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BY Judith A. Voigt DEPUTY

MONTANA FOURTH JUDICIAL DISTRICT COURT, RAVALLI COUNTY

* *

ROBERT TAKLE AND MARLENE TAKLE Petitioners, v. STATE OF MONTANA DEPARTMENT OF NATURAL DEPARTMENT RESOURCES AND CONSERVATION, and RAY AND JEAN LORENZ, Respondents. IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS 76691-s76H, 72842-s76H, 76692-s76H AND 76070-s76H BY ROBERT AND MARLENE TAKLE Before the Department of Natural Resources and Conservation for the State of Montana.	Cause No. DV-92-323 OPINION AND ORDER

* *

This case is before the Court on a petition for judicial review under the Montana Administrative Procedures Act. MCA § 2-4-702. The petition concerns Robert and Marlene Takle's

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(Applicants) applications to the Department of Natural Resources and Conservation (DNRC) for new water use permits in the Sheafman and Cow Creeks area, Ravalli County, Montana.

The Applicants propose new water appropriations for irrigation from four ponds excavated to intercept shallow groundwater. Two of the ponds are already in place. The two others are yet to be constructed. The ponds are, or would be, located within 300 feet of Sheafman Creek in wet or marshy areas along intermittent tributary or overflow channels of the stream.

Although the ponds are also designed with dams for capturing surface flows in these channels in the spring, the permits would be for subsurface water. Water would be pumped from the ponds during the irrigation season when surface water generally does not flow in the intermittent channels. Surface water captured by the ponds during spring high flows would be rapidly depleted. The ponds would be pumped down and refilled many times during the irrigation season.

The DNRC conducted administrative contested case proceedings after other Sheafman Creek water users objected to the applications claiming they would be adversely affected. The contested case included an evidentiary hearing where the Applicants attempted to establish that the criteria for issuance of new water use permits were met. The administrative process concluded after the agency's final order, including findings of fact and conclusions of law, denied the permits. The Applicants have appealed the agency's final order to this Court.

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The controversy focuses on whether or not water in the shallow groundwater source that Applicants would be pumping from is tributary to Sheafman Creek. Respondents (DNRC and Lorenz) contend that the shallow groundwater is tributary to Sheafman Creek, and because Sheafman Creek is already overappropriated no new appropriations can be allowed. Applicants contend that because their pumping would not be measurable as decreased surface flows in Sheafman Creek, the shallow groundwater is not connected to Sheafman Creek and would not adversely affect Sheafman Creek water users.

The standard of review which this Court must employ is stated in § 2-4-704, MCA as follows:

> The court may not substitute its judgement for that of the agency as to the weight of the evidence in questions of fact.

Moreover, an agency is entitled to rely on its experience, technical competence, and specialized knowledge in evaluating the evidence. MCA § 2-4-621(7). Accordingly, judicial review of factual matters is narrow. The reviewing court will not overturn an agency's findings of fact unless clearly erroneous. If the agency's findings are supported by substantial credible evidence, they are not clearly erroneous. Wage Claim of Holbeck v. Stevy West, Inc., 240 Mont. 121, at 124, 783 P. 2d 391 (1989).

Judicial review of legal issues is broader. In reviewing legal conclusions, the court will examine those conclusions to see if they are a correct interpretation of the law. Steer, Inc. v. Department of Revenue, 245 Mont. 470, 803 P.2d 601 (1990).

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Although it is the court's province to interpret the law, the interpretations given to the statutes by the officers or agencies charged with their administration are shown deference. Department of Revenue v. Kaiser Cement, 245 Mont. 502, 803 P.2d 1061 (1990). Consequently, in this case if the DNRC has made a conclusion based on a reasonable interpretation of the Water Use Act which it administers, see § 85-2-112, MCA, the conclusion will be upheld.

In order for the DNRC to issue a new water use permit an applicant must prove that there are unappropriated waters in the source of supply and that the water rights of prior appropriators will not be adversely affected. MCA § 85-2-311(1)(a) & (b). The subsurface supply of a stream, whether it comes from tributary swamps or the streambed itself, is part of the stream and subject to the same rules. Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909). Underground tributary flow cannot be taken to the detriment of other appropriators. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966). Based on this law, if groundwater is tributary to a stream, a prospective user of that groundwater must prove there is unappropriated water in the stream.

The DNRC found that the shallow groundwater from which Applicants would remove water is tributary to Sheafman Creek. DNRC based this finding on testimony by Applicants' expert that the Sheafman Creek and Cow Creek area is basically a shallow groundwater basin draining east into the Bitteroot Valley. There was also testimony about the rapid filling of the shallow pits

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already excavated by the Applicants and about the bogs, marshy areas, and intermittent channels between the pits and Sheafman Creek. None of this testimony is disputed. Moreover, the applications list the source as tributary to Sheafman Creek. This evidence indicates that the entire shallow groundwater system, including marshes, bogs, and streams, in the Sheafman and Cow Creek area is closely interconnected.

The Applicants do not dispute that the groundwater system and surface water are interconnected. They argue, however, the interconnection is so tenuous as to be immeasurable. They submitted evidence in the form of an expert's opinion that the pumping they propose would not be measurable on Sheafman Creek. That opinion was based on flow measurements taken on Sheafman Creek as part of the City of Pinesdale's application for a water use permit just upstream from the Applicants' proposed appropriation. See In the Matter of the Applications for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale (DNRC, 1993).

To evaluate the expert's opinion, the DNRC examined the original information upon which the opinion was based. That information did not convince DNRC that the subsurface water that Applicants would be pumping from is not tributary to Sheafman Creek. In fact, the Pinesdale studies are weak basis for indicating the degree of connection between surface and subsurface flow. The weakness is evident because the applicant in Pinesdale was pumping water from the gravel immediately under

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the creek. Despite this intimately close connection between Pinesdale's source and Sheafman Creek, the studies were unable to detect any effect on Sheafman Creek during pumping. It appears that measurability of effect on Sheafman Creek, at least in the manner measurement was attempted in the Pinesdale case, does not reliably indicate how closely the surface and subsurface flow of Sheafman Creek are connected.

The information from Pinesdale also reveals that Sheafman Creek gains and looses surface flow at various points along its course. When this fact is coupled with testimony in this case that Sheafman Creek goes subsurface between the Applicants' property and the Lorenz point of diversion but surfaces again immediately above the Lorenz point of diversion the case for interchanging surface and subsurface flows becomes compelling. Logic dictates that where surface flows reappear in a creek after a reach of dry creek bed, the water has come from subsurface flows. With respect to Respondents Lorenz, it appears that they are entirely dependent on recharge of surface flows by subsurface flows.

The DNRC was not clearly erroneous that the Applicants' proposed source is tributary to Sheafman Creek.

Because the Applicants' proposed source is tributary to Sheafman Creek, it was necessary for Applicants to prove that unappropriated water is available on Sheafman Creek. The DNRC concluded otherwise, that Sheafman Creek is overappropriated and that therefore any new appropriation no matter how small would

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adversely affect senior users. This conclusion is supported by facts that a water commissioner has already been appointed on Sheafman Creek and that generally there is water sufficient to fill only the first eight of twenty-one decreed rights on the stream. There is also evidence that the sum of decreed rights on the stream exceeds the average flow of Sheafman Creek during all months except June. Applicants showed that water is physically present at the point of diversion, but there is no evidence to establish that water physically available at the source is not under legal call for use by downstream decreed rights. The DNRC's conclusion is therefore a reasonable application of the law to the facts.

The DNRC, having found that the permit applications were from a source tributary to Sheafman Creek and concluded that unappropriated water was not available on Sheafman Creek, were required to deny the permits. MCA § 85-2-311.

Based upon this review, the Court hereby denies the petition and affirms the final administrative order of the Department of Natural Resources and Conservation dated November 5, 1992.

Dated this 16th day of JUNE, 1994.

DISTRICT COURT JUDGE
M. JAMES SORTE

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G(W)111151-76HT

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MONT. DEPT. of NATURAL RESOURCES & CONSERVATION

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MONTANA FOURTH JUDICIAL DISTRICT COURT, RAVALLI COUNTY

ROBERT TAKLE and MARLENE TAKLE, Petitioners,	)	Cause No.
-vs-	)	PETITION FOR JUDICIAL REVIEW
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, Respondent.	)	

COME NOW Petitioners and, by and through their attorney and pursuant to Section 2-4-701 et seq., MCA, hereby petition this Court to review the Final Order of the Department of Natural Resources and Conservation issued on November 5, 1992. For the convenience of the Court, a copy of the Final Order is attached as Exhibit A, and a copy of the March 27, 1992 Proposal for Decision, upon which the Final Order is based, is attached as Exhibit B. Copies of said Final Order and said Proposal were previously served on all parties of record by Respondent.

1. Jurisdiction and venue are proper in this Court pursuant to Section 2-4-702(2)(a), MCA, in that the Petitioners

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residence is in Ravalli County, Montana.

2. Pursuant to Section 85-2-309 et seq., MCA, Respondent has jurisdiction to hear and determine issues concerning Petitioners' Applications for Beneficial Water Use Permits.

3. On November 13, 1990, Petitioners filed Applications for Beneficial Water Use Permits 76691-s76H, 72842-s76H, 76692-s76H and 76070-s76H and for Change of Appropriation Water Right G(W)111151-76H. On January 16, 1992, a hearing regarding said Applications was held at Missoula, Montana. On March 27, 1992, the Hearings Examiner issued a Proposal for Decision, proposing that Respondent grant Application for Change of Appropriation Water Right G(W)111151-76H and Application for Beneficial Water Use Permit 76691-s76H, but also proposing that Respondent deny Applications for Beneficial Water Use Permits 72842-s76H, 76692-s76H and 76070-s76H.

4. On May 14, 1992, Petitioners filed Exceptions to the Proposal for Decision, taking exception to proposed Conclusion of Law 12, which concluded that Applicants (Petitioners) had not proven that the water rights of a prior appropriator will not be adversely affected by appropriations pursuant to Applications 72842-s76H, 76692-s76H and 76070-s76H. Exceptions were also filed by Objector Ryan.

5. On August 27, 1992, oral argument was held on said Exceptions before the Assistant Administrator of the Water Resources Division of Respondent Department of Natural Resources and Conservation. On November 5, 1992, Respondent issued its

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Final Order denying Petitioners' Exceptions, and sustaining certain of Objector Ryan's Exceptions. The Examiner's proposed Findings of Fact and Conclusions of Law were then adopted with modifications, to wit: deletion of proposed Conclusion of Law 10; and modification of Conclusion of Law 12 to include Application 76691-s76H as having not been proven to not adversely affect the water rights of prior surface appropriators.

6. Petitioners have exhausted all administrative remedies and are aggrieved by the Final Order in that such Order improperly, arbitrarily, capriciously and without justification adopts and modifies the Proposal for Decision and denies Petitioners' Applications for Beneficial Water Use Permits 72842-s76H, 76692-s76H, 76691-s76H and 76070-s76H.

7. The grounds on which this review and relief from the Final Order are sought are that substantial rights of the Petitioners have been prejudiced because the administrative findings, inferences, conclusions and decisions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are in violation of constitutional and statutory provisions and are affected by other error of law; are made upon unlawful procedure; and are arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

8. Petitioners are aggrieved by Respondent's Final Order in this matter in that substantial rights of the Petitioners were prejudiced because Conclusion of Law 12 is not supported

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by Findings of Fact or by substantial credible evidence of record concerning the effect of the proposed appropriations on prior appropriators of surface water; is based on improper assumptions and inferences regarding subsurface water flow and use of surface water; and is contrary to substantial credible evidence of record.

9. Petitioners are aggrieved by Respondent's Final Order in this matter in that substantial rights of the Petitioners were prejudiced because proposed Conclusion of Law 10 was erroneously and improperly rejected in said Final Order, although supported by Findings of Fact and based on substantial credible evidence.

10. Petitioners are aggrieved by Respondent's Final Order in this matter in that substantial rights of the Petitioners are prejudiced because Conclusion of Law 12 is erroneous as a matter of law. Said Conclusion is contrary to statutory and common law and the provisions of Section 85-2-311(1)(b), MCA; incorrectly allocates the burden of proof as to adverse effect under said Section; and arbitrarily departs from Respondent's previous administrative decisions regarding Section 85-2-311(1)(b) wholly without reason or justification.

11. Petitioners are aggrieved by Respondent's Final Order in this matter in that substantial rights of the Petitioners are prejudiced because Finding of Fact 23 regarding surface water use is clearly erroneous and not supported by substantial credible evidence of record.

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WHEREFORE, Petitioners move that this Court issue an Order:

1. For judicial review of the Final Order of the Department of Natural Resources and Conservation dated November 5, 1992;

2. Vacating and setting aside those portions of said Final Order denying issuance of Beneficial Water Use Permits 72842-s76H, 76692-s76H, 76691-s76H, and 76070-s76H;

3. Granting Beneficial Water Use Permits 72842-s76H, 76692-s76H, 76691-s76H and 76070-s76H;

4. Granting Petitioners' attorney's fees; and

5. Allowing Petitioners such other and further relief as is just and proper.

DATED this 4th day of December, 1992.

ROBERT H. SCOTT
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 4th day of December, 1992, a true and correct copy of the foregoing Petition for Judicial Review was duly served upon Respondent and all parties of record by placing same in the United States Mail, postage prepaid, addressed as follows:

Office of the Director
Department of Natural Resources
and Conservation
1520 E. Sixth Ave.
Helena, Montana 59620-2301

John W. O'Mailia
Catherine A. O'Mailia
369 Sheafman Creek Rd.
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Marjorie G. Ryan
2814 27th Ave. W.
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Hank and Jeanette Winters
399 Sheafman Creek Rd.
Hamilton, Montana 59840

John Lee Ryan, Jr.
Roger Whitney Ryan
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Leslie B. Golden
Agnes M. Golden
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Ray and Darlene Gramza
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Miles S. Knutson
1219 Creek View Lane
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS 76691-s76H, 72842-s76H, 76692-s76H, AND 76070-s76H AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT G(W)111151-76H BY ROBERT AND MARLENE TAKLE	)	FINAL ORDER

* * * * * * * *

On March 27, 1992, the Department Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended denying Applications for Beneficial Water Use Permit 76070-s76H (Pond 4), 72842-s76H (Pond 2), and 76692-s76H (Pond 5) and granting Application for Beneficial Water Use Permit 76691-s76H (Pond 3) as well as granting Application for Change of Appropriation Water Right G(W)111151-76H to change the point of diversion and to add four places of storage in Ponds 2, 3, 4, and 5.

A timely written exception and request for oral argument was received from the Applicants through Attorney, Jeffrey Langton. Objector John Lee Ryan, Sr. and Marjorie G. Ryan submitted a timely exception to the Proposal for Decision. Ryan's exception contained no affidavit of service to other parties but was mailed to other parties by the Department. Mr. Langton submitted a timely written response to the Ryan exception. Oral Argument on the exceptions to the Proposal for Decision in this matter was held before the Assistant Administrator of the Water Resources Division on August 27, 1992 in Hamilton, Montana.

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On behalf of the Applicants, Jeffrey H. Langton presented exceptions to the Proposal for Decision. Also appearing and responding to the exceptions were Objectors Ray Lorenz, Leslie B. Golden, Miles S. Knutson, and Darlene Gramza. Although Mr. Ryan did not appear at this oral argument and was served notice of the hearing, his written exception is considered herein. Objector Winters submitted a letter indicating he would not be able to attend the oral argument hearing but wished to remain a party in the matter. Others who did not appear at this oral argument do not lose their status as parties in this matter.

The Applicants take exception to the Hearing Examiner's ruling denying the Applications for Beneficial Water Use Permit for Ponds 2, 4, and 5. The denial is premised on the Examiner's Conclusion of Law 12 that concludes that the Applicants have not proven that the water rights of a prior appropriator will not be adversely affected as required by § 85-2-311(1)(b), MCA.

The Applicants argue that after spring runoff there is no surface connection between the ponds and Sheafman Creek and that the subsurface connection indicated in Conclusion of Law 12 is not borne out by the evidence or Findings of Fact 12, 14, or 15. They argue that their expert Lee Yelin testified that there is no surface connection between the marshy areas where Ponds 4 and 5 are to be built prior to existing Pond 2 and Sheafman Creek. Ponds 4 and 5 were actually built prior to the time of the hearing. Their expert, Ross Miller, testified, as reflected in

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Finding of Fact 29, that pumping water from the ponds would have no measurable effect on Sheafman Creek.

The Applicants assert that based on the testimony reflected in Findings of Fact 24-29 and based upon the lack of any hard data from the Objectors challenging that evidence there is no factual basis for the Examiner's conclusion that the Applicants have not provided evidence the proposed appropriations would not adversely affect prior surface water rights.

My review of the evidence and Findings of Fact 12, 14, 15, and in addition 24 through 29 clearly indicate a system of surface and underground waters all interconnected with the shallow groundwater system and the surface flows of Sheafman and Cow Creeks. After spring runoff, contributions to the creeks include surface and subsurface waters originating as rain or snowmelt that make their way down the basin to the Bitterroot River. Some waters diverted for irrigation return to the stream in a surface and subsurface manner as irrigation return flow. (Findings of Fact 21 and 24) Ponds 2, 3, and 5 are proposed in marshy and boggy areas within approximately 300 feet of Sheafman Creek, and Pond 4 is within 300 feet as well from Cow Creek. (Applicants' Exhibit 3) After spring runoff, waters of Sheafman Creek are usually allocated to the first eight rights of the 21 water rights decreed in 1913. (Finding of Fact 18) Also by examining the evidence estimating basin water yields, the existing water rights substantially exceed the ability of the basin to produce the required yield. (Findings of Fact 22 and 23)

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Section 85-2-311(1)(b), MCA, requires that the applicant prove by substantial credible evidence that the water rights of prior appropriators will not be adversely affected. Since the bogs and marshy areas are so closely interconnected and associated with Sheafman and Cow Creeks, the Applicants must prove by substantial credible evidence that the prior appropriators on Sheafman and Cow Creeks will not be adversely affected. A contention by the Applicants' expert, Ross Miller, based on the Pinesdale pump tests on a series of wells located downstream from the Takle property, and measurements below Pinesdale's infiltration gallery on Sheafman Creek that withdrawals from the ponds would have no measurable effect on the stream was given little weight by the Hearing Examiner. (Findings of Fact 25-29) I concur. No studies were done that specifically analyze and compare the proposed pond sites with the previous tests. Objector Golden's testimony is that of the last five years because of limited water supplies and the great demand, a water commissioner has been hired for the last three. (Finding of Fact 31) Together, these proposed Findings of Fact fairly represent the record concerning the facts pertaining to adverse effect to prior appropriators. It is the duty of the Hearing Examiner to weigh and balance the evidence when making a proposed conclusion. I have reviewed the Findings of Fact that support the Hearing Examiner's Conclusions of Law and cannot conclude that sufficient proof has been presented by the

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Applicants that prior appropriators on Sheafman or Cow Creek will not be adversely affected.

The Applicants assert in the exception that the Department's previous decisions indicate that the objector has the burden of producing facts sufficient to raise allegations of adverse effect to a level of plausibility. They assert the Objectors failed to meet this test and departure by the Department from previous practice, without explanation or reason, is arbitrary. The Applicants contend that the Objectors completely failed to offer any proof that the waters to be collected by the ponds contribute in any measurable way to the flow of Sheafman Creek or that use of such waters by the Applicants will diminish the availability of irrigation water to them. The Applicants believe that since the Objectors failed their burden of production, the Applicants have no burden of proof to disprove the necessary evidence by inference without an adequate foundation in the record.

The evidence on the record shows the interrelated characteristics of the surface water and shallow groundwater of the basin and that there are a substantial number of appropriations on the creek, many of which are not usually satisfied. The initial showing that prior appropriators will not be adversely affected is squarely on the Applicants. §85-2-311(1), MCA. In order for the burden of production to shift to Objectors to show adverse effect, the Applicants must <u>first</u> make their initial showing, based on substantial credible evidence, that other appropriators will not be adversely affected. <u>See</u> *<u>In</u>*

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re Application 60117-g76L by Houston. The Applicants have not done so in this case.

Therefore after reviewing the Applicants' arguments and the Findings of Fact, I concur with the Hearing Examiner's Conclusions of Law 12 and 13.

Mr. Ryan's exception raises various concerns about the applications and Department policy.

I believe that most of Objector Ryan's exceptions have been adequately addressed by the Hearing Examiner in the Proposed Order and by the evidence produced at the hearing on January 16, 1992 with a few exceptions. Proposing to store water in Ponds 2-5 in addition to the diversion of the eighth right for irrigation is clearly an expansion of the use of the eighth right. If Pond 1 is included as a place to store Sheafman Creek, the same principle would apply. I concur with the Hearing Examiner's Conclusion of Law 11. His concern about the diversion from Ponds 1, 2, 3, 4, and 5 after the eighth right diversion is shut off at the Sheafman Creek diversions is an issue that was not clear in the Order. After the eighth right is shut off, the Applicants' pumping from the ponds constitutes an appropriation of water beyond his eighth right. Further there is no operation plan or measurement of the ponds to assure that only stored water diverted from Sheafman Creek is used. Therefore a condition must be added that the Authorization to Change does not allow irrigation after the eighth right creek diversion is shut off. This is aside from the water which has been properly appropriated

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for Pond 1 under water use Permit 72841-s76H previously issued.

Objector Ryan disagrees with Conclusion of Law 10. He asserts that the evidence is not uncontroverted that the waters to be appropriated are waste water from an up-gradient irrigation project.

I reviewed Conclusion of Law 10 and referenced Finding of Fact 17, but also considered Findings of Fact 22-24 regarding adverse effect on prior appropriators on Sheafman and Cow Creeks. These findings of fact together are not substantial credible evidence that the use of additional water from Pond 3 would not adversely affect other water users on Sheafman and Cow Creeks. There was sufficient evidence concerning the characteristics of the basin and the substantial number of appropriations on the Creeks that I cannot conclude the evidence of record is uncontroverted. It is clear the waters to be pumped from Pond 3 are as likely to be part of the Sheafman Creek waters as not. I cannot conclude that the appropriation proposed for Pond 3 is waste water from an up-gradient irrigation project and the Applicants have not proven that there would not be an adverse affect to prior water right holders. Seepage water along a stream belongs to the stream and its appropriators. Woodward v. Perkins, 116 Mont. 46 (1944). Therefore Conclusion of Law 10 is not accepted and Conclusion of Law 12 is modified to include Application 76691-s76H for Pond 3.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts

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and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference, except that Conclusion of Law 10 is deleted and 12 is modified to include Application 76691-s76H for Pond 3. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation modifies the Proposed Order and makes the following:

ORDER

Applications for Beneficial Water Use Permit 76070-s76H, 72842-s76H, 76691-s76H, and 76692-s76H are denied.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right G(W)111151-76H is hereby granted to change the point of diversion of Statements of Claim W111151-76H and W111152-76H to two points in the NW¼SE¼NW¼ of Section 27, Township 7 North, Range 21 West, in Ravalli County, and to add four places of storage to be located in the SW¼SE¼NW¼, SE¼SE¼NW¼, and NW¼SE¼NW¼ of said Section 27.

1. The Authorization to Change is subject to all prior existing water rights in the source of supply. Further, the Authorization is subject to any final determination of existing water rights, as provided by Montana law.

2. Upon a change in ownership of all or any portion of these water rights, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water

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Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

3. The water right changed by this authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

4. Pumping from the ponds shall not occur after diversion from Sheafman Creek has ceased.

5. This Authorization is subject to the condition that the Appropriator shall keep a written record of the flow rate and volume of all waters diverted and pumped, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, Holiday Village Professional Suite, P.O. Box 5004, Missoula, MT 59806. The volume of water pumped cannot exceed the volume of water diverted.

6. If, at any time after Authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show cause why the

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Authorization should not be modified or revoked. The Department may then modify or revoke the Authorization to protect existing water rights or allow the Authorization to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

7. The issuance of this Authorization to Change is not to be construed as recognition by the Department of the water right involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

NOTICE

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

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.

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Dated this 5 day of November, 1992.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 6th day of November, 1992 as follows:

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John Lee Ryan, Jr.
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CASE #

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

Cindy G. Campbell
Cindy G. Campbell
Hearings Unit Legal Secretary

CASE #

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS 76691-s76H, 72842-s76H, 76692-s76H AND 76070-s76H AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT G(W)111151-76H BY ROBERT AND MARLENE TAKLE	)	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 January 16, 1992, in Missoula, Montana, to determine whether permits should be granted under the criteria in § 85-2-311(1) and (4), MCA, for Applications 76691-s76H, 72842-s76H, 76692-s76H and 76070-s76H and whether an Authorization to Change should be granted for Application G(W)111151-76H under the criteria in § 85-2-402(1) and (2), MCA.

APPEARANCES

Applicants Robert and Marlene Takle (Applicants) appeared at the hearing by and through Robert Takle and counsel, Jeffrey Langton.

Lee Yelin, Water Right Specialist with Land and Water Consulting Inc., appeared at the hearing as a witness for the Applicants.

Barry Dutton, President of Land and Water Consulting Inc., appeared at the hearing as a witness for the Applicants.

Ross Miller, Hydrogeologist and Geological Engineer with

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Land and Water Consulting Inc., appeared at the hearing as a witness for the Applicants.

Tom Gale, Chief Water Commissioner of the Fourth Judicial District and Sheafman Creek Water Commissioner, appeared at the hearing as a witness for the Applicants.

Objectors Leslie B. and Agnes M. Golden appeared at the hearing pro se.

Objector Miles S. Knutson appeared at the hearing pro se.

Objectors Ray and Jean Lorenz appeared at the hearing by and through Leo Barnett, caretaker of the Lorenz property.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Objectors John Lee Ryan, Sr. and Marjorie G. Ryan, in a letter dated January 12, 1992, to Gary Fritz, Administrator of the Water Resources Division of the Department, requested that certain documents be included in the record and set forth certain conditions under which their objections would be withdrawn. Objectors Ryan's Form 611 with attachments are a permanent part of the Department files which are a permanent part of the record, in this matter, as is Lee Yelin's letter to Mike McLane, dated November 25, 1991. Lee Yelin's handout with attachments, presented at the December 16, 1991, meeting is also a permanent part of the record, as is the letter setting forth the conditions. All of these conditions have been met, not at Objectors Ryan's request, but as a matter of normal procedure.

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Objectors Gramza, Wheat, and Winters did not appear at the hearing, but had notified the Hearing Examiner prior to the hearing and retain their status as parties. However, Objectors Winters made statements in their letter concerning the case that are written testimony which cannot be entered into the record. To do so would deny the Applicants the opportunity to cross-examine Objectors Winters. Mont. Code Ann. § 2-4-612 (1971); Mont. Admin. R. 36.12.220 and 36.12.223 (1984).

Objectors Albert G. Canaris, Mike and Pam Gouse, Charles Prausa, and Kevin T. and Corinne F. Horton did not appear at the hearing nor had they made prior explanation to the Hearing Examiner; therefore, in accordance with ARM 36.12.208, they are in default; their objections are dismissed; and they are no longer parties in this matter.

John W. and Catherine A. O'Mailia filed an objection to these applications on October 29, 1991. The final date to file objections was October 4, 1991. Untimely objectors cannot become parties to a contested case. Mont. Admin. R. 36.12.219. (1984).

PRELIMINARY MATTERS

During the hearing Objectors Knutson and Golden testified to certain conversations with Objector Charles Wheat concerning a pump test by Pinesdale. Since Objectors Wheat did not attend the hearing and the Applicants were unable to cross-examine them, that particular testimony by Mr. Knutson and Golden is hereby stricken from the record.

There were two errors in the public notice of Application

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G(W)111151-76H. The first was that the proposed points of diversion would be in addition to the existing points of diversion. The proposed points of diversion would replace the existing points of diversion. The failure to state that the old points of diversions would be abandoned could in no way prejudice the Objectors since all of them are downstream from both the old and the new points of diversion. The list of persons who were notified would not change if the notice had been correct so there would be no prejudice to potential objectors.

The second error was the omission of the proposed places of storage, the four ponds. The omission of the four proposed storage ponds could not prejudice the Objectors or potential objectors when it was common knowledge that ponds would be used to store part of the eighth right and had been discussed at an informal meeting held by Michael McLane.

There were three errors in the public notice of Application 72842-s76H. The first was that the proposed means of diversion is a dam, when the proposed means of diversion is a pit/dam combination. Failure to state the proposed means of diversion is a pit/dam combination instead of simply a dam could have been a material error because the pit/dam combination would divert subsurface water as well as surface water while a dam would divert only surface water; however, Applicants submitted three other Applications for Permit in the same area, all pit/dam combinations, and none of these notices indicated that any of the water appropriated would be subsurface water which at the time

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these Applications were made was, by definition, surface water.

The definition of groundwater at the time these applications were filed was, ". . . any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." Mont. Code Ann. § 85-2-102(10)(1989). Since it is obvious there is a connection between the subsurface water and Sheafman Creek, the subsurface water cannot be identified as groundwater.

The second error is that the proposed flow rate is 160 gallons per minute (gpm). The rate the water would be pumped from the reservoir is 160 gpm not the rate of flow into the pond. This error does not prejudice the Objectors because the inflow fluctuates from a high flow rate of surface water in the spring to an unknown low flow rate of subsurface water later in the season and if properly noticed, a correct notice would have stated no flow rate at all.

The third error is the legal land description of the pond location. It is described in the file and in the public notice as being located in the SW¼SE¼NW¼ of Section 27, Township 7 North, Range 21 West, Ravalli County.[1] According to Applicants' Exhibits 1, 2, and 3, this pond is located in the SE¼SE¼NW¼ of Section 27. This error does not prejudice the Objectors or potential objectors because both sites are located within the Applicants' property boundary in the SE¼NW¼ of Section 27.

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[1]Unless otherwise specified all land descriptions are in Township 7 North, Range 21 West, Ravalli County.

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There is one error in the public notice of Application 76070-s76H. The statement in the notice was that the flow rate would be 160 gpm when that is the rate the water would be pumped from the reservoir rather than the inflow. This error would not prejudice the Objectors for the reason given above.

There is one error in the public notice of Application 76691-s76H. The point of diversion is described as being in the NE¼SE¼NW¼ of Section 27. According to Applicants' Exhibits 1, 2, and 3, the correct description is the NW¼SE¼NW¼ of Section 27. This error would not prejudice the Objectors or potential objectors because both sites are located within the Applicants' property boundary in the SE¼NW¼ of Section 27.

When errors have occurred in the public notice, a determination must be made whether the errors are material errors. If the errors are material errors, the notice must be republished with the errors corrected. If the errors are deemed not material, it is not necessary to publish the notice again. Mont. Admin. R. 36.12.205 (1984). Since none of the errors would prejudice objectors or potential objectors, the errors are not material and the notice need not be published again.

EXHIBITS

Applicant introduced eight exhibits for inclusion into the record. There were no objections to any exhibit; therefore they were accepted into the record. The numbering of the exhibits indicates that nine exhibits were entered; however, the record indicates there was no Exhibit 4. All exhibits pertain to all

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the Applications regardless of the application number on the exhibit label.

Applicants' Exhibit 1 consists of two pages and is a copy of a Warranty Deed transferring two tracts of land, Parcels 3 and 4, located in the W½ of Section 27, from Anthony Van Marle to Robert Donald Takle and Marlene Lucrecia Takle.

Applicants' Exhibit 2 is page 1 of Certificate of Survey No. 1690. Tracts 3 and 4 are highlighted in yellow.

Applicants' Exhibit 3 is a copy of an aerial photograph taken in May of 1988. The scale of this photograph is 16 inches equals one mile. There is a transparent overlay attached to the photograph. The location of Applicants' property, the existing and proposed ponds, the ditches, the proposed pipelines, two wells, Cow Creek, and Sheafman Creek are shown in various colors on the overlay.

Applicants' Exhibit 5 consists of six pages and is the resume' of Barry L. Dutton, President of Land and Water Consulting Inc.

Applicants' Exhibit 6 is a bell curve showing the difference in plant evapotranspiration and pond evapotranspiration.

Applicants' Exhibit 7 is a diagram of Applicants' property and the location of the ponds, both existing and proposed. The location of the proposed changed point of diversion is also shown on this diagram.

Applicants' Exhibit 8 consists of eight pages. The layout of the high water irrigation system is shown on the first page.

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The layout of the low water irrigation system is shown on the second page. A diagram of the pond system is shown on the third page. The pump curve for a ten horsepower pump is shown on the fourth page. The pump curve for a 15 horsepower pump is shown on the fifth page: Pages six, seven, and eight describe the proposed irrigation schedule.

Applicants' Exhibit 9 is the first page of Applicants' written response to the Objectors to the proposed projects.

All five of the Department's files were made available for review by all parties. There were no objections to any part of any file; therefore, all five of the Department files are accepted into the record in their entirety.

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

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."

2. Robert and Marlene Takle duly filed Application for Change of Appropriation Water Right G(W)111151-76H with the Department on November 13, 1990, at 11:41 a.m. Application for Beneficial Water Use Permit 72842-s76H by the Takles was filed with the Department on November 3, 1989, at 3:01 p.m. Takles

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filed Application 76070-s76H with the Department on November 13, 1990, at 11:35 a.m. Application 76691-s76H was filed with the Department on November 13, 1990, at 11:45 a.m. by Robert and Marlene Takle. Takles filed Application 76692-s76H with the Department on November 13, 1990, at 11:46 a.m. (Department files.)

3. All the aforementioned Applications were published in the Ravalli Republic on September 18, 1991. Seven timely objections to Application G(W)111151-76H were received by the Department. Eleven timely objections and one untimely objection to Applications 72842-s76H, 76070-s76H, 76691-s76H and 76692-s76H were received by the Department. (Department file.)

4. Applicants purchased their property from Anthony Van Marle on May 23, 1986. At the time of purchase, there were three ponds on the property. Mr. Van Marle told the Applicants that the ponds were properly permitted. When Applicants realized the ponds were not properly permitted, they retained Land and Water Consulting Inc. to take the necessary steps to get the ponds permitted and to set up a vegetation management plan since the current predominant plant on Applicants' property is spotted knapweed. Part of the vegetation management plan is an irrigation system that can best use the available water. (Department files, Applicants' Exhibits 1 and 8, and testimony of Applicant and Barry Dutton.)

5. The water rights appurtenant to the Applicants' property are a portion of a decreed eighth right on Sheafman Creek claimed

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in Statements of Claim W111151-76H and W111152-76H. Statement of Claim W111152-76H claims 784 (gpm) up to 575 acre-feet of water per year for irrigation of 60 acres. Since Applicants purchased two-thirds of the place of use, 40 acres, their share of this water right is 522.66 gpm up to 383.333 acre-feet per year for irrigation.[2] Statement of Claim W111151-76H claims a flow rate of three gallons per hour up to .81 acre-feet per year for stock water. Again, since Applicants purchased two-thirds of the place of use, their portion is .034 gpm up to .054 acre-feet per year for stock water. A priority date of May 1, 1895, is claimed by both Statements of Claim. (Testimony of Lee Yelin and Department files and records.)

6. Application to Change Appropriation Water Right G(W)111151-76H seeks to move two points of diversion claimed on Statements of Claim W111151-76H and W111152-76H from the NE$\frac{1}{4}$SE$\frac{1}{4}$NE$\frac{1}{4}$ and SW$\frac{1}{4}$NW$\frac{1}{4}$NE$\frac{1}{4}$ of Section 28 to two points in the NW$\frac{1}{4}$SE$\frac{1}{4}$NW$\frac{1}{4}$ of Section 27, one on each side of Sheafman Creek. Although the notice states the new points of diversion would be additional points of diversion, testimony was given during the hearing that the points of diversion claimed in Section 28 would no longer be used by Applicants. Also not included in the notice is Applicants' intent to add four places of storage. Item D of

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[2]Applicants are aware Statement of Claim W111152-76H is inflated and that it will most likely be reduced by the Water Court. Reduction to the Water Court standards in the flow rate or volume claimed would not affect the change in point of diversion and added places of storage for Application for Change G(W)111151-76H.

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the Application does not reflect this intent, but is stated in the Supplement to Application for Change of Appropriation Water Right, Items A and B. Applicants' consultants stated the storage intent many times during the hearing. Applicants also intend to change the method of irrigation from flood irrigation to sprinkler irrigation. The places of use are 15 acres north of Sheafman Creek and 10 acres south of the creek located in the SE¼NW¼ of Section 27. (Applicants' Exhibits 3, 4, 7, and 9, Department files and testimony of Lee Yelin.)

7. Water would be withdrawn from Sheafman Creek at the new points of diversion using two headgates, one on the north side of the creek and the other on the south side of the creek. The headgates would be slide gate structures attached to eight-inch diameter corrugated metal pipes. These pipes would lead to two separate 42 inch diameter corrugated metal pipe sumps, excavated down to eight feet and sealed on the bottom to prevent water loss. The outlet side of the sumps would be the beginning point of buried six-inch diameter pipelines leading to the ponds. Each sump is equipped with a slide gate so that water may also be diverted from either sump to operate the entire irrigation system or to fill the ponds. The pump system in the north sump would consist of a 15 horsepower motor and centrifugal pump. The pump system in the south sump would consist of a ten horsepower motor and centrifugal pump. (Testimony of Lee Yelin, Applicants' Exhibits 4, 7, and 8 and Department files.)

8. The proposed irrigation system would use two four-inch

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diameter aluminum pipes as portable mainlines. The laterals would be portable three-inch diameter aluminum pipes with up to 68 sprinkler heads with either one-half inch or eleven-sixty-fourths inch nozzles depending on available water. The larger nozzles would be used to "load" the soil profile during periods of high water availability. The small nozzles would be used during periods of low water availability when Applicants would be pumping from the ponds. Irrigation sets would be eleven and one-half hour sets. The maximum withdrawal rate would be 380 gpm. It would take approximately six days to cover the entire property using both systems. A maximum of eight irrigations per season could be accomplished with six-day irrigations. If there are eight irrigations at 380 gpm, the maximum volume of water used would be 41.67 acre-feet per year or 1.66 acre-feet per acre. (Testimony of Lee Yelin and Barry Dutton, Department files, and Applicants' Exhibit 8.)

9. During periods of high water flow when the eighth right can be exercised, the irrigation of the property would be from the sump directly into the portable mainline. There would be approximately 1500 feet of mainline to the north of the diversion and 1150 feet to the south of the diversion. Two laterals could be run from each mainline. After the Water Commissioner shuts off the eighth right, the irrigation would be changed to use the water which would be stored in the ponds during the high water period. An additional 550 feet of mainline would be added, the small nozzles would be installed and "deficit irrigation" would

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be exercised. Deficit irrigation in this case means there is not enough water to satisfy crop water needs; therefore, Applicants would not attempt to satisfy crop water needs and maximize production, instead the available water would be used just to keep the pasture green. (Department files, Applicants' Exhibit 8, and testimony of Barry Dutton and Lee Yelin.)

10. The diversions and proposed irrigation system have a very high efficiency. There would be little or no loss in the delivery system. The evaporation loss from the ponds would not exceed the amount previously lost through evapotranspiration by the wetlands plants which are presently growing at the proposed pond sites. (Testimony of Barry Dutton and Lee Yelin and Applicants' Exhibit 6.)

11. Applicants would not need to divert as much water from the new points of diversion as they did from the old points of diversion because there would be no ditch loss. Actual water applied to the crop would be less than the old system, but the return flows produced by the flood irrigation would not occur. The loss of return flows would probably equal the amount saved by changing from flood to sprinkler irrigation. However, the amount of water left in the creek as a result of the change in the points of diversion would be water that was not available to other decreed water right holders before the points of diversion were changed. (Testimony of Lee Yelin, Department files, and Applicants' Exhibit 3.)

12. Application 72842-s76H, for Pond 2, seeks the right to

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appropriate up to 7.28 acre-feet of the waters of an unnamed tributary of Sheafman Creek for supplemental irrigation of 15 acres in the S½SE¼NW¼ of Section 27 and .15 acre-feet for stock water by means of an existing pit/dam. Although the notice stated the means of diversion was a dam, the Application indicates the means of diversion is a dam/impoundment and testimony during the hearing indicated a pit/dam combination. The proposed period of diversion and proposed period of use for stock water would be from January 1 through December 31, inclusive of each year. The proposed period of use for irrigation is from April 1 through September 15, inclusive of each year. The dam and pit are located in the SE¼SE¼NW¼ of Section 27 on an overflow channel of Sheafman Creek. This location is also the proposed place of use for the stock watering. This pond has been full since it was constructed prior to 1986. The storage capacity of this pond is estimated to be 1.04 acre-feet. Applicants, in Item 7c of the Application, propose to fill this pond 12 times if there is sufficient water. However, the total amount of water requested in Item 9 is 7.43 acre-feet per year. This calculates to be approximately seven fillings per year. This pond is principally fed by subsurface waste water from irrigation to the north and up-gradient of the pond and runoff from Sheafman Creek. The inflow fluctuates. Item 9 of the Application indicates and the notice stated a flow rate of 160 gpm; however, 160 gpm is the rate the water would be pumped out of the pond not the rate of water that would flow into

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the pond.[3] In the spring, surface runoff can be observed, but during the peak of the irrigation season there is no surface water entering the pond. The pond continually spills indicating recharge from a subsurface source. (Testimony of Lee Yelin, Applicants' Exhibits 3, 8, and 9, and Department files.)

13. Application 76691-s76H, for Pond 3, seeks the right to appropriate six acre-feet of the waters of an unnamed tributary of Sheafman Creek for supplemental irrigation of 15 acres in the N½SE¼NW¼ of Section 27 and .15 acre-feet for stock water. The place of use for the stock water is the location of the existing pond in the NW¼SE¼NW¼ of Section 27. The means of diversion is a pit/dam combination. The proposed period of appropriation and proposed period of use for stock water is from January 1 through December 31, inclusive of each year. The proposed period of use for irrigation is from April 1 through October 31, inclusive of each year. This pond would be enlarged to a capacity of .876 acre-feet. It would have a radius of 45 feet and would be approximately 15 feet deep. This pond was designed to capture subsurface waste water from an up-gradient irrigation project or runoff from large precipitation events after the eighth right is shut off. The pond would be filled with eighth right water while available and stored for use when the eighth right is exhausted. Applicants could irrigate once or twice from this pond, after

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[3]Department policy is not to apply a flow figure to reservoir inflow if it is runoff or subsurface flow that cannot be quantified. There is a comment in the margin of "work copy 2" stating a flow rate is not needed.

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enlargement, without refilling; however, Applicants wish to have the right to refill this pond seven times. In the spring, surface water has been measured entering the pond at a rate of approximately 400 gpm. The average surface flow into this pond is 60 gpm. (Testimony of Lee Yelin, Applicants' Exhibit 4, and Department files.)

14. Application 76070-s76H, for Pond 4, seeks to appropriate 10.60 acre-feet of the waters of an unnamed tributary of Cow Creek for supplemental irrigation of ten acres in the S½SE¼NW¼ of Section 27 and .15 acre-feet for stock water to be used at the proposed pond site in the SW¼SE¼NW¼ of Section 27. The proposed capacity of the pond is .876 acre-feet with a radius of 45 feet and depth of 15 feet. The proposed means of diversion is a pit/dam combination. A flow rate of 160 gpm is stated in Item 9 as well as in the notice. This is not the flow rate that would enter the pond; it is the rate the water would be pumped out of the pond for irrigation.[4] Item 7c of the Application states the Applicants intent to fill the pond seven times; however, Item 9 requests 10.75 acre-feet per year. In order to appropriate 10.75 acre-feet per year the pond would be filled 12.27 times. Lee Yelin testified to the intent of the Applicants to fill the pond 13 or 14 times. The proposed period of diversion and proposed period of use for stock water is from January 1 through December 31, inclusive of each year. The

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[4]See supra note 2. However there is no statement in the margin of this Application that there should not be a flow rate.

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proposed period of use for irrigation is from April 1 through October 31, inclusive of each year.

There is water standing at the proposed pond site throughout the year indicating a high water table. The vegetation around this site is riparian vegetation associated with Cow Creek. During periods of extremely high runoff, water flows into a channel that leads to Cow Creek. There is a culvert under the road to allow the water in that channel to discharge into Cow Creek. The rest of the year there is no active flow or surface connection with Cow Creek and it appears the boggy area would drain toward Sheafman Creek. (Testimony of Lee Yelin, Applicants' Exhibit 4, and Department files 76070-s76H and 76692-s76H.)

15. Application 76692-s76H, for Pond 5, seeks to appropriate six acre-feet per year of the waters of an unnamed tributary of Sheafman Creek for supplemental irrigation of ten acres in the S½SE¼NW¼ of Section 27 and .15 acre-feet for stock water. The proposed pond would be located in the SE¼SE¼NW¼ of Section 27 which is also the place of use for the stock water. The proposed capacity of the pond is .876 acre-feet. The proposed period of appropriation and proposed period of use for stock water is from January 1 through December 31, inclusive of each year. The proposed period of use for irrigation is from April 1 through October 31, inclusive of each year.

There is also standing water at this proposed pond site indicating a high water table. There are no surface channels

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that lead to the proposed pond site; however, there are some draws that lead away from the pond site after a slight drop off a little bench. There is a high water channel that carries water toward Cow Creek, but the majority of the time, the water would flow toward Sheafman Creek if there were a surface connection between the creeks and the pond. (Testimony of Lee Yelin, Applicants' Exhibit 4, and Department file.)

16. The amount of stock water requested in all the Applications is .15 acre-feet of water per year. Applicants propose to keep four to six horses that would drink directly from the stream or the ponds. (Department files.) According to Department standards, one horse equals one and one-half animal unit; six horses equals nine animal units. One animal unit will consume 15 gallons of water per day. Nine animal units would consume 135 gallons of water per day which is .0004 of an acre-foot. Multiplying .0004 by 365 (days in a year) equals .146 of an acre-foot of water per year. The total stock water use from all the ponds would be .146 of an acre-foot of water per year rather than .15 of an acre-foot of water per year from each pond.

17. There is no record the subsurface waste water from the upgradient irrigation which would be appropriated by Pond 3 has been appropriated by a senior user. (Testimony of Lee Yelin.)

18. Sheafman Creek is a decreed stream. A decree was entered on August 5, 1913, setting forth the priority date and flow rate of 21 water rights. Sheafman Creek does not produce the water necessary to satisfy all of the 21 rights. There is

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usually enough water in Sheafman Creek to satisfy all water users in the spring; however, after spring runoff, there is only enough water to serve the first eight rights. As the Creek falls, the eighth right is shut off. The Creek is observed by the Water Commissioner usually once a week in July as the Creek is beginning to fall; then ultimately every other day during August and September. The earliest the eighth right has been shut off since Tom Gale has been Water Commissioner on Sheafman Creek is the first of July and the latest is the first of August.

The water commissioner is generally able to predict far enough in advance when the eighth right is going to be shut off so that Applicants would be able to load the soil profile and top off the ponds. If, however, Applicants failed to fill the ponds and load the soil profile using the eighth right water, they would not be allowed to do so with the decreed waters of Sheafman Creek. (Testimony of Tom Gale and Department records.)

19. When senior users are appropriating from Sheafman Creek, the majority of the first right is taken out at a point in the NE¼SE¼NW¼ of Section 27 by the Burke Ditch which is directly north and upgradient of proposed Pond 5. Objectors Lorenz, holders of a portion of the first right, are down-gradient from the pond. In the past, the owner of that property has not made a call on the water even though the Burke Ditch users try to dam up the creek and take all they can. Sheafman Creek goes dry between the Burke Ditch headgate and the Lorenz point of diversion, but immediately above the Lorenz point of diversion, the creek

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surfaces again and provides water for Objectors Lorenz' use. (Testimony of Tom Gale and Lee Yelin.)

20. None of the ponds, proposed or existing, would be able to sustain constant pumping. A pump test was performed on a test pond located in the SE$\frac{1}{4}$SE$\frac{1}{4}$NW$\frac{1}{4}$ of Section 27 on March 14, 1991. The pond was pumped down 4.75 feet in 119 minutes or one hour and 59 minutes. The recovery time was 420 minutes or seven hours. (Testimony of Ross Miller and Lee Yelin and Department file 76692-s76H.)

21. A field investigation was performed on February 11, 1991, by John Westenberg, Water Resources Specialist with the Department's Missoula Water Resources Regional Office. Mr. Westenberg inspected the proposed sites for Ponds 4 and 5 to determine the source of water that would fill these ponds. Mr. Westenberg concluded that the source would be an unnamed tributary of Sheafman Creek, but there was potential for impact on Cow Creek users. (Department files 76692-s76H and 76070-s76H.)

22. Larry Schock, Civil Engineering Specialist with the Department's Missoula Regional Office, prepared a stream flow forecast for Sheafman Creek based on a 12.5 square mile drainage basin on June 20, 1991. On December 12, 1991, Mr. Schock issued an amended stream flow summary based on a 5.73 square mile drainage basin. An erroneous scale had been entered into the electronic planimeter when Mr. Schock calculated the June 20, 1991, version of the stream flow summary.

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Three methods were used. Method One compares the Sheafman Creek drainage to the nearby Kootenai Creek drainage basin which has gauged stream flow data available for the period between the 1940's and the 1960's and shares a common drainage divide with Sheafman Creek. The two basins have similar topographical and geographical features. This method simply consists of a ratio of the two basin areas multiplied by the mean monthly and annual discharge records for Kootenai Creek.

Method Two uses a regression equation, based on work done by the U.S. Geological Survey, to calculate the mean annual stream flows. This equation relates the drainage area and annual precipitation rate to the specific regional characteristics of the eastern slopes of the Bitterroot Mountain Range. Using the average precipitation level for the Sheafman Creek basin of 70 inches, the mean annual discharge rate is then distributed over the entire year by using the hydrologically similar basin assumption that Sheafman Creek has the same monthly distribution of the annual discharge as Kootenai Creek. The mean monthly discharges were calculated by using the same type of ratio equations as used in Method One.

Method Three uses a regression equation, based on work done by J.F. Orsborn, to calculate the mean annual stream flows. This equation relates the drainage area and annual precipitation rates to specific regional characteristics for southwestern Montana. After the mean annual discharge is calculated, the monthly flow rates were determined by using the same distribution assumptions

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and ratio calculations as used in Methods One and Two.

Method Two has an average prediction error of 12.5 percent and Method Three has an average prediction error of 20 percent. These prediction errors are superior to the possible errors generated by previous methodologies developed for stream flow forecasts.

Mr. Schock then presented the results in tabular form entitled "Stream Flow Summary" and plotted the results on a hydrograph. All three methods presented data and hydrographs of similar shape and magnitude.

The amended Stream Flow Summary predicts an average stream flow of 47.94 cubic feet per second (cfs) in May and 61.21 cfs in June using Method One. Using Method Two, the prediction is 50.82 cfs in May and 64.44 cfs in June. The predicted average stream flow in May is 47.69 cfs and 60.89 cfs in June using Method Three. (Department files and testimony of Lee Yelin.)

23. The total of all decreed water rights on Sheafman Creek is 53.5 cfs. The total of the decreed rights up to the eighth right is 34.8 cfs. If all the water users simultaneously used the water, Applicants would not be able to exercise a newly permitted water right at all from January through April, nor in May except in years of extremely high runoff. Applicants would not be able to exercise a permitted right at all from July through December. However, under the same scenario, Applicants could exercise a permitted water right most years in June. (Department files and testimony of Lee Yelin.)

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24. The Sheafman Creek and Cow Creek area is basically a shallow groundwater basin draining to the east into the Bitterroot River Valley. It has a number of recharge sources; however, there is not sufficient data to quantify the sources of recharge. One source of recharge to the system is leakage from Sheafman Creek and Cow Creek and underflow from these creeks. Precipitation is a minor source of recharge. Another source of recharge to the aquifer is flow from fractured bedrock. Well logs in the area indicate that deep wells do intersect and obtain water from the bedrock. It is unknown just how much of the recharge to the aquifer is from the fractured bedrock. Another source of recharge is leakage from irrigation ditches. Thus, the likely components of recharge are known, but the quantities of recharge contributed by each component are unknown and it is prohibitively expensive to gather the data to quantify the components. (Testimony of Ross Miller.)

25. There is more data than is typical for the drainages along the eastern flank of the Bitterroot Mountains primarily due to the work the City of Pinesdale has done. Pinesdale has two infiltration galleries located in the NW¼NW¼NW¼ of Section 28, approximately one and one-quarter miles upstream of the Applicants' proposed point of diversion. The infiltration galleries are buried 10 to 15 feet below the land surface.[5]

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[5]See In re of Applications for Beneficial Water Use Permit 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale at pg. 12.

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Tests have been conducted where water was withdrawn from one gallery while the flows of Sheafman Creek were measured. Hydrometrics, a natural resource consulting firm based in Helena, performed pump tests in a series of wells for Pinesdale located downstream from the Takle property on the drainage and measured the effects of pumping those wells on nearby wells while gauging the flow of Cow Creek. There are significant data collected specifically in the area that surrounds the Applicants' property. Other experts, Howard Newman and William Uthman, also have performed tests and completed studies. Although Mr. Miller stated he has reviewed all the aforementioned studies, none of these studies were presented at the hearing. (Testimony of Ross Miller.)

26. Pinesdale pumped from the infiltration gallery on Sheafman Creek at a rate of 50 gpm while measuring at numerous points in the stream. The conclusion from that test was that there was no measurable effect at approximately 200 hundred feet from the infiltration gallery. Mr. Miller is not aware of any geological differences of significance between the Pinesdale location on the drainage and the Applicants' location. (Testimony of Ross Miller.)

27. Hydrometrics, in 1987, pumped wells at a rate of 40 to 50 gpm, measured the drawdown in nearby wells, and also measured the effects on Cow Creek. There was no measurable effect on the flow of Cow Creek at a point 660 feet from the pumped wells. The drawdown was approximately one and one-half feet in wells located

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100 to 200 feet from the pumped wells. (Testimony of Ross Miller.)

28. Taking the volume of the four ponds times the number of proposed pond fillings after the eighth right has been shut off, results in the total amount of subsurface water to be withdrawn from the area. Dividing that by the length of the irrigation season which would be approximately five months, calculating that back determines the gallons per minute of subsurface water that would be withdrawn from the hydrologic system of Sheafman Creek. This would be equivalent to a shallow well pumping between 32 to 45 gpm. If Ponds 2, 3, and 5 were pumped dry seven times throughout the course of irrigation season and Pond 4 was pumped dry 14 times, the volume of water appropriated would be the equivalent of pumping 32 to 45 gpm from a groundwater well for the entire time. The low number of 32 represents a seven month irrigation season and the high number of 45 represents a five month irrigation season. (Testimony of Ross Miller.)

29. It is Ross Miller's contention that considering the available data and the fact that Applicants' ponds would be spread out over a larger area than the Pinesdale well cluster or the infiltration gallery, it is unlikely there would be any measurable effects on the flows of either Sheafman Creek or Cow Creek due to Applicants' proposed operation nor would there be an adverse effect on groundwater users. (Testimony of Ross Miller.)

30. Joelina E. Holt filed Statements of Claim W015929-76H, W015931-76H, and W017859-76H. Claim W015929-76H claims 9.30

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miner's inches up to 69.75 acre-feet per year of the waters of Sheafman Creek for irrigation of 20 acres with a priority date of June 1, 1883. Claim W015931-76H claims .0625 gpm up to .1014 acre-feet per year for stock water from Sheafman Creek. Claim W017859-76H claims six miner's inches up to 45 acre-feet per year of the waters of Sheafman Creek for irrigation of 20 acres. Claims W015931-76H and W017859-76H both claim a priority date of July 28, 1882. Objector Miles Knutson purchased a portion of the property appurtenant to these claims and a portion of the water rights were transferred to Mr. Knutson. (Department files and records.)

Objector Knutson believes Sheafman Creek and Cow Creek are over-decreed now and that no more water rights should be issued on these creeks because it just creates more problems that shouldn't be there. Mr. Knutson understands that Applicant is not proposing to take water directly out of Sheafman Creek after the eighth right is shut off, but he believes the proposed appropriation could adversely affect fish and wildlife in the area. (Testimony of Miles Knutson.)

31. Raymond F. Holt filed Statements of Claim W015933-76H and W015942-76H. Claim W015933 claims .0625 gpm up to .1014 acre-feet per year of the waters of Sheafman Creek for stock water. Claim W015942-76H claims 11.5 miner's inches up to 86.25 acre-feet of the waters of Sheafman Creek for irrigation of 20 acres. Both claim a priority date of July 28, 1882. Leslie B. and Agnes M. Golden purchased a portion of the property to which

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these claims are appurtenant and a portion of the water rights were transferred to the Goldens. (Department files and records.)

Objectors Golden hold the first and fourth water rights on Sheafman Creek and they believe the Department should protect those water rights. Further the Goldens believe that if the water commissioner has to put in more time regulating the water if the Applicants' applications are approved, the Applicants should pay the entire cost instead of placing an additional burden on them. If Applicants or their successors agreed to pay the entire cost of the water commissioner's additional expenses, the Goldens would be satisfied. Objectors Golden have lived on Sheafman Creek for a period of five years. The first two years, there was no water commissioner, but the last three years, a water commissioner has been required. (Testimony of Leslie Golden.)

32. Philip L. and Phyllis D. Baden filed Statement of Claim W021959-76H for 20 miner's inches up to 75 acre-feet per year of the waters of Sheafman Creek claiming a priority date of July 28, 1882. Ray Lorenz purchased this property and the water rights were transferred to Objectors Lorenz. (Department files and records.

Objectors Lorenz are still not sure the proposed appropriations will not cause problems during the low water season. They believe the water appropriated by the ponds would normally flow down into Sheafman Creek and keep it going. Objectors Lorenz purchased their property in February or March of

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1991, and were not aware there was a water commissioner on the Creek until recently, nor were they aware they could call for water. Moreover, Objectors Lorenz, through Leo Barnett, are not sure the evidence gathered in the Pinesdale area would accurately reflect the situation in the Applicants' area. (Testimony of Leo Barnett.)

33. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved. (Testimony of Lee Yelin.)

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

CONCLUSIONS OF LAW

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

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
>
> (i) at times when the water can be put to the use proposed by the applicant;
>
> (ii) in the amount the applicant seeks to appropriate; and

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(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

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

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

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

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

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

. . .

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402, MCA, have been 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

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possessory interest, in the property where the water is to be put to beneficial use.

5. The proposed uses, irrigation and stock water, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2)(1989). Applicants would beneficially use all the water diverted. There is no evidence in the record that Applicants would waste water. Although Applicants did apply for .15 of an acre-foot of water per year from each pond, the animals would be drinking directly from the stream or the ponds and would not exceed a total usage of .146 of an acre-foot per year for stock water. See Findings of Fact 12, 13, 14, 15, and 16.

6. Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

7. Applicants have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 4.

8. The proposed change and proposed new uses would 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 33.

9. The Applicants have provided substantial credible evidence the proposed Change of Appropriation would not adversely affect the water right of other persons. See Findings of Fact 5, 6, 9, and 11.

10. There is uncontroverted evidence in the record that the pit/dam combination proposed in Application 76691-s76H, for Pond 3 would appropriate subsurface water which is waste water from an up-gradient irrigation project. Appropriation of the waste water would not create an adverse effect to prior water right holders. See Finding of Fact 17.

11. In most years there is unappropriated water in Sheafman Creek during the month of June. See Findings of Fact 22 and 23. However, during that period, Applicants are still using their decreed right and have no need for other waters at this time. See Finding of Fact 18.

12. For Applications 72842-s76H, 76692-s76H and 76070-s76H Applicants have provided evidence of a shallow groundwater aquifer. See Finding of Fact 24. There is evidence in the record that the shallow groundwater aquifer is a part of the surface water and appears as standing water or marshy areas that drain into Sheafman Creek. See Finding of Fact 14, 15, and 21. As such, the water from the shallow aquifer cannot legally be designated groundwater. Mont. Code Ann. § 85-2-102(10) (1989). Applicants have not provided evidence that the proposed appropriations would not adversely affect prior surface water rights. Perhaps the adverse effect of the proposed appropriations would not be apparent immediately as indicated by the Pinesdale tests, but any water taken upstream in a water-short source will be felt downstream as a shortage of water. See Finding of Fact 25, 26, 27, 28, and 29. However small the

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effect, it would nevertheless be an adverse effect. See Finding of Fact 18. Applicants have not provided evidence that Sheafman Creek does not gain water from the subsurface sources which become a part of the stream that supplies water for the decreed water rights. In Pinesdale it was determined that Sheafman Creek is a losing and gaining stream. In re Pinesdale, supra at pg 15. There is testimony that there are no significant geological differences between the Pinesdale location and the Applicants location. See Finding of Fact 26. Therefore, if Sheafman Creek is a losing and gaining stream at stretches above and below the Pinesdale diversions; it is more than likely a losing and gaining stream in areas of Applicants' proposed diversions.

If, in fact, there is water available after the eighth right is shut off, it should be admeasured and distributed by the Water Commissioner to satisfy the decreed rights rather than attempt to create a permitted right on a source that cannot now support the demand by decreed water rights.

13. The fact that Objectors Lorenz have not called for water does not mean they have been receiving their full allotment. See Findings of Fact 19 and 32.

14. Objectors Golden expressed a belief that Applicants should be required to pay the entire cost of any additional time required to regulate the water if the instant applications are approved. See Finding of Fact 31.

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Section 85-5-107, MCA, provides,

> Each water commissioner must keep a daily record of the amount of water distributed to each water user and must file a summary of such record with the clerk of the court monthly or seasonally, at the discretion of the district judge during his term of service, showing in detail the total amount of water distributed each day to each water user during such month or season and the amount of cost therefor, based upon the water commissioner's or commissioners' salary per day and other costs of the water commissioner approved by the district judge, and the proportionate amount of water distributed. When two or more water commissioners serve under the same decree or decrees by order of the judge, they may file a joint summary of their record with the clerk of the court, or the chief commissioner, if one has been appointed by the judge, may file a summary in behalf of all of them.

Section 85-5-204(1), MCA, states,

> Upon the filing of the report by the water commissioner or water commissioners, the clerk of court shall forthwith notify by letter each person mentioned in such report:
> (a) of the amount he is made liable for by such report;
> (b) that objections to such report and the amount so taxed against him may be made by any person interested therein within 20 days after the date of the mailing of said notice; and
> (c) unless objections thereto are filed, an order will be made by the judge of said court finally fixing and determining the amount due from each of said water users.

At the expiration of the 20 days notice, if objections to the water commissioner's report have been filed, a hearing would be held by the judge to hear and determine the objections. An order fixing and determining the amount found due from each water user would be issued. If there are no objections filed, an order would be made as a matter of course.

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The costs of distributing the water are set by the commissioner's report and the court. One could object to the commissioner's report and show at the hearing that additional time was spent admeasuring and distributing the water to Applicants; however, the court would make the ultimate decision who is responsible to pay what costs.

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

PROPOSED ORDER

Applications for Beneficial Water Use Permit 76070-s76H, 72842-s76H, and 76692-76H are denied.

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right G(W)111151-76H is hereby granted to change the point of diversion of Statements of Claim W111151-76H and W111152-76H to two points in the NW¼SE¼NW¼ of Section 27, Township 7 North, Range 21 West, in Ravalli County, and to add four places of storage to be located in the SW¼SE¼NW¼, SE¼SE¼NW¼, and NW¼SE¼NW¼ of said Section 27.

Application for Beneficial Water Use Permit 76691-76H is granted to appropriate 6.00 acre-feet of water per year for supplemental irrigation and .15 of an acre-foot of water per year for stock water from an unnamed tributary of Sheafman Creek by means of an off-stream pit/dam combination at a point in the NW¼SE¼NW¼ of Section 27, Township 7 North, Range 21 West, Ravalli County. The place of use for the supplemental irrigation shall

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be 15 acres located in the N½SE¼NW¼ of said Section 27 and the place of use for the stock water shall be the location of the pond in the NW¼SE¼NW¼ of said Section 27. The period of appropriation and the period of stock water use shall be from January 1 through December 31, inclusive of each year. The period of use shall be from April 1 through October 31, inclusive of each year. The capacity of the reservoir shall be .876 acre-feet.

1. The Authorization to Change and the Beneficial Water Use Permit are subject to all prior existing water rights in the source of supply. Further, the Authorization and Permit are subject to any final determination of existing water rights, as provided by Montana law.

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

3. The Permit and the Authorization to Change are subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

4. This Permit and Authorization are subject to the condition that the Appropriator 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 30 of each year to the Missoula Water Resource Regional Office, Holiday Village Professional Suite, P.O. Box 5004, Missoula, MT 59806.

5. If, at any time after the Permit and Authorization are issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show cause why the Permit and/or Authorization should not be modified or revoked. The Department may then modify or revoke the Permit and/or Authorization to protect existing water rights or allow the Permit and/or Authorization to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

6. The issuance of this Authorization to Change is not to be construed as recognition by the Department of the water right involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

NOTICE

This proposal may be adopted as the Department's final

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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. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

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 27th day of March, 1992.

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 Proposed Order was duly served upon all parties of record at their address or addresses this 27th day of March, 1992 as follows:

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