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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 70576-41I AND 70577-41I BY THE CITY OF EAST HELENA	))))	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 19, 1993, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

70576-41I

Subject to the terms, conditions, restrictions, and limitations, listed below, a Provisional Permit is hereby granted to the City of East Helena for Application 70576-41I to appropriate 600 gallons per minute up to 840 acre-feet of water per year by means of a horizontal well (infiltration gallery) located in the N½N½SE¼ of Section 7, Township 9 North, Range 2 West, in Jefferson County. The place of use shall be the City of East Helena, more specifically, the SW¼ of Section 30, Township 10 North, Range 2 West; the NW¼ of Section 31, Township 10 North,

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Range 2 West; the NW¼NE¼ of Section 31, Township 10 North, Range 2 West; the SW¼ of Section 24, Township 10 North, Range 3 West; the S½ of Section 25, Township 10 North, Range 3 West; the NE¼ of Section 36, Township 10 North, Range 3 West, all in Lewis and Clark County. The period of diversion and period of use is from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is associated with Beneficial Water Use Permit 70577-41I. The combined appropriation as granted shall not exceed a total of 650 gallons per minute up to 1048.45 acre-feet of water per year.

C. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon request and by November 30 of each year to the Water Resources Regional Office, 1520 E. 6th Ave., Helena, MT 59620-2301 PH: (406) 444-6695.

D. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If

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during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

E. This permit is subject to Section 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 the water may be stopped when not being put to beneficial use.

F. The water right granted by this permit is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit. Permittee shall inform the water commissioner of the location of the measuring device.

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

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issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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

70577-41I

Subject to the terms, conditions, restrictions, and limitations, listed below, a Provisional Permit is hereby granted to the City of East Helena for Permit Application 70577-41I to appropriate 600 gallons per minute up to 840 acre-feet per year of groundwater for municipal use by means of a horizontal well (infiltration gallery) located in the N½N½SE¼ of Section 7, Township 9 North, Range 2 West, in Jefferson County. The place of use shall be the City of East Helena, more specifically, the SW¼ of Section 30, Township 10 North, Range 2 West; the NW¼ of Section 31, Township 10 North, Range 2 West; the NW¼NE¼ of Section 31, Township 10 North, Range 2 West; the SW¼ of Section 24, Township 10 North, Range 3 West; the S½ of Section 25, Township 10 North, Range 3 West; the NE¼ of Section 36, Township 10 North, Range 3 West, all in Lewis and Clark County. The period of diversion and period of use is from January 1 through December 31, inclusive of each year.

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

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 21 day of April, 1993.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21st day of April, 1993, as follows:

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City of East Helena
P.O. Box 1070
East Helena, MT 59635

Eugene L. Helberg
1466 Beaverhead Road
Helena, MT 59601

Beverly Donaldson
3890 Helberg Drive
Helena, MT 59601

Thelma Kleffner
East Helena, MT 59635

Douglas Ashton
4041 Helberg Drive
Helena, MT 59601

Robert Peccia
Robert Peccia & Associates
P.O. Box 5653
Helena, MT 59604-5653

T.J. Reynolds & Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301

Dale Reagor
Luxan & Murfitt
P.O. Box 1144
Helena, MT 59624-1144

Laura Monson
2630 York Road
Helena, MT 59601

Victor Vincent
Prickley Pear Water
Users Association
3150 York Road
Helena, MT 59601

Gordon Herrin
1501 Missoula Ave.
Helena, MT 59601

Bill Uthman, Hydrogeologist
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59260

William Sternhagen
Sternhagen Law Firm
25 South Ewing
Helena, MT 59601

Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 70576

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 70576-41I AND 70577-41I BY THE CITY OF EAST HELENA	))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing was held in the above-entitled matter on March 12, 1990, in Helena, Montana. On April 23, 1990, the Hearing Examiner issued an Interlocutory Order granting Applicant Interim Permits to conduct pumping tests. On February 26, 1993, a hearing was held reopening the record to hear evidence pertaining to the issues of adverse effect and water availability.

APPEARANCES

The following appeared at the February 26, 1993, hearing.

Applicant, City of East Helena, appeared at the hearing by and through counsel Dale Reagor, and the Mayor of East Helena, Edward Stipich.

Daniel L. Erikson, Hydrogeologist with Braun Intertec Environmental, Inc., appeared at the hearing as a witness for the applicant.

Ed Murgal, Director of Public Works for the City of East Helena, appeared at the hearing as a witness for the applicant.

Objector Prickly Pear Water Users Association, appeared at the hearing by and through counsel, William Sternhagen.

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Objector Eugene L. Helberg appeared at the hearing by and through counsel, William Sternhagen.

Objector Beverly Donaldson appeared at the hearing by and through counsel, William Sternhagen.

Objector Laura Monson appeared at the hearing by and through counsel, William Sternhagen.

Objector Thelma Kleffner appeared at the hearing by and through counsel, William Sternhagen.

Objector Victor Vincent appeared at the hearing by and through counsel, William Sternhagen.

Objector Douglas Ashton appeared at the hearing by and through counsel, William Sternhagen.

Objector Gordon Herrin appeared at the hearing by and through counsel, William Sternhagen.

Raymond Lazuk, Hydrologist with Hydrometrics, Inc, appeared at the hearing as a witness for the objectors.

Bill Wegner, Water Commissioner, appeared as a witness for the Objectors.

Jim Beck, Civil Engineering Specialist with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

William Uthman, Hydrogeologist with the Department, appeared at the hearing.

EXHIBITS

The Applicant offered one exhibit for inclusion in the record in this matter.

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Applicant's Exhibit 1 B consists of two pages and is the resume' of Daniel L. Erikson. This exhibit was accepted into the record without objection.

The Department file was made available for review by all parties who expressed no objection to any part of the file; therefore the file was accepted into the record in its entirety.

The decision in this matter has been made on the basis of the record which consists of testimony and exhibits presented at the March 12, 1990, hearing; the testimony presented at the February 26, 1993, hearing; and the Department file which includes the test data. This Proposal for Decision incorporates by reference the Findings of Fact and Conclusions of Law as contained in the Interlocutory Order of April 23, 1990, with the exception of Findings of Fact 10 and 11 and Conclusions of Law 8 through 14, as well as setting forth the following additional Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

14. Applicant retained Braun Environmental Laboratories, Inc. now known as Braun Intertec Environmental, Inc. (Braun) in 1990 to determine the sources of groundwater intercepted by Applicant's infiltration galleries. Braun conducted an aquifer test. The infiltration galleries were shut off for a period of approximately 48 hours before the test to allow the storage tanks to be drawn down to provide a place for the water pumped during the test. The aquifer pumping test duration was 24 hours at an average total discharge of 641 gallons per minute. Both

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infiltration galleries were simultaneously pumped, but independent flow measurements of each well were not possible. For purposes of analysis, one-half of the total discharge was assumed to originate from each collector well. During the pumping, groundwater level measurements were made at the two infiltration galleries and three observation wells with an electronic well probe. In addition, continuous recording monitors were installed on Caisson #1 located on the north side of McClellan Creek[1] and on a well located approximately 130 feet upstream of Caisson #1. Streamflow measurements of McClellan Creek were made with a pygmy current meter and wading rod at sites upstream and downstream of the infiltration galleries. Water samples from the infiltration galleries and McClellan Creek were collected and sent to a laboratory for analysis.

The conclusions drawn from that test were that there was insufficient evidence to conclude that any substantial portion of the discharge from the infiltration galleries originated from any source other than groundwater. Hydraulic head observation indicated that McClellan Creek likely loses flow to the shallow sand and gravel aquifer, but apparently pumping from the infiltration galleries, under the condition of the aquifer test, did not lead to additional induced seepage sufficient to be

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[1]This corrects Finding of Fact 6 which states one infiltration gallery is on the west side of McClellan Creek and the other is on the east side. At the site of the infiltration galleries, McClellan Creek is flowing in a westerly direction which places the infiltration galleries on the north and south sides of McClellan Creek.

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measured by the means used in the pump test. There were sufficient differences in the water chemistry between the two infiltration galleries and McClellan Creek to indicate that a source of groundwater in addition to the McClellan Creek aquifer may be contributing to the well discharge. There was insufficient evidence however, to clearly indicate that the Madison Limestone or other potential bedrock aquifers situated near the lower gallery are the source of the difference in water chemistry.

It was agreed by all involved with the testing that this was not sufficient data and that more information was needed. Braun conducted an additional test over water year 1992, from October 1991 to October 1992. Data were collected by Department personnel and City of East Helena personnel. Stream flow measurements were taken monthly by Department personnel using a current meter at two locations, one upstream from the galleries near Applicant's upstream property boundary and the other downstream from the galleries near the downstream boundary of Applicant's property. To evaluate hydraulic gradient and flow relationships between surface and groundwater near the infiltration galleries, staff gage and piezometer pairs were installed near the upstream and downstream boundaries. Staff gages were installed in McClellan Creek near the flow measuring cross-sections. Piezometers were installed in back hoe pits adjacent to the stream. One well point was driven in the streambed by Department personnel. Water level measurements and

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staff gage readings were made twice a month, alternately by Department and East Helena personnel.[2] The results of this test were that at both the upstream and downstream locations, the groundwater levels are significantly below stream levels throughout the year and that McClellan Creek in this area naturally loses flow to groundwater and would do so even if the galleries were not there. Based on the results of the study, Braun concluded that water obtained from the infiltration galleries is groundwater which is not tributary to the stream at the site and operation of the galleries does not affect available streamflow at that location. The galleries were pumped at a total rate of approximately 650 gallons per minute, Applicant's normal pumping rate, during this test period. There was no attempt in either report to project the potential impact to surface water flows for the rate of 1200 gallons per minute, the total amount requested in the Applications. (Department file and testimony of Dan Erikson, Ed Murgal, and Ray Lazuk.)

15. Applicant did not perform any studies or take any measurements downstream of Applicant's property, rather the study by Braun was site specific. Therefore there is no evidence presented by Braun that concluded there would be no loss to downstream water users as a result of this appropriation. The Prickly Pear Creek system, including McClellan Creek, is a losing and gaining system, that is, water is lost from the stream to the

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[2]There were no staff gage readings in June of 1992 due to flood condition which had washed out the gages.

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groundwater and at other places, water is added to the stream water by the groundwater. Any amount of groundwater taken out of the system upstream at Applicant's points of diversion is going to result in less water available to the surface water users of Prickly Pear Creek. This does not necessarily mean the full amount of groundwater taken upstream would be missed by the surface water users downstream. There are mitigating factors such as the ASARCO reservoir between the Applicant's points of diversion and the downstream users. Also, because the area of the infiltration galleries is large and the hydraulic conductivity is reportedly large, a small hydraulic gradient is required to sustain the discharge. Thus, actual drawdown created by the infiltration galleries will range from nonexistent to negligible. If there is any drawdown created, it should quickly equilibrate near the galleries rather than continue to expand. (Department file and testimony of Ray Lazuk.)

16. During the irrigation seasons of 1990 and 1991, the Prickly Pear water users were unable to obtain the full flow of their water rights. (Testimony of Bill Wegner.) Since objectors did not present any testimony on the normal water supplies in Prickly Pear Creek, it is unknown if these shortages were normal. It is not known if the drought the area has experienced the last several years has caused the shortage of water. It is evident there has been a shortage of water in the past, otherwise a water commissioner would not be appointed to admeasure and distribute the water to the users in accordance with Mont. Code Ann. § 85-5-

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101(1). However, no evidence indicates that there is a constant and recurring call for water on the source during any portion of the proposed period of use.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

Conclusions of Law 8 through 14, as contained in the Interlocutory Order of April 23, 1990, are superseded by the following Conclusions of Law.

15. Applicant has provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed points of diversion in the amount of 650 gallons per minute at times when the water can be put to the use proposed and that during the period in which Applicant seeks to appropriate, that amount is reasonably available. The 1990 test was completed while the pumps were producing a total of 641 gallons per minute and the 1991 test was conducted while the pumps were producing an approximate total of 650 gallons per minute. See Finding of Fact 14.

16. Applicant has provided substantial credible evidence the water rights of prior appropriators will not be adversely affected by the proposed appropriation. See Findings of Fact 14 and 15. It is true there will be a diminution of water in the system as a result of Applicant's water use; however, mere diminution is not in itself an adverse effect. *In re* Application 41255-g41B by Allred; see also Mont. Code Ann. § 85-2-401(1)

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(1991). There may be times when there will not be sufficient water for the decreed rights and Applicant's appropriation; however, there will be times when there is sufficient water for all appropriators. While this will inevitably vary each year, because at least in some years there is water available for Applicant, the junior appropriator is entitled to take its place on the ladder of priorities. Montana Power Company v. Carey, 41 St. Rep. 1233 Mont. 685 P.2d 336, (1984); compare *In re* Applications 74310-s76H and 74311-s76H by City of Pinesdale and Unified Industries.

17. According to Mont. Code Ann. §§ 85-2-102(2) and 85-2-501(3) (1987), "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. Since the water sought to be appropriated by Applicant is hydrologically connected with the Prickly Pear Creek system, including McClellan Creek, it is therefore not groundwater within the meaning of the statutes in effect when the instant applications were made in December of 1988. *In re* Applications 22047-g41E and 22048-g41E by Kyler; *In re* Applications 14965-g41E and 19230-c41E by Boone; *In re* Application 33484-g40A by Hunt; *In re* Application 31382-g41J by Mikesell; *In re* Application 54628-g41O by Tangen Ranch; *In re* Application 41255-g41B by Allred.

18. Since the water sought to be appropriated is not groundwater within the meaning of the statutes and McClellan Creek and Prickly Pear Creek are decreed streams, it is subject

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to the authority of court appointed water commissioners to admeasure and distribute to the parties using water in the source of supply to which they are entitled. Mont. Code Ann. § 85-5-101(1) (1987).

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

PROPOSED ORDER

70576-41I

Subject to the terms, conditions, restrictions, and limitations, listed below, a Provisional Permit is hereby granted to the City of East Helena for Application 70576-41I to appropriate 600 gallons per minute up to 840 acre-feet of water per year by means of a horizontal well (infiltration gallery) located in the $N\frac{1}{2}N\frac{1}{2}SE\frac{1}{4}$ of Section 7, Township 9 North, Range 2 West, in Jefferson County. The place of use shall be the City of East Helena, more specifically, the $SW\frac{1}{4}$ of Section 30, Township 10 North, Range 2 West; the $NW\frac{1}{4}$ of Section 31, Township 10 North, Range 2 West; the $NW\frac{1}{4}NE\frac{1}{4}$ of Section 31, Township 10 North, Range 2 West; the $SW\frac{1}{4}$ of Section 24, Township 10 North, Range 3 West; the $S\frac{1}{2}$ of Section 25, Township 10 North, Range 3 West; the $NE\frac{1}{4}$ of Section 36, Township 10 North, Range 3 West, all in Lewis and Clark County. The period of diversion and period of use is from January 1 through December 31, inclusive of each year.

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

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

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

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filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

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

Dated this 19th day of March, 1993.

Vivian A. Lighthizer, 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 Proposal for Decision was duly served upon all parties of record at their address or addresses this 19th day of March, 1993, as follows:

City of East Helena
P.O. Box 1070
East Helena, MT 59635

Eugene L. Helberg
1466 Beaverhead Road
Helena, MT 59601

Beverly Donaldson
3890 Helberg Drive
Helena, MT 59601

Thelma Kleffner
East Helena, MT 59635

Dale Reagor
Luxan & Murfitt
P.O. Box 1144
Helena, MT 59624-1144

Laura Monson
2630 York Road
Helena, MT 59601

Victor Vincent
Prickley Pear Water
Users Association
3150 York Road
Helena, MT 59601

CASE # 70574

Douglas Ashton
4041 Helberg Drive
Helena, MT 59601

Robert Peccia
Robert Peccia & Associates
P.O. Box 5653
Helena, MT 59604-5653

T.J. Reynolds & Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620

Gordon Herrin
1501 Missoula Ave.
Helena, MT 59601

Bill Uthman, Hydrogeologist
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59260

William Sternhagen
Sternhagen Law Firm
25 South Ewing
Helena, MT 59601

Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 70574

BB

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 70576-41I AND 70577-41I BY THE CITY OF EAST HELENA	INTERLOCUTORY ORDER

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing was held in the above-entitled matter on March 12, 1990, in Helena, Montana.

The City of East Helena, the Applicant in this matter, appeared by and through counsel Dale Reagor, and the Mayor of East Helena, Edward Stipich.

Brian Harrison, Consulting Hydrogeologist, appeared as a witness for the Applicant.

Objector Gordon Herrin appeared pro se and by and through Counsel William Sternhagen.

Objector Prickly Pear Water Users Association, appeared by and through Counsel William Sternhagen.

Don Burnham, a farmer and rancher, and a member of the Prickly Pear Water Users Association, appeared as a witness for the Objectors.

Bill Wegner, Water Commissioner, appeared as a witness for the Objectors.

Wes Simpson, who had worked on the East Helena project, appeared as a witness for the Objector.

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Jim Beck, Agricultural Specialist with the Helena Field Office of the Department of Natural Resources and Conservation, appeared at the hearing.

Bill Uthman, Hydrogeologist with the Department of Natural Resources and Conservation, (hereafter Department) appeared at the hearing.

STATEMENT OF THE CASE

The municipal water supply for the City of East Helena was previously obtained by surface water diversions from McClellan Creek under two surface water use claims located above the present development. Two Statements of Claim were filed for these diversions. Water Right Claim No. 113658-41I was filed for water use from Jackson Creek, Lost Creek, and Crystal Creek which was conveyed by McClellan Creek to a point in the NE¼NW¼NE¼ of Section 20, Township 9 North, Range 2 West where it was diverted by means of a headgate. Water Right Claim No. 113659-41I claims water use from Prickly Pear Creek, however, the water was diverted from an unnamed tributary of McClellan Creek which is also located in the NE¼NW¼NE¼ of Section 20, Township 9 North, Range 2 West. The means of diversion for this water right was also a headgate. The total amount of water claimed by these two Water Right Claims is 180 miner's inches or 2,020 gallons per minute (gpm) up to 3,285 acre-feet per year.

On November 20, 1986, the City of East Helena filed an Application for Change of Appropriation Water Right No.

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W113658-41I to change the point of diversion of both Water Right Claims to a point in the N½N½SE¼ of Section 7, Township 9 North, Range 2 West and to change the means of diversion from the headgate systems to two infiltration galleries. The Department issued an Authorization to Change Appropriation Water Right on April 13, 1987.

During the planning stage of this project and the actual installation of the diversions, it was determined that an unquantified amount of groundwater would be appropriated by the new diversions. The City of East Helena then filed the above-entitled Applications to appropriate a total of 1,200 gpm up to 1,680 acre-feet of groundwater per year.

EXHIBITS

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

Applicant's Exhibit 1 consists of one blue line drawing entitled "Site Plan" which shows the location of the new diversion in relation to the ASCARCO Reservoir, McClellan Creek, Prickly Pear Creek, roads, and other identifying landmarks.

Applicant's Exhibit 2 consists of one blue line drawing entitled "Radial Wells Site Plan" which shows details of the new diversion.

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

The Objector offered 10 exhibits for inclusion in the record in this matter.

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Objector's Exhibit 1 is a hand-drawn map of a cross-section of a stream and underlying formations on a sheet of legal-sized paper. Brian Harrison drew the map during the hearing at the request of Objector's Counsel.

Objector's Exhibit 1 was accepted into the record without objection.

Objector's Exhibit 2 is a list used by the Water Commissioner to determine the priority of water users on Prickly Pear Creek. Applicant objected to the entry of this exhibit into the record because it was not relevant.

The Hearing Examiner reserved the decision on the objection and after reviewing this document, finds it not relevant to the instant case. Objection sustained.

Objector's Exhibit 3 consists of five pages. The first page is a copy of an Authorization to Change Appropriation Water Right No. W113658-41I issued to the City of East Helena. The remaining pages are lists of water right owners who were sent notices of the Application for Change of Appropriation Water Right.

The Applicant objected to the entry of this exhibit into the record on the grounds it was not relevant.

The Hearing Examiner reserved a decision on the objection and upon review finds that a copy of the Authorization was in the Department's file which is a part of the record. This document verifies that the Department had approved the Application for Change of Appropriation Water Right prior to the installation of the diversions when it was thought that only surface water would

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be appropriated. The four-page listing of persons who were notified during the processing of the Application for Change of Appropriation Water Right is not relevant to this application; therefore, that listing will not be accepted into the record.

Objector's Exhibit 4 consists of two pages and is a copy of the "Instructions to Water Commissioner" by the First Judicial District of the State of Montana, in Case No. 3435, Beach v. Spokane Ranch and Water Co.

Applicant objected to the entry of this exhibit into the record because it was not relevant to this case.

The Hearing Examiner reserved a decision on the objection and upon review of the document makes the finding that it is not relevant. Objection sustained.

Objector's Exhibit 5 consists of 18 pages which are copies of computer printouts of the Department's Priority Date Index of Surface Water Rights by source, by priority date.

Applicant objected to the entry of this exhibit into the record based on foundation and irrelevancy.

The Hearing Examiner reserved a decision on the objection. Review of the record and the document disclosed that there was no foundation laid for this exhibit and no point to its entry into the record. Objection sustained.

Objector's Exhibit 6A consists of five pages and is a copy of Case No. 4643, Prickly Pear Creek decree. Parties of the hearing called this exhibit the "State Decree".

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Applicant objected to the entry of this exhibit into the record because it was not relevant.

The Hearing Examiner reserved a decision on the objection and upon review of the document finds that the document establishes proof the Objectors do have decreed water rights on either McClellan Creek or Prickly Pear Creek which they fear may be adversely affected by the Applicant's project. Objection overruled.

Objector's Exhibit 6B consists of 18 pages. This is a copy of Case No. 668, Prickly Pear Decree which was referenced as the "Federal Decree".

Applicant objected to the entry of this exhibit into the record because it was not relevant.

The Hearing Examiner reserved a decision on the objection.

Review of this document further establishes proof the Objectors do have water rights which they fear may be adversely affected by the Applicant's project. Objection overruled.

Objector's Exhibit 7 consists of a 12-page report entitled "Report on McClellan Creek Ground Water" for Robert Peccia and Associates prepared by Streamworks of Helena, Montana.

The Applicant objected to the entry of this exhibit on the grounds of no foundation.

Review of the record disclosed there was no foundation laid for this exhibit before offering. Objection sustained.

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Objector's Exhibit 8 consists of a 16-page report entitled "Preliminary Digital Computer Model of the McClellan Creek Aquifer" prepared by Brian J. Harrison.

This exhibit was received into the record without objection.

Objector's Exhibit 9 consists of a 39-page report entitled "Water Supply System Study East Helena, Montana" prepared by Robert Peccia and Associates in September of 1984.

The Applicant objected to the entry of this exhibit into the record on the grounds of foundation.

The Hearing Examiner reserved a decision on the objection. Review of the record disclosed there was no foundation laid for this exhibit before offering, however, this document is pertinent to the case and was prepared for the City of Helena by its consultant, Robert Peccia and Associates. This document was listed on Objector's Supplement to Response for Disclosures of Witnesses and Exhibits dated March 9, 1990. Objection overruled.

The Department's file was reviewed by all parties and received into evidence without objection.

FINDINGS OF FACT

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

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2. The City of East Helena filed Application for Beneficial Water Use Permit No. 70576-41I with the Department on December 12, 1988 at 11:17 a.m., and Application for Beneficial Water Use Permit No. 70577-41I with the Department on December 12, 1988 at 11:16 a.m.

3. The pertinent portions of the Applications were published in the Independent Record, a newspaper of general circulation in the area of the source, on March 29, 1989.

4. Applicants propose to appropriate 600 gpm up to 840 acre-feet per year for each application; a total of 1,200 gpm up to 1,680 acre-feet per year of groundwater for municipal use by means of two radial wells (infiltration galleries) located in the N½N½SE¼ of Section 7, Township 9 North, Range 2 West, in Jefferson County. The place of use will be the City of East Helena, more specifically, the SW¼ of Section 30, Township 10 North, Range 2 West; the NW¼ of Section 31, Township 10 North, Range 2 West; the NW¼NE¼ of Section 31, Township 10 North, Range 2 West; the SW¼ of Section 24, Township 10 North, Range 3 West; the S½ of Section 25, Township 10 North, Range 3 West; the NE¼ of Section 36, Township 10 North, Range 3 West, all in Lewis and Clark County. The proposed period of diversion and period of use is from January 1 through December 31, inclusive of each year. (Department file.)

5. The source of water is subsurface water flowing underground in the aquifer underlying McClellan Creek. McClellan Creek is a decreed stream with a court appointed water commis-

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sioner. The aquifer water which the Applicant seeks to tap is hydrologically connected to the surface water of McClellan Creek. (Testimony of Applicant's witness, Brian Harrison.)

6. The Applicant contends its source of water is ground-water. The Objector believes the source is surface water as defined in the Water Use Act. (Testimony of Brian Harrison and opening statement by Objector's Counsel.)

7. The Water Commissioner for the Prickly Pear Creek basin has, on occasion, had to call on the Applicant to reduce the amount of water diverted from the old point of diversion. On August 25, 1988, Applicant was requested to cease diverting water from McClellan Creek with the new diversion so that a senior water user could exercise his water right. After Applicant ceased to divert, the senior water user was able to exercise his right. However, the water did not reach the senior's place of use until between 24 and 36 hours had elapsed. (Testimony of Bill Wegner and Don Burnham.)

8. The diversion system is complete as authorized by Authorization to Change Appropriation Water Right No. W113658-41I. The Applicant's new diversion system appropriates an unknown quantity of surface water and an unknown quantity of subsurface water.

Water is diverted on the west side of McClellan Creek by two eight inch perforated pipes, 150 feet long, buried horizontally in trenches 16 feet deep. Each pipe is connected to a collector from which a submersible pump delivers water to the municipal

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water system. On the east side of McClellan Creek there is a similar arrangement except the perforated pipes are 120 feet long. (Testimony of Brian Harrison.)

9. There is a large quantity of subsurface water in the area surrounding the diversions. Pumping from approximately 120 wells, 16 feet deep, located at 10-foot intervals around the diversion area was not enough to dewater the area to permit installation of the diversions. While digging the trenches for the diversions, the water was flowing in so rapidly that in addition to the wells, up to seven holes were dug by a backhoe to a depth of 25 feet, a plastic casing and pumps were installed. This action still did not stop all the flow of water. (Testimony of Wes Simpson.)

10. To determine the amount and percentage of surface water and subsurface water appropriated by the new system, a testing program must be instituted. (Testimony of Brian Harrison.)

11. The Applicant stated it was willing to undertake a testing program that will quantify the contribution of groundwater and if the Department feels it is necessary to undertake some kind of specific program that they would submit a proposal for the Department's consideration. (Testimony of Brian Harrison.)

12. Applicant has two groundwater wells which may be used when the McClellan Creek right has been reduced or shut off by the Water Commissioner. When the Applicant must rely on these

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wells as the sole source of water, the water use in the City of East Helena is restricted. (Testimony of Mayor Edward Stipich.)

13. Department records reveal no other planned uses or developments for which a permit has been issued or for which water has been reserved.

The Missouri River system is presently involved in a water reservation process; however, as yet no reservations have been granted.

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

PROPOSED CONCLUSIONS OF LAW

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

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

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;

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(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, municipal, is a beneficial use of water. See § 85-2-102(2)(a), MCA.

5. The proposed means of diversion, construction, and operation of appropriation works are adequate. See Findings of Facts 4 and 8.

6. The Applicant does not have possessory interest in the place of use. However, part of its governmental duties are to supply the residents and businesses of the City of East Helena with water.

7. 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 Finding of Fact 13.

The Missouri River system presently is involved in a water reservation process. If such a reservation were to be granted by the Board of Natural Resources and Conservation, that reservation, with a 1985 priority date would be senior to the instant applications which have a 1988 priority date.

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8. The Applicant has failed to sustain its burden of proof that there are unappropriated waters readily available in the source of supply in the amount the applicant seeks to appropriate at times when the water can be put to the use proposed during the period in which the applicant seeks to appropriate. Although the diversion works are in place and have been for two years, there is no evidence concerning the amount of groundwater appropriated by the new system, if in fact the subsurface water is groundwater. See Findings of Fact 5, 6, 7, and 8.

9. The Applicant has failed to sustain its burden of proof regarding adverse effect. Although it is clear that some subsurface water is available for appropriation, the effect on McClellan Creek and Prickly Pear Creek and the actual amount of water available remain to be determined. See Findings of Fact 5, 6, 7, and 9.

10. The Department has the authority to issue an Interim Permit authorizing an applicant to begin appropriating water immediately, ARM 36.12.104.

11. There is substantial evidence that the criteria for a provisional permit will be met. However, the only way to determine the amount of water appropriated from both the surface water and the subsurface water is through a testing period. See Findings of Facts 8 and 10.

12. The purpose of an Interim Permit is to allow the Applicant to begin a testing period, to include actual withdrawal and application to beneficial use, of the water for which the

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Permits are sought. Because of the uncertainty regarding the amount actually available and the extent of stream depletion, the grant of Interim Permits is appropriate herein. The Applicant is thereby authorized to gather the data, which is unobtainable by any other means, necessary for it to show the existence of the statutory criteria for provisional permit issuance.

13. The issuance of an Interim Permit does not entitle the Applicant to a provisional permit. To be entitled to a provisional permit, Applicant is still under a duty to show that which remains uncertain: a) the appropriation will not adversely affect the water rights of prior water right owners; and b) there is unappropriated water in the source of supply at the proposed points of diversion, at times when the water can be put to the use proposed by the applicant, and that during the period in which the applicant seeks to appropriate, the amount of water is reasonably available.

14. Board Rule 36.12.103(c) requires a fee of $10.00 before the issuance of an Interim Permit, in addition to the regular filing fee.

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

INTERLOCUTORY ORDER

Subject to the terms, conditions, restrictions, and limitations listed below and upon receipt of the proper filing fees, 1) an Interim Permit is hereby granted to the City of East Helena

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for Permit Application No. 70576-41I to appropriate 600 gpm up to 840 acre-feet per year by means of a radial well and 2) an Interim Permit is hereby granted to the City of East Helena for Permit Application No. 70577-41I to appropriate 600 gpm up to 840 acre-feet per year by means of a radial well both located in the N½N½SE¼ of Section 7, Township 9 North, Range 2 West, in Jefferson County, Montana.

The water is to be used for municipal use in the City of East Helena, more specifically, the SW¼ of Section 30, Township 10 North, Range 2 West; the NW¼ of Section 31, Township 10 North, Range 2 West; the NW¼NE¼ of Section 31, Township 10 North, Range 2 West; the SW¼ of Section 24, Township 10 North, Range 3 West; the S½ of Section 25, Township 10 North, Range 3 West; the NE¼ of Section 36, Township 10 North, Range 3 West, all in Lewis and Clark County.

A. The Permittee shall submit a testing program to the Department's Helena Water Rights Bureau Field Office for approval within 60 days after receipt of this Order. After Departmental approval of the program, the Applicant shall install the necessary measuring devices subject to the supervision and approval of the aforementioned Department personnel. Failure to submit the testing program in the aforementioned time period, will cause the above-entitled permit applications to be denied with prejudice.

B. The Permittee shall install flow meters on the pipes leading from the pumps that are capable of measuring the length of time pumped and amounts of water pumped.

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C. The Permittee shall keep a written record of the flow rate and volume of waters withdrawn, including the times of pumping, shall make these records available to the Department upon request, and at the end of the test period submit all records to the Hearing Examiner.

D. These Interim Permits are 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 to the flow of water may be stopped when not being put to beneficial use.

E. These Interim Permits are subject to all prior existing water rights in the source of supply. Further, these Interim Permits are subject to any final determination of existing water rights, as provided by law.

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

G. The water rights granted by these Interim Permits are subject to the authority of court appointed water commissioners to admeasure and distribute to the parties using water in the source of supply to which they are entitled. The permittee shall pay its proportionate share of the fees and compensation and

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expenses, as fixed by the district court, incurred in the distribution of the waters.

H. These Interim Permits shall be valid through October 31, 1991, for purposes of testing to determine the effect of Permittee's pumping on McClellan Creek and to determine the amount of surface and subsurface water diverted by the radial wells.

NOTICE

After expiration of these Interim Permits, another hearing will be held on the issues of adverse effect and water availability wherein the Applicant and Objectors will present further evidence thereon. After presentation of evidence, the Hearing Examiner will prepare a Proposal for Decision to which all parties will have an opportunity to present exceptions and request further oral argument before a final departmental decision is issued.

Dated this 23rd day of April, 1990.

Vivian A. Lighthizer

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

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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 23rd day of April, 1990, as follows:

City of East Helena
P.O. Box 1070
East Helena, MT 59635

Eugene L. Helberg
1466 Beaverhead Road
Helena, MT 59601

Beverly Donaldson
3890 Helberg Drive
Helena, MT 59601

Thelma Kleffner
East Helena, MT 59635

Douglas Ashton
4041 Helberg Drive
Helena, MT 59601

Gary Swanson
Robert Peccia & Associates
P.O. Box 4518
Helena, MT 59604-4518

T.J. Reynolds, Field Manager
Helena Field Office
1520 East 6th Avenue
Helena, MT 59620

Dale Reagor
Luxan & Murfitt
P.O. Box 1144
Helena, MT 59624-1144

Laura Monson
2630 York Road
Helena, MT 59601

Victor Vincent
Prickley Pear Water
Users Association
3150 York Road
Helena, MT 59601

Gordon Herrin
3860 Floweree Drive
Helena, MT 59601

Bill Uthman, Hydrogeologist
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59260

William Sternhagen
Keller, Reynolds, Drake,
Sternhagen & Johnson
38 S. Last Chance Gulch
Helena, MT 59601

Irene V. LaBare
Legal Secretary

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