

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 71133-g41B BY CLAYTON AND )  
RAY HILDRETH )

\* \* \* \* \*

On December 5, 1989, the Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended granting the subject Application. Timely written exceptions were received from Objectors Archie and Millie Hayden, George and Ellen Laknar, Larry and Margaret Laknar, and Judith Laknar McKelvey. The Applicant subsequently filed a timely written response to the exceptions.

The Department of Natural Resources and Conservation ("Department") has reviewed the entire record and considered the exceptions. In most cases the Hearings Examiner's findings of fact are supported by substantial evidence in the record and therefore may not be modified or rejected by the Department. Mont. Code Ann. § 2-4-621 (1989). However, the 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.

CASE # 71133

Objector McKelvey excepted to the renumbering of his exhibits in the Proposal for Decision because the renumbered exhibits excluded an exhibit that had been admitted at the hearing. Although not numbered in the Proposal, the exhibit is part of the record. The Department agrees with the Hearing Examiner, however, that the exhibit has little evidentiary value. Consideration of the excluded exhibit does not alter this Final Order. Therefore, the Department will continue to refer to the exhibits as specified in the Proposal for Decision.

#### 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 Applicants have not made application for appropriation of water as described under § 85-2-306 (1985), MCA. Therefore, § 85-2-302, MCA, applies in this matter.

2. Application for Beneficial Water Use Permit No. 71133-g41B was duly filed with the Department of Natural Resources and Conservation on April 4, 1989, at 11:18 a.m.

3. The pertinent portions of the Application were published in the Tribune Examiner, a newspaper of general circulation in the area of the source, on April 25, 1989.

4. The source of water for the proposed appropriation is groundwater by means of two wells.

5. The Applicants have contracted the services of Everly and Associates, Consulting Engineers, to gather data and formulate a feasible plan, based on the information available, for the construction and operation of the appropriation works. Applicants' Exhibit 3 is the engineer's supplementary report for Hildreth Major Subdivision No. III. Among other findings, this report concluded the peak flow rate demand based on expected use, the size and type of water delivery system to each of the 44 planned lots, drainfield design, etc.

The Applicants have applied for 300 gallons per minute (gpm) up to 70 acre-feet of water per year for multiple domestic uses. The groundwater withdrawal will be made by means of two wells located approximately 150 feet from each other in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. Water from the wells will be conveyed by six-inch PVC main line. From this main line a 3/4-inch supply line will feed each of the 44 planned lots in the subdivision plus two park areas of the Hildreth Major Subdivision III. The proposed place of use is in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. The requested period of appropriation is January 1 through December 31, inclusive of each year.

The Haydens excepted to this Finding but raise no issue of error. The exception questions how water use will be measured

and use controlled. Condition D requires the Applicant to install a flow meter and measure and record water usage monthly. After 70 acre-feet is used, the Applicant must cease taking water by law.

6. The Application in the matter requests 300 gpm from two wells. However, the testimony of Applicant Hildreth and Everly, witness for the Applicants, indicates that 175 gpm, is sufficient to satisfy the peak demand for the domestic uses, including irrigation of lawn and gardens for which the Applicants applied. There was testimony that a maximum of 350 gpm could be required during a fire.

Each of the Applicants' two proposed wells will be capable of pumping the 175 gpm peak demand requirement. The purpose of having two wells with similar capabilities is to meet the Department of Health and Environmental Sciences' duplicate water supply requirement for subdivisions (Everly's testimony).

7. Applicants have possessory interest of the land at the intended place of use. (See Applicants' Exhibit 4.)

8. The Applicants purchased 28 acres of land, now described as the intended place of use, from Garth Taylor. Together with the land, the Applicants also purchased a portion of the Garth Taylor Beneficial Water Use Permit No. 54490-g41B amounting to 223 gpm up to 70 acre-feet of water per year for irrigation purposes. (See Applicants' Exhibit 6.)

The Applicants' original intent was to change the purpose and period of use of the Permit, appurtenant to the 28 acres they

bought from Garth Taylor, from irrigation to multiple domestic use, and to make it year-round use instead of seasonal irrigation use (Applicants' testimony). Upon review of Applicant Hildreth's request to change the type of use and period of use of the portion of Beneficial Water Use Permit No. 54490-g41B, the Department advised the Applicants that in addition to an Authorization to Change, a Permit was also needed to extend the period of use to year-round. However, the Department suggested that an Application for a Beneficial Water Use Permit could be fashioned instead to include all of the Applicant's requirements (Beck's testimony). The Applicant chose the latter alternative.

At the hearing Applicant Hildreth indicated his willingness to exchange his irrigation right under Beneficial Water Use Permit No. 54490-g41B for a multiple domestic use right with a year-round period of use (testimony of Applicant Hildreth). Much of the findings and conclusions in this order are premised on the Applicant relinquishing this irrigation right. The permit is therefore conditioned on such a relinquishment. (See Condition E).

9. Applicant Hildreth introduced geohydrologic reports (memoranda) written by past and present DNRC geohydrologists. Applicants' Exhibit 8A is a geohydrologic report by a former DNRC geohydrologist concerning the Garth Taylor well, Beneficial Water Use Permit No. 54490-g41B, which is located approximately 800 feet from Applicants' proposed wells. Applicants' Exhibit 8B is a geohydrologic report by a current DNRC geohydrologist concern-

ing a previously proposed land subdivision development called Pioneers' Peaks Estates, Application for Beneficial Water Use Permit No. 65284-g41B. Both of these reports were prepared for groundwater applications near the area where Applicant Hildreth proposes to utilize the wells applied for in this matter. Neither of the authors of these reports were present to explain or answer questions regarding their reports. Applicants' Exhibit 8D is a geohydrologic report written by Mark Shapley, DNRC geohydrologist, and is specific to the Application in this matter. Shapley testified at the hearing explaining the report he wrote and the data he used. Shapley was also available for cross-examination by all parties.

Shapley explained that he investigated the work previously conducted by Lemire, Uthman and their predecessor Tom Patton. In addition, he has had extensive field experience in testing aquifers with similar characteristics in other parts of the State (Shapley's testimony).

10. The data included in the geohydrologic report by Uthman and Shapley indicates that the Applicants will be withdrawing water from an aquifer that extends vertically from a few feet below ground surface (6 to 10 feet) to 70 feet or more in depth. All groundwater appropriations in the area take water from the same aquifer (Shapley's testimony).

The main source of water recharge for this aquifer is the Beaverhead River. Other water recharge sources that may dictate

the seasonal static water level of the aquifer include irrigation runoff, precipitation, and snow melt (Shapley's testimony).

The static water level of the aquifer has lowered in the last few years. (See Objector Barnes' Exhibit 1.) One explanation for the seasonal lowering of the static water level of this aquifer is the conversion from flood irrigation to sprinkler irrigation by several irrigators in the area. Sprinkler irrigation, being more efficient in the application of water to a specific crop, does not afford as much runoff as flood irrigation. Thus, less water is available to percolate into the aquifer (Applicants' testimony).

The Objectors assert in their exceptions that contrary to the finding, the Beaverhead is not the main source of recharge for the aquifer. The exceptions further assert that the decline in water levels is due to increased groundwater use rather than the change to sprinkler irrigation.

The Department may not reject the Hearing Examiner's findings of fact if they are supported by substantial credible evidence. Mont. Code Ann. §2-4-621(3)(1989). Here the excepted to findings are supported by the testimony of Mark Shapley and are therefore adopted. However, the Department does not disagree that groundwater usage can deplete groundwater. Anticipated effects of groundwater are more fully discussed in Findings of Fact No. 13, 14 and 16.

11. One of the two wells for which the Applicants have applied is already drilled and has been used for monitoring pur-

poses. This well first encountered water at a depth of 58 feet, and the water rose under artesian pressure to within 14 feet of ground surface.

Monitoring of the static water level on Applicants' well took place this year. On June 10th the water had risen to within 12 feet of ground surface, on June 29th to within 10 feet, on August 1st to within 9 feet, and on August 26th to within 8.5 feet. This monitoring took place while the Garth Taylor well and the Stoddard well, both within 1/4 mile of Applicants' well, were pumping at a rate of 1100 gpm and 840 gpm respectively (Everly's testimony). (See also Applicants' Exhibit 11.)

12. Applicant Hildreth testified that he did not know of any other Permits issued from the same source which had not been developed and the water used. Additionally, Objector Larry Laknar's Exhibit 1 is a computer listing from the DNRC showing all the water rights on file for this area. This computer listing does not show any Reservations of Water issued for this area, or appurtenant to the source of supply in question, in the Application in this matter.

The Laknars have asserted in their exceptions that the City of Dillon has applied for a water reservation from the same aquifer. This alleged fact was not offered at the hearing and is not part of the record. Regardless, if it were true that the City of Dillon's well would be in the same aquifer, it would be up-gradient from the Applicant's project and therefore not effect this decision.

13. One of the major concerns voiced by most of the Objectors is the possibility of the static level on their wells lowering further than found at present. The closest well to Applicants' proposed wells is the Larry Laknar well which is approximately 300 feet from Applicants' north property line (Objector Larry Laknar's testimony). According to Applicants' Exhibit 2 the approximate distance from Applicants' well to the north property line is 300 feet. Therefore, the total distance from Applicants' well to the closest of the Objectors' wells is 600 feet. This calculation was made by adding the distance from Objector Larry Laknar's well to Applicants' north property line, approximately 300 feet, to the distance from Applicants' well to the north property line, approximately 300 feet. (See Applicants' Exhibit 2.)

Shapley described the aquifer from which the Applicants will be withdrawing water as highly transmissive and unconfined. Shapley concluded that due to the nature of the aquifer, Applicants' use of water as permitted would have minor interference with other wells in the area. (See Applicants' Exhibit 8D). Shapley's calculations project a static water level draw down of 1.2 feet or less within 100 feet of Applicants' proposed wells at a pumping rate of 300 gpm. Less draw down will occur at the project's maximum pumping rate of 175 gpm and at farther distances. Moreover, Shapley's calculations do not consider recharge by the subdivision's septic systems nor possible repumping of septic system discharge by the proposed wells. Finally, peak

water use from the subdivision will occur during the irrigation season when groundwater levels as indicated by measurements of the subdivision's observation wells generally increased. (Everly Testimony and Finding of Fact No. 11). Consequently, the drawdown effect, if any, is expected to be negligible.

14. Several Objectors indicated concern with water quality degradation due to discharge from the proposed subdivision septic systems. This concern for the degradation of water quality on existing wells is well founded, since low quality water may prevent a previous appropriator from exercising their water rights. However, due to the type of development, i.e., subdivision of land for single family dwellings, the Water Quality Bureau of the Department of Health and Environment Sciences (DHES) has authority to approve, modify, or to deny a subdivision development based on adverse impact to the public drinking water supply, or on minimal impact to other wells in the area. The DHES maximum allowable standard for drinking water is ten parts per million at the subdivision boundary. ARM Section 16.16.303.

Everly's estimated pollution factor, due to septic systems discharge into the aquifer from the proposed 44 lots, is 0.001%. This prediction is based on the septic systems discharge being absorbed by the entire aquifer, i.e., horizontally as well as vertically.

Shapley's estimate of groundwater pollution included the factor of the aquifer gradient, which when mapped by Tom Patton in the 1970's, was calculated at 0.0029%. The gradient factor

introduced by Shapley indicates that the pollution would not be absorbed by the entire aquifer, but rather the vertical contamination would be limited due to the slope at which the groundwater in the area moves. Therefore, Shapley's prediction of 2% pollution factor is much higher than predicted by Everly. In this specific case the 2% pollution factor translates to .9 milligrams per liter, or .9 parts per million nitrate which is still less than a tenth (1/10) of the allowable standard. (See Applicants' Exhibit 8D.)

Consequently, based upon Shapley's report and other evidence in the record, water quality effects are expected to be negligible.

The exceptions question the assumption that septic systems will be installed according to standard. This Permit is conditioned to the effect that DHES standards will be complied with. Therefore, if these septic systems are not installed according to standard, the Applicant will be in violation of both DHES laws and this Permit.

15. Objector McKelvey's Exhibit 1 demonstrates the concern of the location of Applicants' wells in regards to their proximity to the septic systems in the subdivision. Shapley's report also questions the integrity of the water supply well due to its location. Shapley believes that, due to the characteristics of the aquifer in question, less nitrate than predicted will leave the boundary of the subdivision because some of the subdivisions'

effluent will be recaptured by Applicants' pumping well. (See Applicants' Exhibit 8D.)

16. Objector Hayden testified that he uses water from the Selway Slough for irrigation. Objector Hayden's Exhibit 1 also states that the Meine Brothers, Objectors of record, have a right for 228 miner's inches of water from the Selway Slough. Objector Larry Laknar testified that springs, sloughs, and drain ditches have been losing volume.

Shapley summarizes in his report (Applicants' Exhibit 8D) that surface waters may be depleted under certain pumping scenarios but that surface flows can be expected to increase during the summer irrigation season. Shapley's estimates assumed that the sloughs did not receive any recharge from surface or groundwater. Consequently, any slough depletion as predicted by Shapley will be less than predicted. Moreover, Bill Uthman estimates a negligible effect to Selway and Murray-Gilbert Sloughs during pumping at a constant 400 gpm in the same aquifer. (Applicant Exhibit 8B). These reports taken in conjunction with the negligible drawdown effect (Finding of Fact No. 14) and the fact that the sloughs are over 1000 feet away from the proposed wells indicate negligible depletion of flows on the sloughs.

The Objectors offered no testimony concerning the lowering of pump intakes, or the cost, or the ease or ability of making gravity diversions from the sloughs under the changed water levels if any.

This Finding of Fact has been modified from the proposed Finding after a review of the complete record. The Hearing Examiner's finding could leave a reader with the impression that the effects on the sloughs might be significant eventhough factual information included with the proposed Conclusion of Law No. 10 tends to negate a finding of significant adverse effects.

#### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantial and procedural requirements of law or rules have been fulfilled, therefore, the matter was properly before the Hearing Examiner. (See Findings of Fact 2 and 3.)

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. (See Findings of Fact 1.)

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria 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 during which the applicant seeks to appropriate, the amount requested is available;

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

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

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

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

(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.

Mont. Code Ann. § 85-2-311 (1989).

4. The proposed use of water, multiple domestic, is a beneficial use of water. (See § 85-2-102(2), MCA. See also Findings of Fact 5.)

5. The Applicants have possessory interest of the land at the intended place of use. (See Findings of Fact 7.)

6. Applicants' request for 300 gpm flow rate is excessively high for the intended use. Applicants' testimony indicates that 175 gpm is the peak flow rate demand for the intended use. Since the second well is merely a backup system as per DHES requirement, the only time it would be used is when the first well fails. (See Findings of Fact 6.) However, assuming the pumping is from either one well or from a combination of both wells, the maximum withdrawal should not surpass the peak demand of 175 gpm. The Applicants peak pump rate of 300 gpm was intended only for fire protection. No Beneficial Water Use Permit is required for diversion to fight fire. (See Crop Hail Management Inc., Permit No. 41432-g76LJ, F.O. issued 11-28-84.)

7. Applicant Hildreth has proven by substantial credible evidence that there are unappropriated waters in the source of supply, at the proposed points of diversion, at times when the

water can be put to the proposed use, in the amount requested, and during the period during which the Applicant seeks to appropriate. (See Findings of Fact No. 10 & 11.)

8. Applicant Hildreth has proven by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact No. 5).

9. Applicant Hildreth has proven 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 Finding of Fact 12.)

10. Applicant Hildreth has proven by substantial credible evidence that the proposed use will not adversely affect the water rights of prior appropriators.

As indicated by the objections filed there are three areas of concern by the Objectors. They are as follows: adverse impact to existing wells, adverse impact due to degradation of water quality, and adverse impact to the surface water sources in the area. However, the record indicates that the impact on these areas will be negligible. (See Findings of Fact 13-16). If the impact is negligible then there is no adverse impact. (See, Kenyon-Noble Ready Mix Co., Permit No. 24591-g41H, Final Order issued 1-23-82.)

The surface water appropriators complain that they should not be forced to "chase the water into the ground" because of

subsequent groundwater appropriators. The Department's finding that there will be negligible impacts to surface water rights negates the need to consider this argument. However, because of the importance of the issue generally and in response to the exceptions, the Department will discuss the matter briefly here.

Priority of appropriation does not include the right to prevent new appropriators from decreasing water levels as long as the senior appropriator can reasonably exercise his or her right under the new conditions. Mont. Code Ann. § 85-2-401(1989); See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). The test of whether prior appropriators can reasonably exercise their rights applies to both "surface water" or "groundwater" supplies. (Permit No. 31441-g41R, In re Application by McAllister, Final Order issued 7-15-85). The determination must be made on a case by case basis considering the facts concerning the ease and cost of adjusting prior appropriator's diversions. Here, the Applicants offered testimony to establish that the effect on the sloughs would be negligible and the Objectors did not offer evidence to establish that they would not be able to reasonably exercise their right under the changed water levels if any. (Finding of Fact No. 16). Consequently, the Department can only conclude as it did that senior water rights will not be adversely impacted.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71133-g41B is hereby granted in part and denied in part without prejudice. The Permit is hereby granted to Clayton and Ray Hildreth to divert groundwater at the rate of 175 gpm up to 70 acre-feet of water per year for multiple domestic use.

The water will be diverted by means of two wells located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. Water from the wells will be used to supply multiple domestic water to the proposed 44 lots within the Hildreth Major Subdivision III, which is located in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana.

The period of use shall be January 1 through December 31, inclusive of each year. The priority date for this Permit is April 4, 1989, at 11:18 a.m.

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

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

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise

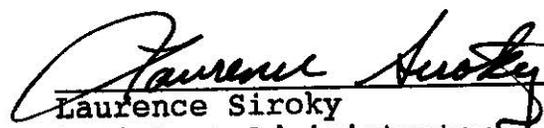
of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. Before exercising the right to use the water under this Permit, the Applicants must possess the necessary licenses and permits required by the DHES, which are customary for this type of water development. This Permit is also subject to the Permittee, or predecessors, abiding by the terms, conditions, restrictions, and limitations imposed by the DHES as part of their license or Permit requirements.

D. The Permittee shall install a flow meter and record the water use and water level in each well monthly. The static water level shall be measured in the designated well on the 15th of each month from April 15 to November 15, inclusive. The well shall not be operated (pumped) for four hours prior to the measurement. The Permittee shall keep a written record of these measurements and submit them to the Helena Field Office by November 30 of that year.

E. The Permittee shall not be exercising any rights under this Permit until the Department is notified in writing that the Permittee's rights to the Garth Taylor well, Beneficial Water Use Permit No. 54490-g41B, are relinquished and forever abandoned.

Dated this 1 day of June 1990.

  
\_\_\_\_\_  
Laurence Siroky  
Assistant Administrator  
Department of Natural Resources  
and Conservation

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served by first class mail upon all parties of record at their address or addresses this 3<sup>rd</sup> day of June, 1990, as follows:

Clayton and Ray Hildreth  
1025 Webster Lane  
Dillon, MT 59725

Max A. Hansen, P.C.  
310 East Sebree Street  
P.O. Box 1301  
Dillon, MT 59725

George and Ellen Laknar  
4900 Laknar Lane  
Dillon, MT 59725

Norman and Estelle Hill  
4830 Laknar Lane  
Dillon, MT 59725

Ivan Hale  
4600 Carrigan Lane  
Dillon, MT 59725

Archie and Millie Hayden  
4850 Laknar Lane  
Dillon, MT 59725

Tom Barnes  
P.O. Box 93  
Dillon, MT 59725

William R. Pierce  
2125 Webster Lane  
Dillon, MT 59725

Mark Shapley, Hydrologist  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

T.J. Reynolds, Field Manager  
Water Rights Bureau F.O.  
1520 6th Avenue  
Helena, MT 59620

Jerry R. Meine and  
Richard R. Meine  
d/b/a/ Meine Brothers  
2915 Anderson Lane  
Dillon, MT 59725

Judith Laknar McKelvey  
2850 Grizzly Gulch  
Helena, MT 59601

Dennis and Beverly McCoy  
5600 Highway 91 North  
Dillon, MT 59725

Big Sky Missionary  
Baptist Church  
P.O. Box 325  
Dillon, MT 59725

Glen W. Hayden  
17 East Bannack  
Dillon, MT 59725

Floyd T. Barnes and  
Cynthia K. Barnes  
4100 Highway 91 North  
P.O. Box 93  
Dillon, MT 59725

Larry and Margaret Laknar  
4800 Laknar Lane  
Dillon, MT 59725

Michael Wityk  
Department of Health and  
Environmental Sciences  
Cogswell Building  
Helena, MT 59620

Cindy Campbell  
Cindy Campbell, Secretary  
Water Rights Bureau

BB

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 71133-g41B BY CLAYTON AND )  
RAY HILDRETH )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 29, 1989, in Dillon, Montana. The record was left open at the conclusion of this hearing until September 12, 1989, for the submission of evidence by Objector Barnes and the response to said evidence by the Applicants.

APPEARANCES

Applicants Clayton and Ray Hildreth (hereafter, "Applicants" or "Applicant Hildreth") appeared at the hearing pro se.

Walter Everly (hereafter, "Everly") appeared as a witness for the Applicants.

Jim Beck (hereafter, "Beck"), Civil Engineer Specialist III for the Helena Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (DNRC), was called as a witness by Applicant Hildreth.

Objector Judith Laknar McKelvey (hereafter, "Objector McKelvey") appeared at the hearing by and through her spouse Patrick McKelvey.

**CASE # 71133**

Objectors George and Ellen Laknar (hereafter, "Objector Laknar") appeared at the hearing pro se.

Objector Big Sky Missionary Baptist Church (hereafter, "Objector Myers") appeared at the hearing by and through Pastor David Myers.

Objectors Jerry R. Meine and Richard R. Meine (hereafter, "Objector Meine") appeared at the hearing pro se.

Objectors Archie D. and Millie Hayden (hereafter, "Objector Hayden") appeared at the hearing pro se.

Objectors Larry and Margaret Laknar (hereafter, "Objector Larry Laknar") appeared at the hearing pro se.

Objectors Floyd T. and Cynthia K. Barnes (hereafter, "Objector Barnes") appeared at the hearing pro se.

Objectors Dennis and Beverly McCoy (hereafter, "Objector McCoy") appeared at the hearing pro se.

Mark Shapley, geohydrologist for the DNRC, appeared as staff expert witness.

Objectors of record not present at the hearing are as follows: Norman and Estelle Hill, Glenn W. Hayden, and William R. Pierce.

#### PRELIMINARY MATTERS

Objector McKelvey requested to know why the Clark Canyon Water Supply Company and the East Bench Irrigation District had not received notice of the hearing since he believed both entities had filed objections to the Application in this matter. Furthermore, Objector McKelvey had copies of the objection forms

that had been filled out by the above stated entities. Copies of these objections were marked for the record as Objector's Exhibit 1.

Upon examination of the objection copies submitted, the Hearing Examiner finds that these copies do not contain a DNRC receipt date. A review of the information on the file record also reveals no indication that these objections were filed with or received by the DNRC.

Therefore, since the record reflects that these objections were not filed by the proper representatives of the aforementioned irrigation companies, the Hearing Examiner finds these documents, named Objector's Exhibit 1 for the record, to have no relevance to the Application in this matter.

#### EXHIBITS

Applicants submitted 16 exhibits for inclusion in the record in this matter. All of the Applicants' exhibits were admitted for inclusion in the record in this matter without objection. NOTE: Applicants' exhibits were not consecutively numbered as some numbers were omitted, however, they are numbered starting with the first exhibit being Applicants' Exhibit 1 and the last exhibit being Applicants' Exhibit 17.

Applicants' Exhibit 1 is a floodway map published by the Federal Emergency Management Agency, and dated September 30, 1982. On this map Applicant Hildreth has drawn in red the boundary of the proposed place of use as well as the approximate

location of both wells which will serve as the points of diversion.

Applicants' Exhibit 2 is a copy of a subdivision map titled "Preliminary Plat of Hildreth Major Subdivision III." On this map Applicant Hildreth has indicated in red the 44 property lots that make up the proposed place of use. Also indicated on this map is the approximate location of both wells which will serve as the points of diversion.

Applicants' Exhibit 3 is an engineer's supplementary report for the Hildreth Major Subdivision No. III prepared by Everly and Associates, Consulting Engineers.

Applicants' Exhibit 4 is a Title Insurance Guarantee document from the First American Title Insurance Company for the lands under the Hildreth Subdivision No. III.

Applicants' Exhibit 5 is a copy of a letter from Jim Beck to Garth P. Taylor asking confirmation that part of the place of use under Beneficial Water Use Permit No. 54490-g41B had been sold to Raymond Hildreth.

Applicants' Exhibit 6 is a copy of a three-page memorandum from Jim Beck concerning the verification of Beneficial Water Use Permit No. 54490-g41B and dated September 21, 1988.

Applicants' Exhibit 8A is a copy of an eight-page geohydrology report for Application for Beneficial Water Use Permit No. 54490-g41B by Paul Lemire, geohydrologist for the DNRC, Water Management Bureau, dated August 27, 1984.

Applicants' Exhibit 8B is a copy of a 12-page geohydrology report for Application for Beneficial Water Use Permit No. 65284 by Bill Uthman, geohydrologist for the DNRC, Hydrosciences Section, dated December 7, 1987.

Applicants' Exhibit 8C is a copy of a three-page letter from M. K. Boltz, P.E. to Schellock Engineering and Associates, concerning the Hildreth Subdivision No. 2 and Keller Subdivision No. 2.

Applicants' Exhibit 8D is a copy of a 22-page report, plus a map, written by Mark Shapley for the Application in this matter and dated July 26, 1989.

Applicants' Exhibit 10 is a copy of a letter from Jim Beck to Robert Everly, Everly and Associates, dated February 17, 1989, concerning the Hildreth Subdivision Well.

Applicants' Exhibit 11 is a copy of a two-page letter with four attached supplementary pages written by Walter F. Everly to Ray Hildreth concerning the Hildreth test well drawdown, and dated August 27, 1989.

Applicants' Exhibit 13 is a copy of an Irrigation Statement of Claim filed by George and Ellen Laknar.

Applicant's Exhibit 14 is a copy of a one-page letter with an additional three pages attached written by Eugene Regan, Beaverhead County Sanitarian, to Steve Pilcher, Water Quality Bureau, and dated May 1, 1987.

Applicants' Exhibit 15 is a copy of a letter from Rick Duncan, Environmental Specialist with the Water Quality Bureau, addressed to Ray Hildreth, and dated July 27, 1987.

Applicants' Exhibit 17 is a seven-page report from Jim Brockett, Beaverhead County Planning Director, to the Beaverhead County Board of Commissioners, dated September 30, 1988.

Objector McKelvey submitted two exhibits for inclusion in the record in this matter.

Objector McKelvey's Exhibit 1 is a copy of a letter from Walter Everly to Steve Pilcher, et al., dated July 31, 1989, concerning the Hildreth Subdivision III Water and Sewer System, Beaverhead County.

Objector McKelvey's Exhibit 2 is a handwritten table summarizing and comparing the responses from five different geohydrologist and engineer reports.

Objector McKelvey's Exhibit 1 and 2 were admitted for inclusion in the record in this matter without objection.

Objector Larry Laknar submitted three exhibits for inclusion in the record in this matter.

Objector Larry Laknar's Exhibit 1 is a DNRC computer listing dated August 15, 1989, and which contained 23 pages of water rights for the area around the proposed project.

Objector Larry Laknar's Exhibit 2 is a three-page summary of the number and type of groundwater uses for Sections 5, 6, 7, and 8 of Township 7 South, Range 8 West, and for Sections 30, 31, and

32 of Township 6 North, Range 8 West. This exhibit is intended to be used in conjunction with Objector Larry Laknar's Exhibit 3.

Objector Larry Laknar's Exhibit 3 is a blowup copy of a USGS topographic map covering the sections of land within two townships described on the preceding exhibit. Objector Larry Laknar has color coded the different types of groundwater uses and has indicated the approximate location of these uses.

Objector Laknar's Exhibits 1 through 3 were admitted for inclusion in the record in this matter without objection.

Objector Hayden submitted one exhibit for inclusion in the record in this matter.

Objector Hayden's Exhibit 1 is a copy of a signed statement by G. W. Hayden, dated August 28, 1989, describing Hayden's and the Meine Brothers' claim to water from Selway Slough.

Objector Hayden's Exhibit 1 was admitted for inclusion in the record in this matter without objection.

Objector Laknar submitted three exhibits for inclusion in the record in this matter.

Objector Laknar's Exhibit 1 is a summary of the water rights claimed by George Laknar and Larry Laknar. The second page of this exhibit is a copy of a USGS topographical map showing the approximate location of each of the rights summarized on the first page.

Objector Laknar's Exhibit 2 is a copy of pages 2, 9, 9 (repeated), 10, 12, 11, (out of order) 13, and 17 of the Beaverhead County Soils Report by the Soil Conservation Service. The last

page of this exhibit is a copy of a soils map for an area which encompasses the proposed place of use of the Application in this matter, and the lands owned by George Laknar.

Objector Laknar's Exhibit 3 is five copies of handwritten and four copies of typewritten pages indicating static water level depth (from top of casing) for the 16 wells measured by the Soil Conservation Service during the period of May 10 to October 4, 1977. The tenth page is a copy of an aerial photograph showing the approximate location of the 16 wells within George Laknar's property.

Objector Laknar's Exhibits 1 through 3 were admitted for inclusion in the record in this matter without objection.

Objector Barnes submitted one exhibit for inclusion in the record in this matter within the time allowed for submission of said evidence.

Objector Barnes' Exhibit 1 is two handwritten pages, dated August 19, 1989, indicating the type of water right he owns, his concern about the dropping water table in the area, his concern about the water quality, and his concern with water availability for fire protection.

Objectors Myers, Meine, Hayden, and McCoy did not offer any exhibits for inclusion in the record in this matter.

Neither Mark Shapley nor Jim Beck offered, on behalf of the DNRC, any exhibits for inclusion in the record in this matter.

No objections were registered by any party to the content of the Department file.

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 Applicants have not made application for appropriation of water as described under § 85-2-306 (1985), MCA. Therefore, § 85-2-302, MCA, applies in this matter.

2. Application for Beneficial Water Use Permit No. 71133-g41B was duly filed with the Department of Natural Resources and Conservation on April 4, 1989, at 11:18 a.m.

3. The pertinent portions of the Application were published in the Tribune Examiner, a newspaper of general circulation in the area of the source, on April 25, 1989.

4. The source of water for the proposed appropriation is groundwater by means of two wells.

5. The Applicants have applied for 300 gallons per minute (gpm) up to 70 acre-feet of water per year for multiple domestic uses. The groundwater withdrawal will be made by means of two wells located approximately 150 feet from each other in the NW¼SE¼SE¼ of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. Water from the wells will be conveyed by six-inch PVC main line. From this main line a 3/4-inch supply line will feed each of the 44 planned lots in the subdivision plus two park areas of the Hildreth Major Subdivision III.

D The proposed place of use is in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. The requested period of appropriation is January 1 through December 31, inclusive of each year.

6. The Application in the matter requests 300 gpm from two wells. However, the testimony of Applicant Hildreth and Everly, witness for the Applicants, indicates that 175 gpm, is sufficient to satisfy the peak demand for the domestic uses, including irrigation of lawn and gardens for which the Applicants applied.

Each of the Applicants' two proposed wells will be capable of pumping the 175 gpm peak demand requirement. The purpose of having two wells with similar capabilities is to meet the subdivision requirements of the Department of Health and Environmental Sciences (Everly's testimony).

8 7. Applicants have possessory interest of the land at the intended place of use. (See Applicants' Exhibit 4.)

8. The Applicants purchased 28 acres of land, now described as the intended place of use, from Garth Taylor. Together with the land, the Applicants also purchased a portion of the Garth Taylor Beneficial Water Use Permit No. 54490-g41B amounting to 223 gpm up to 70 acre-feet of water per year for irrigation purposes. (See Applicants' Exhibit 6.)

The Applicants' original intent was to change the purpose and period of use of the Permit, appurtenant to the 28 acres they bought from Garth Taylor, from irrigation to multiple domestic use, and to make it year-round use instead of seasonal irrigation

use (Applicants' testimony). Upon review of Applicant Hildreth's request to change the type of use and period of use of the portion of Beneficial Water Use Permit No. 54490-g41B, the Department advised the Applicants that in addition to an Authorization to Change, a Permit was also needed to extend the period of use to year-round. In view of the multiple filings necessary to accommodate Applicant Hildreth's request, the Department suggested that one Application for Beneficial Water Use Permit be filed to include all of the Applicant's requirements (Beck's testimony).

At the hearing Applicant Hildreth indicated his willingness to exchange his irrigation right under Beneficial Water Use Permit No. 54490-g41B for a multiple domestic use right with a year-round period of use (testimony of Applicant Hildreth).

9. Applicant Hildreth introduced geohydrologic reports (memoranda) written by past and present DNRC geohydrologists. Applicants' Exhibit 8A is a geohydrologic report by a former DNRC geohydrologist concerning the Garth Taylor well, Beneficial Water Use Permit No. 54490-g41B, which is located approximately 800 feet from Applicants' proposed wells. Applicants' Exhibit 8B is a geohydrologic report by a current DNRC geohydrologist concerning a previously proposed land subdivision development called Pioneers' Peaks Estates, Application for Beneficial Water Use Permit No. 65284-g41B. Both of these reports were prepared for groundwater applications near the area where Applicant Hildreth proposes to utilize the wells applied for in this matter.

Neither of the authors of these reports were present to explain or answer questions regarding their reports. Therefore, the Hearing Examiner affords more value to Applicants' Exhibit 8D which is a geohydrologic report written by Mark Shapley, DNRC geohydrologist, and which is specific to the Application in this matter. Furthermore, Shapley testified at the hearing explaining the report he wrote and the data he used. Shapley was also available for cross-examination by all parties.

Shapley explained that he investigated the work previously conducted by Lemire, Uthman and their predecessor Tom Patton. In addition, he has had extensive field experience in testing aquifers with similar characteristics in other parts of the State (Shapley's testimony).

10. The data included in the geohydrologic report by Uthman and Shapley indicates that the Applicants will be withdrawing water from an aquifer that extends vertically from a few feet below ground surface (6 to 10 feet) to 70 feet or more in depth. All groundwater appropriations in the area take water from the same aquifer (Shapley's testimony).

The main source of water recharge for this aquifer is the Beaverhead River. Other water recharge sources that may dictate the seasonal static water level of the aquifer include irrigation runoff, precipitation, and snow melt (Shapley's testimony).

The static water level of the aquifer has lowered in the last few years. (See Objector Barnes' Exhibit 1.) One explanation for the seasonal lowering of the static water level of this

0 aquifer is the conversion from flood irrigation to sprinkler irrigation by several irrigators in the area. Sprinkler irrigation, being more efficient in the application of water to a specific crop, does not afford as much runoff as flood irrigation. Thus, less water is available to percolate into the aquifer (Applicants' testimony).

11. One of the two wells for which the Applicants have applied is already drilled and has been used for monitoring purposes. This well first encountered water at a depth of 58 feet, and the water rose under artesian pressure to within 14 feet of ground surface.

8 Monitoring of the static water level on Applicants' well took place this year. On June 10th the water had risen to within 12 feet of ground surface, on June 29th to within 10 feet, on August 1st<sup>11</sup> to within 9 feet, and on August 26th to within 8.5 feet. This monitoring took place while the Garth Taylor well and the Stoddard well, both within 1/4 mile of Applicants' well, were pumping at a rate of 1100 gpm and 840 gpm respectively (Everly's testimony). (See also Applicants' Exhibit 11.)

12. Applicant Hildreth testified that he did not know of any other Permits issued from the same source which had not been developed and the water used.

13. One of the major concerns voiced by most of the Objectors is the possibility of the static level on their wells lowering further than found at present. The closest well to Applicants' proposed wells is the Larry Laknar well which is approxi-

0

mately 300 feet from Applicants' north property line (Objector Larry Laknar's testimony). According to Applicants' Exhibit 2 the approximate distance from Applicants' well to the north property line is 300 feet. Therefore, the total distance from Applicants' well to the closest of the Objectors' wells is 600 feet. This calculation was made by adding the distance from Objector Larry Laknar's well to Applicants' north property line, approximately 300 feet, to the distance from Applicants' well to the north property line, approximately 300 feet. (See Applicants' Exhibit 2.)

0

Shapley described the aquifer from which the Applicants will be withdrawing water as highly transmissive and unconfined. Shapley concluded that due to the nature of the aquifer, Applicants' use of water as permitted would have minor interference with other wells in the area. Shapley's calculations suggest static water level draw down of 1.2 feet or less within 100 feet of Applicants' proposed wells. (See Applicants' Exhibit 8D.)

0

14. Several Objectors indicated concern with water quality degradation due to discharge from the proposed subdivision septic systems. This concern for the degradation of water quality on existing wells is well founded, since low quality water may prevent a previous appropriator from exercising their water rights. However, due to the type of development, i.e., subdivision of land for single family dwellings, the Water Quality Bureau of the Department of Health and Environment Sciences (DHES) has authority to approve, modify, or to deny a subdivision development

D based on adverse impact to the public drinking water supply, or on minimal impact to other wells in the area.

The Hearing Examiner looked at the requirements of the DHES in regards to subdivisions. The Hearing Examiner found that the Environmental Protection Act (EPA) has a maximum allowable drinking water standard of ten parts per million nitrate at the subdivision boundary. (See ARM 16.16.303.)

Everly's estimate of water quality degradation, due to septic systems discharge into the aquifer from the proposed 44 lots, suggests a pollution factor of 0.001%. As he suggests, the impact of this pollution factor on groundwater quality is indeed minimal. (See file.) However, this prediction is based on the septic systems discharge being absorbed by the entire aquifer, i.e., horizontally as well as vertically.

B Shapley's estimate of groundwater pollution included the factor of the aquifer gradient, which when mapped by Tom Patton in the 1970's, was calculated at 0.0029%. The gradient factor introduced by Shapley indicates that the pollution would not be absorbed by the entire aquifer, but rather the vertical contamination would be limited due to the slope at which the groundwater in the area moves. Therefore, Shapley's prediction of 2% pollution factor is much higher than predicted by Everly. In this specific case the 2% pollution factor translates to .9 milligrams per liter, or .9 parts per million nitrate. (See Applicants' Exhibit 8D.)

15. Objector McKelvey's Exhibit 1 demonstrates the concern of the location of Applicants' wells in regards to their proximity to the septic systems in the subdivision. Shapley's report also questions the integrity of the water supply well due to it's location. Shapley believes that, due to the characteristics of the aquifer in question, less nitrate than predicted will leave the boundary of the subdivision because some of the subdivisions' effluent will be recaptured by Applicants' pumping well. (See Applicants' Exhibit 8D.)

16. Objector Hayden testified that he uses water from the Selway Slough for irrigation. Objector Hayden's Exhibit 1 also states that the Meine Brothers, Objectors of record, have a right for 228 miner's inches of water from the Selway Slough. Objector Larry Laknar testified that springs, sloughs, and drain ditches have been loosing volume.

Shapley summarizes in his report (Applicants' Exhibit 8D) that depletion effect on surface water from the proposed wells is probable.

#### PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantial and procedural requirements of law or rules have been fulfilled, therefore, the matter was properly before the Hearing Examiner. (See Findings of Fact 2 and 3.)

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. (See Findings of Fact 1.)

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria 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 during which the applicant seeks to appropriate, the amount requested is available;

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

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

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

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

(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, multiple domestic, is a beneficial use of water. (See § 85-2-102(2), MCA. See also Findings of Fact 5.)

5. The Applicants have possessory interest of the land at the intended place of use. (See Findings of Fact 7.)

6. Applicants' request for 300 gpm flow rate is excessively high for the intended use. Applicants' testimony indicates that 175 gpm is the peak flow rate demand for the intended use. Since the second well is merely a backup system as per DHES requirement, the only time it would be used is when the first

well fails. (See Findings of Fact 6.) However, assuming the pumping is from either one well or from a combination of both wells, the maximum withdrawal should not surpass the peak demand of 175 gpm.

7. Applicant Hildreth has proven by substantial credible evidence that there are unappropriated waters in the source of supply, at the proposed points of diversion, at times when the water can be put to the proposed use, in the amount requested, and during the period during which the Applicant seeks to appropriate.

Although Lemire's geohydrologic report (see Applicants' Exhibit 8A) differs from Uthman's and Shapley's geohydrologic reports (see Applicants' Exhibits 8B and 8D, respectively) in whether more than one aquifer is present in the area in question, all of the reports agree that the aquifer from where the Applicant proposes to withdraw water is quite extensive.

The aquifer from which the Applicants seek to appropriate seems to extend vertically from approximately 10 feet to 70 feet below land surface. Therefore, the saturated gravels and other materials that comprise this aquifer is approximately 60 feet or more in thickness. (See Finding of Fact 10.)

Everly's monitoring of Applicants' well demonstrated an increase in the static level of the water in the well of 3.5 feet between the period of June 10 to August 26, 1989. (See Findings of Fact 11.)

8. Applicant Hildreth has proven by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The Applicants have contracted the services of Everly and Associates, Consulting Engineers, to gather data and formulate a feasible plan, based on the information available, for the construction and operation of the appropriation works. Applicants' Exhibit 3 is the engineer's supplementary report for Hildreth Major Subdivision No. III. Among other findings, this report concluded the peak flow rate demand based on expected use, the size and type of water delivery system to each of the 44 planned lots, drainfield design, etc.

9. Applicant Hildreth has proven 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.

Applicant Hildreth testified that there are no outstanding permits from the same water source and for the same area of the Application in this matter, which had not yet been developed.

(See Findings of Fact 12.)

Additionally, Objector Larry Laknar's Exhibit 1 is a computer listing from the DNRC showing all the water rights on file for this area. This computer listing does not show any Reservations of Water issued for this area, or appurtenant to the source of supply in question, in the Application in this matter.

10. Applicant Hildreth has proven by substantial credible evidence that the proposed use will not adversely affect the water rights of prior appropriators.

As indicated by the objections filed there are three areas of concern by the Objectors. They are as follows: adverse impact to existing wells, adverse impact due to degradation of water quality, and adverse impact to the surface water sources in the area. Each area is discussed below separately and in the above order.

Shapley's geohydrologic report, Applicants' Exhibit 8D, calculates that a pumping rate of 300 gpm would establish a drawdown of 1.2 feet at 100 feet from the pumping well. Although 1.2 feet of drawdown at 100 feet is not very significant in most situations, two other factors would make this calculated drawdown even more negligible. First, the Applicants' peak flow rate demand for the use contemplated is 175 gpm instead of 300 gpm which was the flow rate used by Shapley to calculate the above stated drawdown. Second, the closest Objector well is Larry Laknar's well which is approximately 600 feet from Applicants' well. Thus, the impact, if any, to existing wells is expected to be negligible. (See Findings of Fact 13.)

Degradation of water quality applies to the Objectors' use of water and to use of water by the people who will eventually utilize the subdivision water. For purposes of being able to utilize a water right due to water quality, the Hearing Examiner adopts the EPA maximum allowable drinking water standard of ten

parts per million nitrate at the subdivision boundary in ARM 16.16.303. Consequently, under the worst case scenario studied by Shapley, the nitrate level is not expected to rise anywhere close to the EPA maximum allowable standard. (See Findings of Fact 14 and 15.)

Due to the type of use contemplated by the Applicants a unique situation exists whereby two state agencies have discretionary authority to issue, modify, or deny different permits which would dictate the success of the Applicants' proposed water development. Therefore, even though for water rights purposes the Hearing Examiner adopts the EPA maximum allowable drinking water standard, the Hearing Examiner intends to condition the Beneficial Water Use Permit to require that Applicants meet the DHES permit requirements.

The Applicants' initial argument, as stated in Applicants' response to the Objections (see file), that a hydrologic separation exists between the proposed well and surface water in the area, specifically the Selway Slough and the Murray-Gilbert Sloughs, was studied and addressed by Shapley in his geohydrologic report dated July 26, 1989. (See Applicants' Exhibit 8D.) Shapley's testimony, which was not challenged by the Applicant, is that there probably will be a water depletion effect on the above-stated sloughs due to the Applicants' proposed withdrawal of water from the two wells. Although Shapley's prediction included specific depletion rates to the surface water drainages, his predictions are based on the applied for flow rate of 300

gpm, and not on the more practical withdrawal rate of 175 gpm. Even though mentioned in the geohydrologic report, Shapley's prediction does not consider the immediate and direct recharge by septic system emissions, nor does the prediction include the possible repumping of the septic system emissions by the proposed wells. Therefore, we can expect that the net depletion to surface water drainages in the area will be a lot less than what Shapley previously anticipated.

This case is also unique in that the evidence on record indicates that the Applicants have applied for groundwater from an aquifer that also provides water to surface drainages.

If the water from the groundwater aquifer that surfaces in the Selway Slough and Murray-Gilbert Sloughs are indicative of the top boundary of the groundwater aquifer in question, then, in the evaluation of adverse impact, the following question must be answered: Is it reasonable to not allow any further diversions from an extensive source of supply so that existing water right holders can continue to enjoy that portion of the water which surfaces naturally? Section 85-2-401(1), MCA, states in 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.

The above statute clearly indicates that the level of a source of supply cannot be protected unless the level becomes so

low that it is unreasonably difficult for the prior water right holder to exercise his water right.

Shapley's studies concluded, and the Hearing Examiner adopts said conclusions, that a water level change will be experienced in the Selway Slough and Murray-Gilbert Sloughs due to the proposed pumping. Although, the impact may be less than what was predicted, said impact may be consequential if it happens during a low water year or a low water month. Is it then reasonable to issue a groundwater permit that may impact an existing water holder to the point that water may not be physically available during some times during the year?

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 aquifer in question, according to expert testimony of Shapley, is extensive in water quantity and availability. This aquifer extends for at least 60 feet vertically and for several miles horizontally. The concerns in this case are not whether the demand surpasses the recharge capabilities of the aquifer. 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 water 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.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71133-g41B is hereby granted in part and denied in part without prejudice. The Permit is hereby granted to Clayton and Ray Hildreth to divert groundwater at the rate of 175 gpm up to 70 acre-feet of water per year for multiple domestic use.

The water will be diverted by means of two wells located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana. Water from the wells will be used to supply multiple domestic water to the proposed 44 lots within the Hildreth Major Subdivision III, which is located in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 31, Township 6 South, Range 8 West, Beaverhead County, Montana.

The period of use shall be January 1 through December 31, inclusive of each year. The priority date for this Permit is April 4, 1989, at 11:18 a.m.

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

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

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. Before exercising the right to use the water under this Permit, the Applicants must possess the necessary licenses and permits required by the DHES, which are customary for this type of water development. This Permit is also subject to the Permittee, or predecessors, abiding by the terms, conditions, restrictions, and limitations imposed by the DHES as part of their license or Permit requirements.

D. The Permittee shall select one of the two wells granted under this Permit as the well designated for water level measurements. The static water level shall be measured in the desig-

nated well on the 15th of each month from April 15 to November 15, inclusive. The designated well shall not be operated (pumped) for four hours prior to the measurement. The Permittee shall keep a written record of these measurements and submit them to the Helena Field Office by November 30 of that year.

NOTICE

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

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

Dated this 5<sup>th</sup> day of December, 1989

  
\_\_\_\_\_  
Silvio Rodriguez, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 438  
Lewistown, MT 59457  
(406) 538-7459

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the fore-  
going Proposal for Decision was duly served by first class mail  
upon all parties of record at their address or addresses this  
5<sup>th</sup> day of December, 1989, as follows:

Clayton and Ray Hildreth  
1025 Webster Lane  
Dillon, MT 59725

Max A. Hansen, P.C.  
310 East Sebree Street  
P.O. Box 1301  
Dillon, MT 59725

George and Ellen Laknar  
4900 Laknar Lane  
Dillon, MT 59725

Norman and Estelle Hill  
4830 Laknar Lane  
Dillon, MT 59725

Ivan Hale  
4600 Carrigan Lane  
Dillon, MT 59725

Archie and Millie Hayden  
4850 Laknar Lane  
Dillon, MT 59725

Tom Barnes  
P.O. Box 93  
Dillon, MT 59725

William R. Pierce  
2125 Webster Lane  
Dillon, MT 59725

Mark Shapley, Hydrologist  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

Jerry R. Meine and  
Richard R. Meine  
d/b/a/ Meine Brothers  
2915 Anderson Lane  
Dillon, MT 59725

Judith Laknar McKelvey  
2850 Grizzly Gulch  
Helena, MT 59601

Dennis and Beverly McCoy  
5600 Highway 91 North  
Dillon, MT 59725

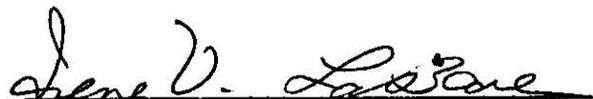
Big Sky Missionary  
Baptist Church  
P.O. Box 325  
Dillon, MT 59725

Glen W. Hayden  
17 East Bannack  
Dillon, MT 59725

Floyd T. Barnes and  
Cynthia K. Barnes  
4100 Highway 91 North  
P.O. Box 93  
Dillon, MT 59725

Larry and Margaret Laknar  
4800 Laknar Lane  
Dillon, MT 59725

Michael Wityk  
Department of Health and  
Environmental Sciences  
Cogswell Building  
Helena, MT 59620

  
Irene V. LaBare  
Legal Secretary