

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

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL
78884-g76H BY JAMES L. AND)	ORDER
PAMELA A. SUND)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 21, 1992, Proposal for Decision, and incorporates them herein by reference.

Through a clerical oversight, an element of the Stipulation among Applicant and Objectors Scherr and Neuvonen was omitted from the October 21, 1992, Proposed Order. The Stipulation contained the following condition to be placed on the Permit, if issued:

If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines

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that no existing water rights are being adversely affected.

This condition is nothing more than an expression of existing law and is not unique to the circumstances in above-entitled matter. See Mont. Code Ann. §§ 85-2-314 and 115 (1991). Therefore, no error would result from omitting a statement of this condition on the Permit. Nevertheless, to incorporate the full terms of the Stipulation and to give notice of the law, the omitted language shall be added to the conditions on the Permit.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit 78884-g76H is hereby granted to James L. and Pamela A. Sund to appropriate groundwater by means of a well in Lot 23b of Eagle Watch Subdivision, Ravalli County, Montana, within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana, at a maximum flow rate of 40 gallons per minute up to a maximum volume of 8.9 acre-feet per year for irrigation of 2.5 acres in Lots 23a and 23b of Eagle Watch Subdivision, Ravalli County, Montana, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana. The period of appropriation for irrigation purposes shall be May 1 through September 30 of each year. Of the total irrigation use, 0.25 acre may be supplemental irrigation in Lot 23b, Eagle Watch

Subdivision, Ravalli County, Montana, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana. The priority date shall be 12:55 p.m. August 6, 1991.

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

B. This Permit is associated with Certificate of Water Right 36542-g76H. They have overlapping places of use.

C. This Permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

D. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

E. This permit is subject to the condition that the Permittee shall keep a written log of the operation of the system, including the number and size of sprinkler nozzles, pressure, and

period of time, in order to allow the approximate flow rates and approximate total yearly volume of water diverted to be calculated. The Permittee shall submit said records by November 30 of each year to the Water Resources Regional Office, P.O. Box 5004, Missoula, MT 59806.

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

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

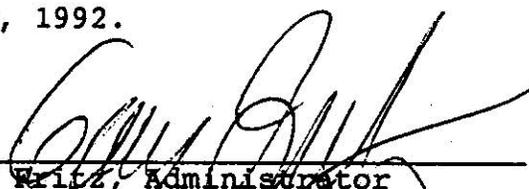
H. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient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

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 ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 17 day of November, 1992.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 17th day of November, 1992, as follows:

James L. & Pamela A. Sund
105 El Capitan Loop
Stevensville, MT 59870

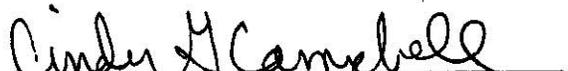
Walter F. Scherr
5662 Eastside Hwy
Stevensville, MT 59870

Gordon P. Blietz, Sr.
Margaret L. Blietz
118 Crooked Pine Rd.
Stevensville, MT 59870

Charles Fricke
229 Wagner Ln
Florence, MT 59833

Chester Neuvonen
5680 Eastside Hwy
Stevensville, MT 59870

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
78884-g76H BY JAMES L. AND)
PAMELA A. SUND)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1991), a hearing was held in the above matter on September 30, 1992, in Missoula, Montana, to determine whether a Permit to Appropriate Water based on the above Application should be granted to James L. and Pamela A. Sund under the criteria in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants appeared at the hearing on their own behalf. Lee Kilbourn, Applicants' adjacent neighbor, appeared as witness in behalf of Applicants. Mike McLane, Manager of the Missoula Water Resources Division Regional Office of the Department of Natural Resources and Conservation (Department), appeared as spokesperson for the Department.

Objector Charles Fricke appeared at the hearing on his own behalf.

EXHIBITS

Applicants offered the following exhibits which were accepted into the record without objection. No other exhibits were offered or accepted.

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Applicants' Exhibit 1 consists of two pages. The first is a photocopy of a duly filed Joint Tenancy Warranty Deed dated April 3, 1981, conveying certain premises from Kenneth D. Cox to James Lee Sund and Pamela Ann Sund. Page two is a photocopy of a plat of the premises described in the Deed.

Applicants' Exhibit 2 consists of twenty pages. The pages are photocopies of various Certificates of Water Right, Well Log Reports, and Objections to Application which document the locations, construction features, and use of eleven wells in the vicinity of the proposed appropriation. This exhibit is intended to be used with Applicants' Exhibit 3 on which locations of the eleven wells have been marked with a number corresponding to the number written in black ink on the respective documents.

Applicants' Exhibit 3 is a 27½ inch by 29½ inch aerial photograph of the proposed place of use and point of diversion and surrounding area. The approximate locations of the eleven wells which are the subjects of Applicants' Exhibit 2 are identified on the photograph by numbers in blue ink. Also identified in blue ink is the approximate distance from the proposed point of diversion to the property of untimely objectors Gordon P. and Margaret L. Blietz, the location of the proposed place of use, and the approximate direction of North.

Applicants' Exhibit 4 is a hand-written letter dated September 19, 1992, signed by Jim Sund with the salutation "Dear Mike", and stamped "Received Sep 21 1992 Montana D.N.R.C. Missoula Field Office."

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this Application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

In the course of reaching a decision in this matter, the Hearing Examiner took official notice of records maintained by the Department on water rights in the vicinity of the proposed appropriation. Facts in this Proposal for Decision which have been derived from the noticed records are identified as such.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 78884-g76H was filed with the Department on January 6, 1992, at 10:30 a.m.

This Application replaces a Notice of Completion of Ground-water Development, Form 602, filed by Applicants in good faith on August 6, 1991, at 12:55 p.m. A recently effective change in statute enacted by the 1991 Legislature, lowered the limit for exemption from the water rights permitting procedure from 100 gallons per minute (gpm) to 35 gpm. As a result, the Form 602 and subsequent issuance of a Certificate of Water Right were no longer applicable to this proposed appropriation. On December 19, 1991, Department staff notified Applicants of the need to employ the permitting procedures and allowed Applicants thirty days to replace their Form 602 with an Application for Beneficial Water Use Permit, Form 600, but maintain the filing date of the

original Form 602 as the potential priority date of the proposed appropriation. Applicants filed a Form 600 within thirty days. (Department's file and testimony of Mike McLane)

2. In the Application, Applicants proposed to appropriate 50 gallons per minute up to 10.53 acre-feet (AF) per year of groundwater by means of a well in Lot 23b of Eagle Watch Subdivision, Ravalli County, Montana, within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana.¹ The appropriation would be used for sprinkler irrigation of 2.5 acres in Lots 23a and 23b at a flow rate of 50 gpm up to a volume of 8.9 AF per year, and for domestic purposes in Lot 23b at a flow rate of 10 gpm up to a volume of 1.63 AF per year. The periods of appropriation would be January 1 through December 31 of each year for domestic purposes and May 1 through September 30 of each year for irrigation purposes. (Department's file)

3. Pertinent portions of the Application were published in *The Missoulian*, a newspaper of general circulation in the area of the proposed source, on June 10, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. (Department's file)

4. The Department received three timely objections and one untimely objection filed against this Application. The untimely objector did not request further participation in these

¹ Unless otherwise stated, all legal land descriptions are in Township 10 North, Range 19 West, Ravalli County, Montana.

proceedings.² Two of the three timely objectors subsequently and conditionally withdrew their opposition to this Application. See Finding of Fact 8, below. (Department's file)

5. As a result of negotiations between the objectors and Applicants facilitated by staff of the Department's Missoula Water Resources Division Regional Office, Applicants amended this Application by letter dated September 2, 1992. The amendment deletes all of the domestic use portion of the Application and reduces the proposed maximum flow rate from 50 gpm to 40 gpm. (Department's file and testimony of James Sund and Mike McLane)

6. Applicants own Certificate of Water Right 36542-g76H. The Certificate as issued allows for appropriation of 20 gpm of groundwater up to 1.5 AF per year for domestic use and up to an additional 6.25 AF per year for irrigation use on 2.5 acres in Lot 23 of Eagle Watch Subdivision for a total maximum appropriation of 20 gpm up to 7.75 AF per year. This water right has never been used for the separately identified irrigation purposes. It has been used for the domestic purposes which include irrigation of a small area of lawn and garden. (Department's file and testimony of James Sund, Pamela Sund, and Mike McLane)

7. Applicants have filed a correction of water right form with the Department to delete the irrigation portion of Certificate 36542-g76H so that the water right, once corrected, would be limited to the appropriation of 20 gpm of groundwater up to 1.5

² See Mont. Admin. R. 36.12.219 (1991).

AF per year for domestic purposes which may include one-quarter acre of lawn and garden. The Certificate could not be used for irrigation of additional area. The correction form filed by Applicants was duly completed and is acceptable for processing by the Department which means the correction will be made. (Testimony of James Sund and Mike McLane)

8. Objectors Walter F. Scherr and Chester Neuvonen each signed a separate copy of a Stipulation agreeing to the issuance of a permit based on this Application if the following actions are taken.

- a) The Application is amended as stated in Finding of Fact 5, above.
- b) Certificate 36542-g76H is corrected as stated in Finding of Fact 7, above.
- c) The permit, if issued, is issued under these conditions:
 - A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.
 - B. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

Applicants accept the placement of the above conditions on any permit based on this Application. (Department's file and testimony of Mike McLane and James Sund)

9. Applicants own the proposed place of use and point of diversion. (Applicants' Exhibit 1 and testimony of James Sund and Pamela Sund)

10. The general area in which the proposed place of use is located is dry and not particularly productive for pasturing livestock. The proposed place of use, itself, is presently a very dry area that cannot adequately support the pasturing of Applicants' horses. Irrigation of the proposed place of use will increase the production of grass on it and make it better able to consistently satisfy the pasturing needs of their horses. Applicants plan to pasture their horses on the proposed place of use in a rotational system that optimizes the productivity of the pasture land. (Testimony of James Sund, Pamela Sund, Charles Fricke, and Lee Kilbourn)

11. The well that will serve as the point of diversion has been constructed. It was completed by Jerome's Drilling Co., Inc., a licensed driller, on May 13, 1991, and has a depth of 150 feet. The well is six inches in diameter with steel casing its entire depth which is perforated from 107 feet to 115 feet below the land's surface. A three-horsepower pump has been installed at 136 feet. The power source metering for the well is the same as that for the electrical system in the home, including the house well. (Department's file and testimony of James Sund)

12. The productivity of the well was tested by the driller at the time it was constructed. Water was pumped from the well at 50 gpm for four hours during which time the water level in the

well dropped from its initial level of 70 feet below the land's surface to 92 feet. Four hours after pumping was stopped, the water level had returned to 73 feet. (Department's file)

13. The proposed flow rate for irrigation was determined through an analysis of the sprinkler system and pump Applicants have obtained for this project. The pump is rated at three horsepower and sits in the well at 136 feet below the land's surface. The wellhead is at the high point of the proposed place of use. The sprinkler system has eight sprinkler heads with 5/32 inch nozzles. The system operates at a measured pressure of forty pounds per square inch. The output of the system is calculated to be approximately 37 gpm. The proposed volume of 8.9 AF, or 3.56 AF per acre, is based on an estimation of the needs of irrigating the property for the pasture grasses for horses. The calculations and estimations were made by Mr. Sund with assistance from Larry Schock, Civil Engineering Specialist at the Department's Missoula Water Resources Division Regional Office. (Department's file and testimony of James Sund and Mike McLane)

14. The proposed appropriation and Certificate 36542-g76H would be associated appropriations with respect to their use for irrigation of overlapping places of use. The area of lawn and garden in Lot 23b that has been irrigated under the Certificate would also be irrigable under the proposed appropriation. It is the intent of Applicants to operate both systems to irrigate the lawn and garden area of their property immediately around their

home. The total area of supplemental irrigation would be approximately one-quarter of an acre. (Department's file and testimony of James Sund and Pamela Sund)

15. There is no flow or volume meter on the subject well or the irrigation system. (Testimony of James Sund)

16. No chemical or fertilizer distribution system would be connected to the irrigation system. (Testimony of James Sund)

17. Applicants have operated the well and sprinkler system at times over the past two irrigation seasons. The system operates as it is designed and functions properly. (Testimony of James Sund and Pamela Sund)

18. Applicants have performed a test of the potential drawdown effect and impact the proposed appropriation might have on neighboring wells. They operated the subject well for 13½ hours and checked the water level in their house well (Certificate 36542-g76H) which they kept idle from twelve hours before the start of pumping of the subject well to one-half hour after the pumping stopped. The water level in the house well was at 65 feet before the pumping started and also at 65 feet at 13½ hours of pumping of the subject well. The test was observed by Lee Kilbourn. The method used to measure the water levels was to lower a wire into the well then measure the length of wire between where the edge of where it was wet to the point that had been held at the wellhead. At the house well, the sound of the wire touching the water could be heard by James Sund and Lee Kilbourn, and when a light was directed down the well, the

surface of the water could be seen. The method of measurement was somewhat crude and imprecise but fairly accurate and consistent. (Applicants' Exhibit 4 and testimony of James Sund and Lee Kilbourn)

19. Applicants have not experienced any adverse impacts to their house well from operation of the subject well when the subject well was used for irrigation during the past two irrigation seasons. (Testimony of James Sund)

20. Lee Kilbourn has a well 96 feet away from the subject well. There have been no negative impacts to the Kilbourn well from Applicants' operation of the subject well, either during the subject wells' use for irrigation or during the well test. (Testimony of Lee Kilbourn)

21. Objector Fricke owns two wells in the general vicinity of the proposed appropriation. One is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, approximately two-thirds of a mile north of the Applicants' proposed appropriation, and is used to supply water to a mobile home park. The other is in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, approximately seven-eighths of a mile from Applicants' proposed appropriation, and is used to supply water to a single dwelling.

The mobile home park well was originally eighty-five feet deep. It went dry around September 1991 and was deepened by approximately 40 feet. Objector Fricke is not aware, however, of an effect on his wells specifically resulting from the operation of the subject well and does not anticipate that the operation of the subject well, specifically, at the proposed flow rate and

volume would adversely impact the operation of his wells.

(Department's file, Department's records, Applicants' Exhibit 3, and testimony of Charles Fricke)

22. Objector Fricke objects to the granting of a permit based on this Application because of the lack of attention paid by the Department to the cumulative impacts of the many wells being constructed and operated in the area and the reasonably certain further demands that will be made on the groundwater resources in this area in the near future. (Department's file and testimony of Charles Fricke)

23. In the past, irrigation water has been delivered to the proposed place of use by means a lateral ditch from the "Big Ditch". The Big Ditch appears to be what is identified in the *Water Resources Survey, Ravalli County, Montana*, (June 1958) as the Bitterroot Irrigation District Canal. Some of the lateral ditch system is in poor repair and delivery of water to the proposed place of use has been unreliable for various reasons.

Objector Fricke expressed concern that if Applicants cease to use the Big Ditch delivery system it may result in less recharge to the groundwater resources in the area which in turn would cause wells to go dry. (Department's records, Testimony of Charles Fricke, James Sund, Mike McLane, and Lee Kilbourn)

24. There are no other planned uses or developments of water in the proposed source for which permits have been issued but not perfected or for which water has been reserved.

(Department's records, Department's file)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, and 4.

The Department has properly required the filing of an Application for Beneficial Water Use Permit for this proposed appropriation. See Mont. Code Ann. §§ 85-2-302 and 306(1) (1991). The replacement of the Notice of Completion of Groundwater Development, Form 602, with an Application for Beneficial Water Use Permit, Form 600, under these circumstances is a correction of an application for a water right and, if completed within thirty days, the date of filing of the original form can be carried through as the priority date of the corrected application. See Mont. Code Ann. § 85-2-302 (1991).

3. An Application for Beneficial Water Use Permit may be altered after public notice if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an

increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to increase the rate of diversion or increase the volume of water diverted. See In re Application No. 50272-g42M by Joseph F. Crisafulli. Furthermore, the Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1989). The amendments made to this Application, i.e., eliminating a proposed use and decreasing the proposed flow rate and volume, would decrease the burden on the source. See Findings of Fact 5, 6, 7, and 8. These amendments are acceptable and shall be reflected in the permit.

4. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) (1991) are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;

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

5. To meet the substantial credible evidence standard in Mont. Code Ann. § 85-2-311(1) (1991) the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1991).

6. Applicants proved by substantial credible evidence that Applicants have possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 2 and 9. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(f) (1991) has been met.

7. The proposed use of the water for irrigation purposes is a beneficial use. Mont. Code Ann. § 85-2-102(2)(a) (1991). The proposed irrigation use of water will benefit Applicants. See Findings of Fact 10 and 23. The amount of water to be appropriated for irrigation purposes is reasonable for the purpose and will not be wasteful. See Findings of Fact 2, and 13. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(d) (1991) has been met.

8. After July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989); see Findings of Fact 17. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.

9. Applicants proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 11, 12, 13, and 17. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(c) (1991) has been met.

10. Applicants proved by substantial credible evidence that unappropriated waters are reasonably available in the source of supply at the proposed point of diversion in the amount and during the period Applicants seek to appropriate. See Findings of Fact 2, 11, 17, and 18. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(a) (1991) has been met.

11. Applicants proved by substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 18, 19, 20, and 21. Therefore,

the criterion in Mont. Code Ann. § 85-2-311(1)(b) (1991) has been met.

Upon an applicant's discharge of the burden to produce substantial credible evidence on the issue of adverse effect, objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce: objectors must show they have water rights, describe with particularity the operation of their rights, state how they anticipate the proposed use will change the conditions of water occurrence in the source or how it will otherwise affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed conditions. See In re Application 60117-g76L by William C. Houston. Objector's allegations of possible adverse effects from discontinuing the use of surface water deliveries to the proposed place of use were not substantiated, and therefore do not rise above the level of speculation and do not require a controverting proof by Applicants. See Finding of Fact 23.

Furthermore, even if it did happen, a reduction in recharge by ceasing the deliveries of contract water would not in these specific circumstances be adverse effect. Applicants would be discontinuing a practice which is exclusively under Applicants' control. See generally McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 72; Thrasher v. Mannix-Wilson, 95 Mont. 273, 26 P.2d 370; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074; Spaulding v. Stone, 46 Mont. 483, 129 P. 327; West Side

Ditch Co. v. Bennet, 106 Mont. 422, 78 P.2d 78. Other appropriators' theoretical benefit from the hypothetical groundwater recharge would essentially be a windfall they might enjoy only so long as Applicants continued the activity that caused the recharge. The other appropriators could not compel Applicants to continue the activity solely for the other appropriators' benefit. See Newton v. Weiler, 87 Mont 164, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927).

Statements were made suggesting Applicants' proposed appropriation may be part of a cumulative depletion effect which may be ongoing and insidious, or which may be initiated by the proposed appropriation. See Finding of Fact 22. With regard to these Applicants' proposed appropriation, the Objector provided no testimony or evidence that incipient or hastened depletion of the proposed groundwater source will result. See Finding of Fact 21. Applicants have no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. See In re Application 70584-g41B by Petersen Livestock.

If Objector wishes to seek answers to the questions raised concerning possible cumulative effects, Montana law provides a mechanism for pursuing answers, and controls, through Mont. Code Ann. § 85-2-319, or §§ 85-2-506 and 507 (1991).³

³ See specifically Mont. Code Ann. § 85-2-506(2)(b) (1991).

There being no other allegations of adverse effect on the record (see Finding of Fact 8), and no adverse effect to prior appropriators being on the face of the record, it is concluded that the criterion in Mont. Code Ann. § 85-2-311(1)(b) (1991) is met.

12. Applicants proved by substantial credible evidence that the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. See Conclusion of Law 11; Finding of Fact 24. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(e) (1991) has been met.

13. The Department has the authority to impose terms, conditions, restrictions, and limitations the Department considers necessary to satisfy the criteria in Mont. Code Ann. § 85-2-311(1). Mont. Code Ann. § 85-2-312(1) (1983).

Applicants have stated that no chemical or fertilizer distribution system will be connected to the proposed project. See Finding of Fact 16. Furthermore, the project must be constructed so as to avoid contamination or pollution of groundwater. Mont. Code Ann. § 85-2-505(1) (1991). Therefore, it is proper for the permit to contain a condition regulating the use of chemical or fertilizer distribution systems that might in the future be connected to the diversion or conveyance works.

The system does not contain a flow rate or volume meter and is, by exceeding the period of appropriation or alteration of the output, capable of being operated to divert more water than is

permitted. See Findings of Fact 2, 13, and 15. Therefore it is proper for the permit to contain a condition requiring the keeping of records that will allow the total yearly appropriation to be calculated, thereby ensuring that the permitted appropriation is not exceeded.

14. Applicants having proven that the application meets the statutory criteria, and conditions having been identified which ensure that the project as constructed and operated will conform to the statutory criteria, a permit may be issued. Mont. Code Ann. §§ 85-2 311(1) and 312(1) (1991).

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit 78884-g76H is hereby granted to James L. and Pamela A. Sund to appropriate groundwater by means of a well in Lot 23b of Eagle Watch Subdivision, Ravalli County, Montana, within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana, at a maximum flow rate of 40 gpm up to a maximum volume of 8.9 acre-feet per year for irrigation of 2.5 acres in Lots 23a and 23b of Eagle Watch Subdivision, Ravalli County, Montana, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10 North, Range 19 West, Ravalli County, Montana. The period of appropriation for irrigation purposes shall be May 1 through September 30 of each year. Of the total irrigation use, 0.25 acre may be supplemental irrigation in Lot 23b, Eagle Watch Subdivision, Ravalli County, Montana, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 10

North, Range 19 West, Ravalli County, Montana. The priority date shall be 12:55 p.m. August 6, 1991.

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

B. This Permit is associated with Certificate of Water Right 36542-g76H. They have overlapping places of use.

C. This Permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

D. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

E. This permit is subject to the condition that the Permittee shall keep a written log of the operation of the system, including the number and size of sprinkler nozzles, pressure, and period of time, in order to allow the approximate flow rates and approximate total yearly volume of water diverted to be

calculated. The Permittee shall submit said records by November 30 of each year to the Water Resources Regional Office, P.O. Box 5004, Missoula, MT 59806.

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

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

NOTICE

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

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

Dated this 21ST day of October, 1992.


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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 21ST day of October, 1992, as follows:

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105 El Capitan Loop
Stevensville, MT 59870

Charles Fricke
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Missoula Water Resources
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Missoula, MT 59806
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary