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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 72455-g76G AND APPLICATION TO CHANGE APPROPRIATION WATER RIGHT G(W)017056-76G BY ANACONDA-DEER LODGE CITY-COUNTY	)	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 April 8, 1994, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

I. Application 72455-g76G

Subject to the terms, conditions, limitations, and restrictions specified below, Beneficial Water Use Permit 72455-g76G is hereby granted to Anaconda-Deer Lodge City-County to appropriate 2400 gallons per minute up to 1935 acre-feet of ground water per year for municipal use at points in NW¼NE¼SW¼ and the NE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, Deer Lodge County. The means of diversion shall be two wells and pumps in a manifold system. The places of use shall be Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12,

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Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, all in Deer Lodge County. The period of appropriation shall be from January 1 through December 31, inclusive of each year. The priority date is May 29, 1990, at 5:00 p.m.

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 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.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

C. This permit is subject to the condition that the Permittee shall install an adequate flow metering device on each well in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30th of each year and/or upon request to the Helena Water Resources Regional

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Office, 1520 E. 6th Ave., Helena, MT 59620-2301 PH: (406) 444-6695.

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

E. 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 Mont. Code Ann. § 85-2-424.

II. Application G(W)017056-76G

Subject to the terms, conditions, limitations, and restrictions specified below, Authorization to Change Appropriation Water Right G(W)017056-76G is hereby granted to Anaconda-Deer Lodge City-County to change a point of diversion from the NE¼NE¼SW¼ of Section 33, Township 5 North, Range 11 West, to the NW¼NW¼SE¼ and the SE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, to add a 3.5 million gallon storage tank in the SW¼NW¼NW¼ of Section 4, Township 4 North, Range 11 West, and to change the places of use to Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12, Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, all in Deer Lodge County.

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A. This authorization is subject to Mont. Code Ann. § 85-2-505, 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.

B. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to the possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, chapter 2, part 2 and § 85-2-404 (1993).

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

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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 12 day of May, 1994.

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 13th day of May, 1994 as follows:

Anaconda-Deer Lodge City-Cnty
% Cheryl S. Beatty
Deer Lodge County Courthouse
800 S. Main
Anaconda, MT 59711

William Uthman, Geohydrologist
Water Management Bureau
Department of Natural
Resources
& Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301

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William & Rita Illston
5010-5 Hwy 1 West
Anaconda, MT 59711

Fay Howery
4618 N. Cable Rd
Anaconda, MT 59711

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

Hydrometrics, Inc.
2727 Airport Rd
Helena, MT 59601

T.J. Reynolds, Manager
Helena Water Resources
Regional Office
1520 E. 6th Avenue
Helena, MT 59620-2301

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

Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * * * * *

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT 72455-g76G AND APPLICATION TO CHANGE APPROPRIATION WATER RIGHT G(W)017056-76G BY ANACONDA-DEER LODGE CITY-COUNTY	)	PROPOSAL FOR DECISION

* * * * * * * *

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 March 4, 1994, in Anaconda, Montana, to determine whether a Beneficial Water Use Permit should be granted to Anaconda-Deer Lodge City-County (Applicant) for Application 72455-g76G under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993) and whether an Authorization to Change Appropriation Water Right should be granted to Applicant for Application G(W)017056-76G under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1993).

APPEARANCES

Applicant appeared at the hearing by and through counsel, Ted J. Doney and co-counsel Candace Torgerson.

Robert B. Morton, Environmental Scientist with Robert Peccia and Associates, appeared at the hearing as an expert witness for the Applicant.

Cheryl S. Beatty, Chief Executive of Anaconda-Deer Lodge County, appeared at the hearing as a witness for Applicant.

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Steve Huntington, Consultant Liaison with Mountain West Management, appeared at the hearing as a witness for Applicant.

Ray Lazuk, Senior Hydrogeologist with Hydrometrics, Inc., appeared at the hearing as an expert witness for Applicant.

Robert C. Anderson, Hydrogeologist with Hydrometrics, Inc., appeared at the hearing as an expert witness for Applicant.

William Uthman, Hydrogeologist with the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called as a witness by Applicant.

Jim Beck, Civil Engineering Specialist with the Department's Helena Water Resources Regional Office, appeared at the hearing, but did not testify.

Objectors William and Rita Illston appeared at the hearing *pro se*.

Objector Fay Howery appeared at the hearing *pro se*.

All other objectors, with the exception of Leonard Anderson; Arlow E. Hancock; Charlotte L. Hancock; Pat Bennett; Ruth Bennett; Jess Eighorn; John Digalis; Carol Digalis; and David Maynard, Sr., who did not appear at the hearing, entered into an agreement with Applicant to settle their objections. The record shows a properly constituted Notice of Hearing was properly served on all parties on August 13, 1993, by certified mail, return receipt requested. *See* Mont. Admin. R. 36.12.204(1) (1993). After several continuances, a Notice of Rescheduling Hearing was properly served on all parties on February 2, 1994. The Hearing Examiner received no communication from the missing

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objectors prior to the hearing or subsequent to the close of the hearing. Therefore, Objectors Leonard Anderson, Arlow E. Hancock, Charlotte L. Hancock, Pat Bennett, Ruth Bennett, Jess Eighorn, John Digalis, Carol Digalis, and David Maynard, Sr. are in default and no longer have status as parties in this matter. Mont. Admin. R. 36.1.208 (1993).

EXHIBITS

Applicant offered 14 exhibits for acceptance into the record. All were accepted without objections.

Applicant's Exhibit 1 is a letter from Montana Resources, Inc. (MRI) to Gene Vuckovich, then Chief Executive of Anaconda-Deer Lodge County, advising him of MRI's stand on the use of the pipeline.

Applicant's Exhibit 2 is the resume' of Robert B. Morton.

Applicant's Exhibit 3 is a bound report produced by Robert Peccia and Associates entitled *Anaconda Water System Improvements Program*.

Applicant's Exhibit 4 is a chart showing the 1991 daily consumption of water through the Anaconda water system.

Applicant's Exhibit 5 is a copy of a map of Anaconda which has been enhanced to show the proposed well field, the proposed water main replacement, and the proposed location of the 3.5 million gallon water storage reservoir.

Applicant's Exhibit 6 is a copy of an enlargement of the proposed well field identifying the proposed locations of the various wells.

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Applicant's Exhibit 7 consists of three pages and is the resume' of Raymond Lazuk.

Applicant's Exhibit 8 is a bound report of a proposed testing plan prepared by Hydrometrics, Inc. entitled *Assessment of the Warm Springs Creek Aquifer in Response to Pumping of Anaconda-Deer Lodge Test Wells TH1 and TH2.*

Applicant's Exhibit 9 is a copy of a topographic map which has been enhanced to show the extent of the Warm Springs Creek Watershed boundary and area (in yellow) down to a point just below the municipal well field, the location of the upgradient monitoring well PW-5, the location of the municipal well field, and the location of Silver Lake.

Applicant's Exhibit 10 is a schematic cross section through the Anaconda Valley illustrating the origin of the recharge to the Warm Springs Aquifer.

Applicant's Exhibit 11 consists of two pages and is the resume' of Robert C. Anderson.

Applicant's Exhibit 12 is a bound report prepared by Hydrometrics, Inc. in April of 1993, entitled *Assessment of the Warm Springs Creek Aquifer in response to Pumping of Anaconda-Deer Lodge Test Well TH-2.*

Applicant's Exhibit 13 is a copy of a map of Anaconda and the West Valley Subdivision which has been enhanced to show the generalized groundwater flow direction in pink, the locations of the certain private wells in green, the location of the test well

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in red, the location of the fish hatchery wells in purple, and line of equal drawdown in light blue.

Applicant's Exhibit 14 is a copy of the same map as Applicant's Exhibit 13 which has been enhanced to show all the features described above plus the locations of existing city wells with large red dots containing a number; the location of the proposed city wells with large yellow dots containing letters; the location of existing wells with a predicted water level decline caused by additional municipal wells, in green, red, and purple, with red numbers; and in yellow lines, the upgradient and downgradient limit of the area experiencing a water level decline of one foot or more.

Objectors offered no exhibits for inclusion into the record.

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

PRELIMINARY MATTERS

Butte Water Company filed Application for Beneficial Water Use Permit 72455-g76G with the Department on August 25, 1989. The application was terminated by the Department on March 26, 1990, for failure to respond within an allotted time. Applicant reapplied on May 29, 1990, at 5:00 p.m. which established its priority at that date and time. Pertinent portions of the application were published in the *Anaconda Leader* on August 22, 1990. Sixty-seven objections were filed. A hearing was

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scheduled to be held on July 11, 1991. After several continuances, the hearing was continued without date on November 5, 1991, for Applicant to perform pump tests. During that period of time, Butte Water Company sold its interest in the water system of Anaconda to Applicant. On April 1, 1993, Applicant submitted an Application for Change of Appropriation Water Right to change the proposed points of diversion of the original application. Since an application for change cannot be used to amend an application for beneficial water use permit, the information in the change application was transferred to an amended application for beneficial water use permit and the change application was declared void. The amended application was published in the *Anaconda Leader* on June 30, 1993, to allow persons who had not objected to the original application to file objections while at the same time allowing those persons who had objected to the original application to continue their objections. The hearing was held on amended Application for Beneficial Water Use Permit 72455-g76G and on Application for Change of Appropriation Water Right G(W)017056-76G which was filed on April 1, 1993. This Proposal deals only with the amended application and the application for change unless otherwise specified.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

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FINDINGS OF FACT

1. Montana Code Ann. § 85-2-302 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."

Montana Code Ann. § 85-2-402(1) states in relevant part, "An appropriator may not make a change in an appropriation right except, as permitted in this section, by applying for and receiving the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. The original application for Beneficial Water Use Permit 72455-g76G was filed by Butte Water Company on May 29, 1990, at 5:00 p.m. The application was amended on April 1, 1993. Application to Change Appropriation Water Right was filed on April 1, 1993. (Testimony of Cheryl Beatty and Department file.)

3. Pertinent portions of the amended application were published in the *Anaconda Leader* on June 30, 1993, and pertinent portions of Application to Change Appropriation Water Right G(W)017056-76G were published in the *Anaconda Leader* on May 26, 1993. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed water use and the proposed change. In addition to the original

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67 objections filed to the original application for permit, Department of Fish, Wildlife and Parks objected to the change application. (Department file.)

4. Application for Beneficial Water Use Permit 72455-g76G seeks to appropriate 2400 gallons per minute up to 1935 acre-feet of ground water per year for municipal use at points in NW¼NE¼SW¼ and the NE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, Deer Lodge County. The proposed means of diversion is two wells and pumps in a manifold system. The proposed places of use are Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12, Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, all in Deer Lodge County. The proposed period of appropriation is from January 1 through December 31, inclusive of each year. (Department file.)

Application for Change of Appropriation Water Right seeks to change a point of diversion from the NE¼NE¼SW¼ of Section 33, Township 5 North, Range 11 West, to the NW¼NW¼SE¼ and the SE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, and to add a 3.5 million gallon storage tank (water tank) in the SW¼NW¼NW¼ of Section 4, Township 4 North, Range 11 West, and to change the places of use to Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12, Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of

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Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, Deer Lodge County. (Department file.)

5. Applicant's wells currently are producing approximately 2400 gallons per minute which produces 3,456,000 gallons per day. Originally the wells produced approximately 3100 gallons per minute which would produce 4,464,000 gallons per day. The maximum use has been recorded as 6,852,000 gallons of water on July 15, 1991. These wells pump constantly. Applicant has, in the past, used water from the 60-inch MRI pipeline to supply the additional water necessary to meet the peak use demands as well as using the pipeline to waste the excess water produced by the constant pumping. The MRI pipeline also acts as storage that both maintains pressure in the system and supplies water if needed. Applicant must disconnect from the MRI pipeline after 1994. The new wells and proposed storage are necessary to supply the water needed during the peak use period after the MRI pipeline is disconnected. (Applicant's Exhibits 1, 3, and 4 and testimony of Cheryl Beatty, Steve Huntington, and Robert Morton.)

6. Interim Permit 72455-g76G was granted to Applicant on November 30, 1993, to allow Applicant to begin construction of the appropriation works. All six wells have been drilled by a licensed well driller. Five wells were complete at the time of the hearing with the other well nearing completion. Four of the wells are replacement wells; the remaining two wells are the new city wells. All are 12-inch diameter wells. The distribution lines have been installed on the four replacement wells.

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The pipelines from the well heads are all eight-inch ductile iron pipe. As each well is joined to the system, the pipeline would be enlarged so that after all six wells are connected the pipeline would be 18-inch ductile iron pipe when it reaches the new chlorination and control building. From the chlorination and control building, water would be pumped to the water tank via a 20-inch pipe. Water would be piped from the water tank into the city distribution system.

A radio telemetry and control system would be installed to coordinate the activities of the new well pumps, chlorinator, and water tank. The control and monitoring devices would be located at the new chlorination building, the water tank, and the water shop. The new telemetry system will sense when the water in the tank has dropped to a certain level and would activate three pumps. If the use is normal and there is not an excess demand, the three wells would fill the tank and shut off. If there is an excess demand, the telemetry system would activate the other three wells until the demand is met.

Immediate plans include replacement of the water mains in Park and Commercial Avenues. Long term plans include replacing fire hydrants, water mains, and pipes. A leak detection program will be activated to determine the conditions of the pipes and mains. The results of the leak detection program will help prioritize the lines that need replacement. (Department file, Applicant's Exhibits 3, 5, and 6, and testimony of Robert Morton.)

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7. Applicant owns the property where the wells, chlorination and control building, and water tank are located. Anaconda is an incorporated municipality with a current population of 6,224. The projected water use is calculated on a static population. The City of Anaconda encompasses the proposed place of use. (Department file, Applicant's Exhibit 3, and testimony of Cheryl Beatty and Robert Morton.)

8. The Warm Springs Creek Aquifer in the Anaconda valley is one of the top sand and gravel aquifers in Montana. It is comparable to the Missoula Aquifer which is very productive. The Warm Springs Creek Aquifer is a typical glacial outwash valley aquifer found in western Montana. On an average daily basis approximately 34,000,000 gallons per day of water recharges the ground water system. (Applicant's Exhibits 10 and 12 and testimony of Ray Lazuk.)

9. An aquifer test was performed in December of 1992. One well, Test Hole 2 (TH-2), was pumped continuously for six days. Water levels were monitored in observation wells to define the area of influence of the pumping well. Observation well locations were selected to provide water level drawdown data for aquifer parameter calculations and to detect potential effects on objectors' wells in the area.

The observation well network consisted of 14 wells, including the pumping well, all of which were monitored before, during and after the test. A total of nine private wells were used as observation wells during the test, with four of those

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wells located at the Washoe Park Fish Hatchery which is downgradient from the test wells. Five private wells, PW-5, PW-4, PW-3, PW-2, and PW-1, used for monitoring belong to members of the West Valley Water Users Association and other objectors. Well PW-5 is located approximately 3.8 miles upgradient from the test wells and the proposed city wells. Wells PW-4 and PW-3 are approximately two miles upgradient from the test wells and proposed city wells. Private wells PW-2 and PW-1 are within one-half mile of the test well. In addition to existing test wells, TH-1, TH-2, and TH-3, two new test wells (TH-4 and TH-5) were constructed specifically for water level observation during the test and for future long-term monitoring of the aquifer by Applicant.

Before the test began, water levels were monitored in the 14 observation wells to determine seasonal water level trends. Water levels were recorded on a weekly basis for a four week period preceding the test. Wells TH-3 and PW-5 also were equipped with continuous digital recorders to further document ground water levels prior to the test.

During the aquifer test, the three existing municipal wells operated by Applicant continued to pump at their average combined withdrawal rate of approximately 3.5 millon gallons per day. Ground water levels in several of the observation wells therefore show the drawdown effects of existing production wells in addition to the pumping from TH-2. Conducting the test with the production wells in use means that any predictions using the test

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results will likely overestimate future drawdown effects when the existing production wells are shut off and abandoned. (Applicant's Exhibits 12, 13, and 14 and testimony of Ray Lazuk and Robert Anderson.)

10. Based upon the aquifer test results, the impact to water levels in the Warm Springs Creek Aquifer from pumping the additional 2400 gallons per minute was evaluated. Although six new wells have been constructed, four of those wells are replacements for the existing three city wells and should not significantly alter the existing pattern of water levels. Therefore the predictive analysis quantifies the drawdown effects of the two additional wells, pumping approximately 1200 gallons per minute each.

The additional pumping proposed by Applicant would occur during periods of peak water use only. The two additional wells would be pumped when the municipal water use exceeds 3.5 millon gallons per day. For analytical purposes, it was assumed that each additional well would operate continuously for 180 days at a constant discharge rate of 1200 gallons per minute. This, of course, would not be the case. Daily water use figures from the city water system for 1991 indicate this assumption is conservative since water use exceeded 3.5 millon gallons per day on fewer than 180 days and never reached 7.0 million gallons per day which is the volume that would be withdrawn if all six wells were pumping simultaneously. (Applicant's Exhibits 4 and 12 and testimony of Robert Anderson.)

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11. Water level drawdown from the proposed additional wells was evaluated for those monitoring sites showing pumping-induced drawdown during the aquifer test. This includes the five test wells, the four fish hatchery wells, and private wells PW-1 and PW-2. The lack of pumping-induced drawdown at wells PW-3, PW-4, and PW-5, and the distance-drawdown relationship observed during the aquifer test, indicate these wells and other West Valley Park wells would not be significantly impacted by the proposed municipal wells.

The predicted drawdowns range from 9.2 feet at proposed city well 3 to 1.3 feet at fish hatchery well FH-1. Drawdowns at private well PW-1 and PW-2, the nearest private wells to Applicant's proposed well field, are estimated to be 5.5 feet and 3.3 feet, respectively. Actual drawdowns at these private wells would probably be less than the estimated values because Applicant's well 3, presently located approximately 230 feet downgradient of PW-1, would be replaced by two wells, proposed city wells B and F. Also all predictions are based upon a worst case analysis. (Applicant's Exhibits 5, 6, 13, and 14 and testimony of Robert Anderson.)

12. There are no reservations or permits for planned uses or developments for water from the Warm Springs Creek Aquifer. (Department file and records.)

13. Objectors offered no testimony for the record.

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

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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. *See* Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Mont. Code Ann. Title 85, chapter 2 (1993). *See* Findings of Fact 1 and 2.

3. The Department must approve a change in appropriation water right if the appropriator proves by a preponderance of evidence the criteria in Mont. Code Ann. § 85-2-402(2) (1993), are met:

> (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
>
> (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
>
> (c) The proposed use of water is a beneficial use.
>
> (d) 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.
>
> (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.
>
> (f) The water quality of an appropriator will not be adversely affected.
>
> (g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
>
> (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information

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establishing to the satisfaction of the department that the criteria in subsection (2)(f) and (2)(g), as applicable, may not be met.

4. Applicant is not seeking salvaged water; therefore, Applicant is not required to prove the criterion in (2)(e). Applicant is required to prove the criteria set forth in subsections 85-2-402(2)(f) and (g) have been met only if a valid objection as defined in (3) above is received. A valid objection was not received; therefore, Applicant is not required to prove the criteria set forth in subsections (2)(f) and (g).

5. The Department must issue a Beneficial Water Use Permit if the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5), are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
> (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;

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> (g) the water quality of a prior appropriator will not be adversely affected;
>
> (h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
>
> (i) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
>
> . . .
>
> (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

6. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. Mont. Code Ann. § 85-2-311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (h), or (i) were filed. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (h), or (i).

7. The proposed use of the water, municipal, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a)

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(1993). Applicant has proved by a preponderance of evidence that use of the water will benefit it. *See* Findings of Fact 4, 5, and 7.

8. Applicant proved by a preponderance of evidence that it has possessory interest in the property where the water is to be put to beneficial use. *See* Finding of Fact 7. The City of Anaconda has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use of its city or inhabitants. Mont. Code Ann. Title 7, chapter 13 (1993).

9. Applicant has proved by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when it can be put to the use proposed and that water is reasonably available during the period Applicant seeks to appropriate, in the amount Applicant seeks to appropriate. *See* Findings of Fact 8, 9, 10, and 11.

10. Applicant has proved by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected. *See* Findings of Fact 10, 11, and 12.

Upon the Applicant's discharge of the burden to produce a preponderance of evidence by submitting hydrologic evidence and other data on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly within their power to do so. Objectors must show they have water rights, describe the operation of their rights, state how they expect the proposed use will change the conditions of water occurrence in the source of supply or how it will otherwise

affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed condition. *See In re Application 60117-76L by William Houston.* Objectors offered no evidence to substantiate or establish a claim of adverse effect related to the proposed project. *See* Finding of Fact 13.

11. Applicant has proved by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. *See* Findings of Fact 5 and 6.

12. Applicant has proved by a preponderance of evidence 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.

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

PROPOSED ORDER

I. Application 72455-g76G

Subject to the terms, conditions, limitations, and restrictions specified below, Beneficial Water Use Permit 72455-g76G is hereby granted to Anaconda-Deer Lodge City-County to appropriate 2400 gallons per minute up to 1935 acre-feet of ground water per year for municipal use at points in NW¼NE¼SW¼ and the NE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, Deer Lodge County. The means of diversion shall be two wells and pumps in a manifold system. The places of use shall be Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12,

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Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, all in Deer Lodge County. The period of appropriation shall be from January 1 through December 31, inclusive of each year. The priority date is May 29, 1990, at 5:00 p.m.

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 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.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

C. This permit is subject to the condition that the Permittee shall install an adequate flow metering device on each well in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30th of each year and/or upon request to the Helena Water Resources Regional

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Office, 1520 E. 6th Ave., Helena, MT 59620-2301 PH: (406) 444-6695.

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

E. 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 Mont. Code Ann. § 85-2-424.

II. Application G(W)017056-76G

Subject to the terms, conditions, limitations, and restrictions specified below, Authorization to Change Appropriation Water Right G(W)017056-76G is hereby granted to Anaconda-Deer Lodge City- County to change a point of diversion from the NE¼NE¼SW¼ of Section 33, Township 5 North, Range 11 West, to the NW¼NW¼SE¼ and the SE¼NW¼SE¼ of Section 33, Township 5 North, Range 11 West, to add a 3.5 million gallon storage tank in the SW¼NW¼NW¼ of Section 4, Township 4 North, Range 11 West, and to change the places of use to Sections 1, 2, 3, 4, the N½N½ of Section 11, and the N½ of Section 12, Township 4 North, Range 11 West, and the S½ of Section 33, S½NW¼ of Section 33, SW¼NE¼ of Section 33, and the S½S½ of Section 34, in Township 5 North, Range 11 West, all in Deer Lodge County.

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A. This authorization is subject to Mont. Code Ann. § 85-2-505, 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.

B. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to the possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, chapter 2, part 2 and § 85-2-404 (1993).

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

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

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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. 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 8th day of April, 1994.

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(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 11th day of April, 1994, as follows:

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City-County
Deer Lodge County Courthouse
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Anaconda, MT 59711

Leonard Anderson
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Anaconda, MT 59711

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Anaconda, MT 59711

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David Maynard Sr. and
Cynthia Budd
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19 Mountain View
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Regina Sanders
36 Mountain View Homes
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Donald and Katherine Hart
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Arlow E. Hancock and
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