:

Dennis McDonald
324 Kopp Road
Hot Springs, MT 59845

Leonard L. Kaufman
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Patricia A. Mullen
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Niarada, MT 59852

Daniel C. Jackson and
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Alan J. McCoy
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Clayton Matt
Water Administrator
Confederated Salish &
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CASE # 69739

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Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 69739

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

FILMED
JUN 03 1991

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 69739-g76L BY DENNIS MCDONALD)

* * * * * * * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on April 3, 1991, in Hot Springs, Montana, to determine whether the above Application should be granted to Applicant Dennis McDonald under the criteria in § 85-2-311(1), MCA.

Applicant appeared in person and by and through his counsel, Leonard L. Kaufman. Appearing as witness for Applicant was Marc Spratt, Consulting Hydrologist, Kalispell, Montana.

Objector Patricia A. Mullen appeared pro se. Objectors Leigh and Judith Herman appeared pro se. Objector Alan J. McCoy appeared pro se. Objector Confederated Salish and Kootenai Tribes ("CS&KT") was present at the hearing in the person of Clayton Matt, Water Administrator for Objector CS&KT.

Objector United States of America ("USA") did not appear at the hearing but had given prior notification to the Hearing Examiner that though they would not appear they wished to remain a party and to have their objections remain a part of the record.

Objectors Daniel C. and Cheryl M. Jackson did not appear and made no prior arrangements with the Hearing Examiner. The objections of Objectors Jackson are hereby stricken, and

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Objectors Jackson no longer retain the status of parties to this matter. See Mont. Admin. R. 36.12.208 (1984).

Calvin Brown appeared representing Objector Brown Ranch and informed the Hearing Examiner and all parties present that Objector Brown Ranch was withdrawing its objections in this matter and no longer wished to be a party to this matter.

Appearing at the hearing representing the Department of Natural Resources and Conservation ("Department") was Chuck Brasen, Manager of the Department's Kalispell Water Resources Regional Office. Also appearing at the hearing was Mark Shapley, Hydrogeologist with the Department's Water Management Bureau, who appeared as the Department's staff witness.

EXHIBITS

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

Applicant's Exhibit 1 is a 2 ft. by 3 ft. blue-line drawing, "McDonald Beneficial Use Application #69739-g76L: Vicinity Map," prepared by Spratt & Associates based on the Niarada USGS Quadrangle Map. The locations of various features referred to in testimony were denoted by Leonard Kaufman on this exhibit at the hearing in black ink: numbers correspondingly identifying the locations of the features depicted in Applicant's Exhibits 3 through 17; two sets of the initials "CR" for a county road which is in Section 25, Township 24 North, Range 24 West (all references herein to Section 25 are to said Section 25); and "P.T."

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for a spring on the Paul Taylor property (spring is in the E½E½SE¼ of Section 5, Township 24 North, Range 23 West).

Applicant's Exhibit 2 consists of three pages being a photocopy of the well log of the well proposed by Applicant to become the point of diversion of the proposed appropriation.

Applicant's Exhibit 3 is a photograph of Sullivan Creek approximately where it crosses the county road in Section 25.

Applicant's Exhibits 4 and 17 are two photographs of the confluence, near the county road in Section 25, of Sullivan Creek and surface flow from a spring which is south of and downstream from the confluence of the outflows from Sullivan Springs.

Applicant's Exhibits 5 and 5a are two photographs of the surface waters at and from the spring which flows into Sullivan Creek near the county road in Section 25 south of and downstream from the confluence of outflows from Sullivan Springs.

Applicant's Exhibits 6, 7, and 8 are photographs of three separate springs in the stream bed of Sullivan Creek downstream from the confluence of outflows from Sullivan Springs.

Applicant's Exhibit 9 is a photograph of the weir at Sullivan Springs.

Applicant's Exhibit 10 is a photograph of surface flows in Sullivan Creek north and upstream from the confluence of outflows from Sullivan Springs.

Applicant's Exhibit 11 is a photograph of surface water at and from a spring which is tributary to Sullivan Creek north of

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and upstream from the confluence of outflows from Sullivan Springs.

Applicant's Exhibits 12 and 13 are two photographs of the weir at Sullivan Springs.

Applicant's Exhibit 14 is a photograph of the measuring device above the weir at Sullivan Springs.

Applicant's Exhibit 15 is a photograph of the measuring device below the weir at Sullivan Springs.

Applicant's Exhibit 16 is a photograph of the leakage of water around the weir structure at Sullivan Springs.

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

Objectors Herman offered:

Herman Exhibit 1 which is a single page of typewritten testimony directed to the Hearing Officer, Elsie Brown, and Dennis McDonald from Leigh and Judith Herman and Patricia A. Mullen.

Objector McCoy offered:

McCoy Exhibit 1 which consists of five pages. The first two pages are typewritten testimony to the Hearing Officer and Dennis McDonald from and signed by Alan J. McCoy to re-affirm Objector McCoy's objection to granting water use permit 69739-g76L. The final three pages are copies of pump curves from the Berkeley Pump Company.

The Department's file on the present Application was made available to all parties for review prior to the hearing. The

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Department's file includes a photocopy of the Hydrometrics, Inc. report, "Comparison of Predicted and Actual Effect of Pumping a High Capacity Well in Sullivan Flats Near Niarada, Montana". The file also includes photocopies of four technical memorandums written by Mark Shapley to Chuck Brasen dated, respectively, December 21, 1987, August 15, 1988, July 9, 1990, August 7, 1990, and March 22, 1991. Without objection, the file was entered into the record in its entirety at the hearing by the Hearing Examiner.

At the prehearing conference immediately preceding the hearing, the Hearing Examiner told all parties present that notice would be taken of the Department's records of water rights to surface and groundwater within the drainage basin of Sullivan Creek. No objections to the taking of said notice were expressed.

PRELIMINARY MATTERS

The proposed point of diversion and place of use are within the boundaries of the Flathead Indian Reservation. The water proposed for appropriation arises upon, flows by, or flows through the Flathead Indian Reservation. (Department's file and testimony of Dennis McDonald)

Objectors USA and CS&KT filed timely objections to this Application contending that State of Montana, i.e., the Department, has no jurisdiction over the water of or land within the Flathead Indian Reservation because Objector CS&KT claim the waters arising upon, flowing by, or flowing through the Flathead

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Indian Reservation, citing United States v. McIntire, 101 F.2d 650 and United States v. Alexander, 131 F.2d 359.

The State of Montana does maintain jurisdiction to grant permits to appropriate excess water on the Flathead Indian Reservation. See In re Application Nos. 66459-76L, Ciotti; 62935-s76LJ, Crop Hail Management; 63574-s76L, Flemings; 64965-s76LJ, Gray; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; and G15152-S76L, Pope (Director's Order and Memorandum, April 30, 1990).

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 69739-g76L was filed with the Department on September 21, 1988, at 1:30 p.m. (Department's file)

2. Applicant proposes to appropriate groundwater at a rate of 250 gallons per minute (gpm) up to 218.24 acre-feet (AF) per annum by means of a pumped well in the SE¼SE¼SE¼ of Section 5, Township 24 North, Range 23 West, Flathead County, for the purpose of irrigating 88 acres. The proposed place of use is specifically described as 36 acres in the SE¼SE¼ and 26 acres in the NE¼SE¼ of Section 5, and 26 acres in the NE¼NE¼ of Section 8 of said township and range, and is property owned by Applicant. The proposed period of use is April 1 through October 15 of each year. (Department's file and testimony of Dennis McDonald)

3. Pertinent portions of the Application were published in the Polson, Montana, Courier Pioneer Advertiser, a newspaper of general circulation in the area of the proposed source, on

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January 5, 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 this Application. (Department's file)

4. Timely objections were received by the Department from Objectors McCoy, Herman, and Mullen alleging potential adverse effects on their existing water rights as prior appropriators. Said Objectors have water rights on record with the Department for waters of Sullivan Creek and for groundwater in the Sullivan Creek drainage. (Department's file and records)

5. The proposed appropriation of water would be used to irrigate agricultural crops such as alfalfa and grains for the purpose of increasing the production from the field. The irrigation would be accomplished by a sprinkler system, most likely a big gun because of the irregular shape of the field that would be the place of use. The diversion pump and sprinkler system would be designed by Alan McCoy, the local area expert in irrigation system design by virtue of his experience as an owner of Irrigation Equipment Sales. (Testimony of Dennis McDonald and Alan McCoy)

6. The well intended to be the point of diversion is an existing well drilled in October 1985 in conjunction with a study by David Briar and the United States Department of Interior. It was drilled to a depth of 195 feet. The well has been test pumped at the proposed rate of diversion. (Department's file, Applicant's Exhibit 2, and testimony of Dennis McDonald)

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7. Applicant's proposed source is the Sullivan Flats aquifer, which has been extensively studied; more than most groundwater areas in Western Montana. The extent, features, and characteristics of this aquifer are known to a greater level of certainty than is typical of groundwater resources in Western Montana. It is very transmissive; it is variable in thickness; it is overlain and hydrologically confined by 75 feet or more of glacial lake sediments; and it has the characteristics of a confined aquifer. The aquifer is not significantly connected with the Lonepine aquifer to the south, so the county road in Section 25 can be considered as a rough demarcation of the southern boundary of the Sullivan Flats aquifer. Almost all apparent discharge from the Sullivan Flats aquifer occurs via Sullivan Springs, a tributary to Sullivan Creek, located near the center of Section 24, Township 24 North, Range 24 West. (March 22, 1991, and August 15, 1988, Shapley Memos, and testimony of Marc Spratt, Dennis McDonald, and Mark Shapley)

8. The amount of groundwater flux through the Sullivan Flats aquifer (i.e., the volume of water flowing through the aquifer in a given year) is sufficient to provide water at the point of diversion for pumping at the proposed rate. The existing well has been pumped for testing at the proposed rate, and pumping at the proposed rate up to the proposed volume would not extract water from the aquifer at a rate greater than the aquifer is recharged. Test pumping at rates similar to and greater than the proposed rate has been conducted on many wells that tap the

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Sullivan Flats aquifer. (December 21, 1987, and March 22, 1991, Shapley Memos, Department's file, and testimony of Dennis McDonald)

9. Surface water flows in Sullivan Creek above where it crosses the county road are sustained by many sources such as surface drainage from the three main subbasins (Cromwell Creek, Big Draw, and Upper Sullivan Creek), groundwater flows from small side basins, and discharge to the surface of waters moving through the shallow porous zone between the surface of the land and the sediment layer that confines the Sullivan Flats aquifer. A significant portion of the surface flow of Sullivan Creek where it crosses the county road is the water contributed by Sullivan Springs. Sullivan Springs is estimated to be the source of 75 to 90 per cent of the surface flows in Sullivan Creek. Sullivan Springs flow at a fairly constant rate year round. The average rate of flow from Sullivan Springs is between 2.2 to 2.5 cubic feet per second (cfs) or 987 to 1123 gpm. (March 22, 1991, Shapley Memo, Applicant's Exhibits 1, 4, 5, 5a, 6, 7, 8, 10, and 11, and testimony of Dennis McDonald, Marc Spratt, and Mark Shapley)

10. The Sullivan Flats aquifer responds throughout its extent to pumping wells at modest to high yields. Hydrometrics conducted a test of the Sullivan Flats aquifer in the fall of 1989. They pumped a well in the SW¼SW¼NW¼ of Section 16, Township 24 North, Range 23 West, at 316 gpm for 32 days and measured the flows from Sullivan Springs. They measured a decline in flow

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of 95 gpm which has been concluded as having been caused by the test pumping. From the data available, Mark Shapley calculated a decline of 63 to 125 gpm would be caused by the proposed appropriation. Marc Spratt calculated a decline of 52 to 60 gpm would be caused by the proposed appropriation. According to Mr. Spratt, he and Mr. Shapley are in general agreement as to the amount of reduction to be expected from Applicant's proposed pumping. (March 22, 1991, Shapley Memo and testimony of Dennis McDonald, Mark Spratt, and Mark Shapley)

11. Sullivan Springs reacted to Hydrometrics' test pumping after eight days. It would take at least eight days for Sullivan Springs to react to pumping from the proposed well. Due to the lower pumping rate and the greater distance between the proposed well and Sullivan Springs, it is likely that it would take longer than eight days. (Testimony of Marc Spratt)

12. Based on existing data from pump tests on wells diverting water from the Sullivan Flats aquifer, measured drawdown effects resulting from pumping rates such as the proposed rate are very limited and short term. Well interference from pumping under the proposed appropriation would be modest or minor. In the opinion of Marc Spratt and Mark Shapley, the proposed appropriation would not adversely affect the capability of existing wells to divert the amounts of water allotted by water rights appurtenant to them. (Department's file and testimony of Mark Spratt)

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13. The Board of Natural Resources and Conservation has not reserved water in the proposed source for future development. Beneficial Water Use Permit 54321-g76L has been issued to Coca Mines, Inc., to appropriate water from the proposed source. A notice of completion of the project for the planned use has not been received by the Department.

The period of use of the Coca Mines permit is October 20 to March 21; the period of use proposed by this Application is April 1 through October 15. The periods of appropriation would not coincide or overlap, but rather, have intervening periods for aquifer recovery. Furthermore, because of the characteristics of the Sullivan Flats aquifer, the drawdown cone from pumping of Applicant's well would not expand to the extent that it would interfere with Coca Mines ability to pump their well as permitted. (Department's records and testimony of Marc Spratt, Mark Shapley, and Chuck Brasen)

14. During irrigation season for many years, flows in Sullivan Creek have been inadequate to satisfy the water rights of Objectors McCoy, Mullen, and Herman. Shortages of water in Sullivan Creek have regularly occurred in July and August over the past 55 years. To compensate for the insufficient flows, these Sullivan Creek water users have adopted an informal system of rotating use which they manage through telephone calls and visits. They have also scaled back their sprinkler systems by reducing nozzle sizes and number of sets.

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According to Objectors Herman and McCoy, flows in Sullivan Creek are adequate each year through May such that a reduction in flow of 52 gpm would not hurt existing users. Objectors Herman and McCoy contend that around the beginning of June and certainly after the middle of June, any reduction in flows of Sullivan Creek would adversely affect their Sullivan Creek water rights. (Herman Exhibit 1 and McCoy Exhibit 1, March 22, 1991, Shapley Memo, Department's file, and testimony of Leigh Herman and Alan McCoy)

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); see Preliminary Matters, supra.

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,

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;

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(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 § 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. The proposed use, irrigation, is a beneficial use of water. Mont Code Ann. § 85-2-102(2)(a); see also Finding of Fact 5.

6. Applicant has proved by substantial credible evidence that he has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 2.

7. Applicant has proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 5 and 6.

8. Applicant has proved by substantial credible evidence that unappropriated waters are reasonably available in the source

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of supply at the proposed point of diversion in the amount and during the period Applicant seeks to appropriate. See Findings of Fact 6, 7, and 8. The test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion. See Mont. Code Ann. § 85-2-311(1)(a) (1989); In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-g42M by Joseph F. Crisafulli; Department of Natural Resources and Conservation, Summary Report: Clark Fork Basin Water Use, November 9, 1990.

9. Applicant has proved by substantial credible evidence that 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 Findings of Fact 12 and 13.

10. Applicant's proved by substantial credible evidence that the proposed appropriation would not adversely affect the water right of prior appropriators during the portion of the proposed period of diversion before early June. See Findings of Fact 12 and 14.

Objectors Herman and McCoy are and have been reacting to chronic water shortages in Sullivan Creek after the middle of June of each year by an informal system that is a tantamount to a constant call for water. See Finding of Fact 14. There is an undisputed tributary connection between Applicant's proposed source and Sullivan Creek such that the proposed appropriation would be callable by holders of senior rights to water from

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Sullivan Creek. See Findings of Fact 7, 9, 10 and 11. After the middle of June such senior water right holders would be placing a constant call for water against the proposed appropriation. Where a senior water right holder would have to call for water every time the senior wishes to divert water, there is an adverse effect to the senior. See In re Application No. 53498-s41S by Randal G. Ridgeway; In re Application No. 58432-s43A by Lester and Annabelle M. Frederick; see also In re Application No. G33710-41S by Floyd R. Blair. Therefore, given the reaction time inherent in the tributary relationship between the aquifer and the surface flows of Sullivan Creek, i.e., greater than eight days (see Finding of Fact 11), after the beginning of June the proposed appropriation would adversely affect Objector's water rights. As to the proposed period of diversion after June 1, the criterium in § 85-2-311(1)(b), MCA, is not met.

11. The Department has the authority to grant permits which, by virtue of the imposition of terms, conditions, restrictions, and limitations the Department considers necessary, satisfy the criteria in § 85-2-311(1), MCA. See Mont. Code Ann. § 85-2-312(1) (1983).

To avoid adverse effects on existing rights (see Conclusion of Law 10), the period of diversion of the proposed appropriation must be restricted by limiting it to that portion of the proposed period that is outside of the period identified by objectors as when they have been historically and consistently unable to

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exercise their water rights. Therefore the permitted period of use must be April 1 through June 1.

It is well established that the Department cannot issue a permit for more water than can be beneficially used. This would necessarily include a prohibition against issuing permits for more water than can be physically diverted. The Department may in no case issue a permit for more water than has been requested. Mont. Code Ann. § 85-2-312(1) (1983). The present Application requests 250 gpm; and 250 gpm was the amount of flow indicated in all notices, and at the hearing. It is impossible for 250 gpm to divert the requested volume, 218.24 AF, within a period of diversion from April 1 through June 1. The maximum volume that can be so diverted is 68.49 AF. Therefore, the permit must be limited to a total volume of 68.49 AF.

Since there is a relationship between surface flows in Sullivan Creek and the groundwater source proposed for appropriation, and since diversion by Applicant's well would influence surface flows in Sullivan Creek, the ranking in priority of the proposed appropriation must be as against all rights to surface water in Sullivan Creek and its tributaries as well as against all rights to the groundwater source. See Finding of Fact 12. Placing a condition on the permit to recognize the interrelationship between the source aquifer and Sullivan Creek surface flows ensures that the avenue of relief for senior water right holders provided by statute will apply to this junior right. See Mont. Code Ann. § 85-2-406 (1979). Such a condition also establishes

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that a call for water from a senior right holder to water in either Sullivan Creek or the source aquifer must be heeded. See In re Application No. 63997-g42M by Joseph F. Crisafulli.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 69739-g76L is hereby granted to Dennis McDonald to appropriate 250 gallons per minute up to 68.49 acre-feet of water per year from a well for the purpose of irrigation.

The well shall be located in the SE¼SE¼SE¼ of Section 5, Township 24 North, Range 23 West, Flathead County, Montana. The period of appropriation shall be from April 1 through June 1 of each year. The place of use shall be on a total area not to exceed 88 acres, specifically within the following land descriptions: 36 acres in the SE¼SE¼ and 26 acres in the NE¼SE¼ of Section 5, and 26 acres in the NE¼NE¼ of Section 8 of Township 24 North, Range 23 West, Flathead County, Montana. The priority date shall be 1:30 p.m., September 21, 1988.

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

B. This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be

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wasted, or contaminate other water 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.

C. The permittee shall install and maintain a measuring device on the diversion structure adequate to allow the flow rate and volume of water diverted by this well 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 Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation upon demand.

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. 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.

F. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Depart-

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ment of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

G. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes position that economic investments made in reliance upon this permit do not create in the permittee any equity or vested right against the Tribes. The permittee is hereby notified that any financial outlay or work invested in a project pursuant to this permit is at permittee's risk.

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.

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Dated this 23rd day of May, 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 was duly served upon all parties of record at their address or addresses this 23rd day of May, 1991, as follows:

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