

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )                   FINAL ORDER  
79387-G76LJ BY POLSON READY MIX     )  
CONCRETE, INC.                         )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on February 15, 1995. Applicant filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting a conditional permit to Polson Ready Mix Concrete, Inc. to appropriate 121 gallons per minute of groundwater per year with no increase in volume for industrial use at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 22 North, Range 20 West, in Lake County, Montana. The period of use would be from January 1 through December 31, inclusive of each year. The place of use would be the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 13. The means of diversion would be an existing well with the existing pump. The means of conveyance would be the existing 4,000 feet of four-inch pipe.

One of the conditions proposed for the permit was:

C. Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. Permittee shall keep a written record of the flow rate and volume of all waters diverted and shall submit said records to the Department upon demand and/or no later than November 30, each year to the Kalispell Water Resources Regional Office, P.O. Box 860, Kalispell, MT 59903-0860.

**CASE # 79387**

**FILMED**

Applicant excepts to the part of the condition that would require Applicant to submit a written record of its water use to the Department by November 30 each year, stating that during unusually warm years or long construction seasons, Applicant may use water for industrial use during the month of December and that the December use would not be reported on November 30 report. For an accurate annual report, Applicant believes the reporting time should be the same as its period of use.

The Department has hundreds of such reports due each year and for simplicity and efficiency, all such reports are due on November 30. It is true Applicant's December use would not be on the first report; however, it would be on the next annual report and since Applicant is required to keep a written record of the flow rate and volume of all waters diverted and to submit said records to the Department upon demand, the December use would be available if needed at any other time.

Having given the exception full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 79387-G76LJ is granted to Polson Ready Mix Concrete, Inc. to appropriate 121

gallons per minute of groundwater per year with no increase in volume for industrial use at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 22 North, Range 20 West, in Lake County, Montana. The period of use is from January 1 through December 31, inclusive of each year. The place of use is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 13. The means of diversion shall be an existing well with the existing pump. The means of conveyance is the existing 4,000 feet of four-inch pipe.

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

B. This permit is associated with Certificate of Water Right 70015-g76LJ. They share a common well. The total flow rate shall not exceed 220 gallons per minute. Applicant shall install a permanent flow restricter to limit the flow rate diverted to 220 gallons per minute.

C. Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. Permittee shall keep a written record of the flow rate and volume of all waters diverted and shall submit said records to the Department upon demand and/or no later than November 30, each year to the Kalispell Water Resources Regional Office, P.O. Box 860, Kalispell, MT 59903-0860.

D. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and

Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the Permittee any equity or vested right against the Tribes. The Permittee is hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the Permittee's risk.

Issuance of this permit by the Department shall not reduce 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. The Department does not acknowledge liability for any losses that Permittee may experience should they be unable to exercise this permit due to the future exercise of reserved water rights.

The state of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division - filed May 15, 1992) which case is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

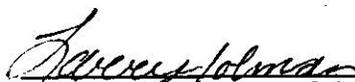
Transfer Certificate, Form 608, pursuant to Section 85-2-424,  
MCA.

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.

Dated this 27<sup>th</sup> day of April, 1995.

  
Larry Holman, Chief  
Water Rights Bureau  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6631

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 27<sup>th</sup> day of April, 1995 as follows:

Polson Ready Mix Concrete Inc.  
% Larry Hancock  
57093 Hwy 93  
Polson, MT 59860-9727

Clayton Matt  
Confederated Salish & Kootenai  
Tribes  
P.O. Box 278  
Pablo, MT 59855

Thomas A. O'Halloran  
Madeleine O'Halloran  
P.O. Box 38  
Polson, MT 59860

Thomas & Agnes Brown  
86 Fair Meadow Ln  
Polson, MT 59860

Dean Allred  
P.O. Box 1268  
Polson, MT 59860

Clinton A. McGiffin  
Elizabeth A. McGiffin  
397 Orchard Ln  
Polson, MT 59860

Charles A. Harball  
Attorney at Law  
20 9th St. E  
Kalispell, MT 59901

Ivanhoe Water District Inc.  
% H.D. Walker  
56813 Hwy 93  
Polson, MT 59860

Richard L. & Carol J. Schafer  
1060 Schafer Rd.  
Polson, MT 59860

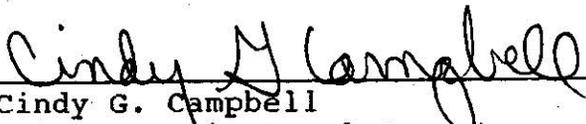
Stephen R. Brown  
Garlington, Lohn & Robinson  
P.O. Box 7909  
Missoula, MT 59807-7909

Clinton J. Fischer  
Attorney at Law  
15 Third Avenue East  
P.O. Box 879  
Polson, MT 59860

Joseph L. Barnoski  
P.O. Box 362  
Polson, MT 59860

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(via electronic mail)

Vivian A. Lighthizer  
Hearing Examiner  
Dept. of Natural Resources  
and Conservation  
1520 East 6th Ave.  
Helena, MT 59620

  
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	)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT	)	FOR
79387-G76LJ BY POLSON READY MIX	)	DECISION
CONCRETE, INC.	)	

\* \* \* \* \*

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 June 8, 1993, in Polson, Montana, to determine whether a Beneficial Water Use Permit should be granted to Polson Ready Mix Concrete, Inc. under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1993).

APPEARANCES

Applicant, Polson Ready Mix Concrete Inc. (PRM) appeared at the hearing by and through counsel, Clinton J. Fischer; Larry Hancock, Plant Manager; and Frank Thomas, owner.

Karen J. Wilson, Hydrogeologist with Shannon Environmental Services, appeared at the hearing as a witness for Applicant.

Objectors Thomas and Agnes Brown appeared at the hearing pro se.

Objectors Clinton A. and Elizabeth A. McGiffin appeared at the hearing pro se.

Objector Ivanhoe Water District Inc. appeared at the hearing by and through its Director/Secretary-Treasurer, Harry Walker.

Dr. Marshall Corbett, Hydrogeologist, and Charles Brasen, Regional Manager, with the Kalispell Water Resources Regional

**CASE # 79387**

**FILMED**

Office of the Department of Natural Resources and Conservation (Department) attended the hearing.

Mars Rolfson and Charles Apple attended the hearing as interested persons. Mr. Rolfson and Mr. Apple were allowed to testify.

Objectors Dean Allred, Thomas A. and Madeleine O'Halloran, and Richard L. and Carol J. Schafer were unable to attend the hearing but submitted written testimony for inclusion in the record. Objector J. L. Barnoski attended a portion of the hearing but had to leave. Mr. Barnoski was allowed to testify out of sequence and also submitted written testimony. All written testimony is accepted into the record and those persons who submitted written testimony retain their standing as parties in this matter.

Objectors Shane E. and Vicky Richwine, Thomas J. Fennessy, and Frances M. Wilson did not appear at the hearing nor did they contact the Hearing Examiner prior to the hearing to explain their absence. Therefore, in accordance with Mont. Admin. R. 36.12.208 (1991), those persons are in default and no longer retain status as parties.

#### EXHIBITS

Applicant's Exhibit 1 is a single page which is a location drawing showing the location of Polson Ready Mix well, the wash plant and the 4,000 feet of buried pipe. This exhibit was accepted into the record without objection.

Applicant's Exhibit 2 is a copy of a USGS Sectional map showing the locations of various wells and the plant site in relation to Applicant's well. It also shows the 500 feet and 2,000 feet radii from Applicant's well. All objectors who attended the hearing objected to this exhibit being accepted into the record because the owners of the individual wells were not identified. The names of the well owners have no bearing on the information gained from this exhibit. The objections were overruled and the exhibit was accepted into the record.

Applicant's Exhibit 3 consists of 10 pages. The first page is a copy of a portion of the tax assessment of Applicant's property. The next three pages are copies of the quitclaim deed and its attachments showing Frank A. Thomas is one of the owners of Polson Ready Mix Concrete, Inc. The next page is a Certificate of Incorporation issued to Polson Ready Mix Concrete, Inc. by the Secretary of State. The remaining five pages are the Articles of Incorporation of Polson Ready Mix. This exhibit was accepted into the record without objection.

Applicant's Exhibit 4 consists of two pages. The first page describes the existing delivery system. The second page contains copies of pump curves for a four-inch pump and a six-inch pump. This exhibit was accepted into the record without objection.

Applicant did not submit an exhibit numbered 5.

Applicant's Exhibit 6 consists of seven pages. The first page is a letter from Karen J. Wilson to Larry Hancock of Polson Ready Mix. The next two pages are the raw data of the drawdown

test on the David well. The next two pages are the raw data of the drawdown test on the Schafer well. The next page is a copy of a Notice of Completion of Groundwater Appropriation by Means of Well filed by Richard L. and Carol J. Schafer on May 29, 1973, for a well completed in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 22 North, Range 20 West.<sup>1</sup> The last page is a copy of a Well Log Report filed by O'K Drilling on a well completed for Glen Barnum on January 6, 1976, which is located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 12. This exhibit was accepted into the record without objection.

Applicant's Exhibit 7 consists of two pages. The first page is well log data for the Schafer, Ivanhoe, and O'Halloran wells. The second page shows the estimated drawdown for each of the aforementioned wells. This exhibit was accepted into the record without objection.

Applicant did not submit an exhibit numbered 8.

Applicant's Exhibit 9 is a copy of a Certificate of Water Right issued to Polson Ready Mix by the Department on March 9, 1989. This exhibit was accepted into the record without objection.

Applicant's Exhibit 10 is a bound report by C.E. Brockway P.E. entitled *Report on Well Pumping Test and Well Interference Polson Ready Mix Concrete Co.*, dated May 1993. This exhibit was accepted into the record without objection.

---

<sup>1</sup>Unless otherwise stated, all land descriptions in this Proposal are located in Township 22 North, Range 20 West, Lake County.

Applicant's Exhibit 11 is a one-page summary of the Application for Beneficial Water Use Permit 79387-g76LJ. This exhibit was accepted into the record without objection.

Applicant's Exhibit 12 consists of six pages and is an Open Cut Mining Reclamation Contract. Objector Thomas Brown objected to the acceptance of this exhibit into the record based on his theory that Applicant could recycle his water and does not need a new permit for additional water. Mr. Brown's objection was overruled because his objection was not pertinent to this exhibit and the exhibit was accepted into the record.

The objectors presented no exhibits for inclusion into the record.

#### PRELIMINARY MATTERS

The original application requested 121 gallons per minute up to one acre-foot of ground water per year, relying on Certificate of Water Right 70015-g76LJ for the remaining volume. Applicant originally held Certificate of Water Right 70015-g76LJ to appropriate 99 gallons per minute up to 93.13 acre-feet of ground water per year by means of a well and pump at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13 at the time the instant application was filed. Larry Hancock testified Applicant has not pumped 93.13 acre-feet of water per year from this well. See Remand Order dated August 4, 1993. Mr. Hancock, working with Kimberly Overcast, Processing Unit Supervisor, calculated the maximum use from the well was 74.18 acre-feet of water. Amended Certificate of Water Right 70015-g76LJ was issued for 99 gallons per minute

up to 72.74 acre-feet of water for industrial and 1.44 acre-feet for domestic uses. During a reopening of the record hearing held on February 15, 1994, for additional information, Mr. Hancock testified there was no need for the volume of one acre-foot as stated on the application because that use had been identified on the amended certificate of water right. The volume of one acre-foot of water was stricken from the application.

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. An application in the name of Polson Ready Mix Concrete, Inc. signed by L. C. Hancock was duly filed with the Department on November 27, 1991, at 10:30 a.m. (Department file.)

2. Pertinent portions of the file were published in the *Lake County Leader*, a newspaper of general circulation in the area of the source on January 23, 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. Eleven timely objections were received by the Department. Applicants were notified of the objections by a letter from the Department dated February 18, 1992. (Department file.)

3. Applicants seek to appropriate 121 gallons per minute of groundwater per year with no increase in volume for industrial use at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 22 North,

Range 20 West, in Lake County, Montana, relying on Amended Certificate of Water Right 70015-g76LJ for the volume. The proposed period of use is from January 1 through December 31, inclusive of each year. The proposed place of use is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 13. The proposed means of diversion is Applicant's existing well with the existing Berkley pump capable of pumping 230 to 240 gallons per minute. The means of conveyance is 4,000 feet of four-inch PVC pipe currently in use. Valving within the system is completely adequate to handle the increased pumping capacity. Water is necessary for the production of concrete, washing sand and gravel, and for use in the office. The increased flow rate would be used mostly in the warmer months, March through October. The wash plant is operated eight hours a day but not every day. Demand for washed gravel and concrete dictates how often the wash plant is operated. (Department file, Applicant's Exhibit 4, and testimony of Larry Hancock.)

4. Presently, Applicant recycles the water used for gravel washing as many times as possible until the water becomes so soil-laden that it cannot be used. The muddy water is then routed to waste water lagoons where it infiltrates the ground at a rate of approximately 1.2 gallons per square foot per day. With a total lagoon volume of 2.2 acres the amount of water which can infiltrate in the lagoon is 114,998 gallons per day. Pumped volume for an eight-hour day at 220 gallons per minute is 105,600 gallons which is less than the infiltrative capacity of the

lagoon. Applicant will continue to recycle its water as many times as possible. (Applicant's Exhibit 4 and testimony of Frank Thomas and Larry Hancock.)

5. Shannon Environmental Services conducted a pumping test on March 5, 1992, on Applicant's well as part of the Polson Wellhead Protection Project. Two observation wells (Schafer well and David well) were monitored during a 261 minute pump test at a constant rate of approximately 229 gallons per minute. The Schafer well is located approximately 325 feet from Applicant's well. The David well is located approximately 1080 feet from Applicant's well. The drawdown in the Schafer well was approximately 4.5 inches after Applicant's well was pumped for 261 minutes. The drawdown in the David well was approximately 3.0 inches. The static water level in the Schafer well returned to the original level within 49.8 minutes. The David well recovered within 55.17 minutes. The raw data from this test was made available to Applicant. Applicant's consultant analyzed the raw data and produced a report on June 2, 1993, entitled *Report on Well Pumping Test and Well Interference Polson Ready Mix Concrete, Co.* According to Dr. Brockway's report, the plot of drawdown versus pumping time for both the David and Schafer wells indicate the drawdown reaches a nearly constant state or a very slowly increasing level after about 50 to 70 minutes of pumping. This is indicative of either a hydraulically connected surface source at some distance from Applicant's well or the interception

by the cone of depression of a highly permeable strata.

(Testimony of Karen J. Wilson and June 2, 1993 Brockway Report.)

6. An interim permit was issued to Applicant on March 1, 1994, allowing Applicant to put the water to the beneficial use proposed in Application for Beneficial Water Use Permit 79387-G76LJ for one season terminating on October 31, 1994. The Kalispell Water Resources Regional Office monitored certain wells during this period. The data gained from the monitoring indicate only minor disturbances (some lowering and some rising) to static water levels in Objectors' wells or any of the other wells monitored by the Department. If Applicant were appropriating more water than it had in the past, there is evidence that mining of the aquifer could occur. However, since Applicant is seeking to appropriate only the higher flow rate with no increase in volume, there is little likelihood of aquifer mining caused by Applicant's well. Applicant, during the test period, did exceed the maximum flow rate set by the interim permit; however, according to the evidence, this did not create any problems for any of the wells monitored during the test which included Objectors Brown's new well and Objectors McGiffin's well.

(Testimony of Dr. Corbett; December 2, 1994 Corbett Report; Corbett letter dated June 18, 1993, and Department file and records.)

7. The Polson area has been subjected to several years of below average precipitation especially in regard to the snow fall that recharges the aquifer. That coupled with the rapid

population growth in the Polson area has created a greater demand on the aquifer. Those wells completed in the shallow zones of the aquifer have experienced declining static water levels. The static water level in Objectors Brown's well which was 149 feet deep, declined to 147.5 feet on June 10, 1993, below the intake of the pump. After a weekend of no pumping from Applicant's well, the static water level in the Browns' well was 146.35 feet on June 14, 1993. Applicant began pumping on June 14, 1993, using the normal amount of water, 99 gallons per minute. The static water level in the Browns' well on June 16, 1993, was 146.3 feet, showing no significant change from two days earlier. On July 13, 1994, Objectors Brown had a new well completed at a depth of 186.5 feet. The static water level in this well was 144 feet on the day it was completed and showed an increase in static water level of two feet in November 1994. The static water level in Objectors McGiffin's well also increased from an average level of 104 feet to 102 feet, an increase of two feet. (Testimony of Dr. Corbett and Tom and Agnes Brown; December 2, 1994 Corbett Report; and Department records.)

8. Applicant owns the property where the water will be put to use. (Testimony of Frank Thomas and Applicant's Exhibits 1 and 3.)

9. There are no unperfected permits in the proposed source and no reservations have been granted by the Board of Natural Resources and Conservation for the proposed source. (Department records.)

10. No objections relative to water quality were filed against this application. (Department file.)

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 substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed use of water, industrial, is a beneficial use of water. See Finding of Fact 3.

3. Applicant has provided a preponderance of evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 5, 6, and 7.

4. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed and that during the period Applicant seeks to appropriate, water is reasonably available in the amount Applicant seeks to appropriate. See Findings of Fact 5 and 6.

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 3 and 4.

6. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the

property where the water is to be put to beneficial use. See Finding of Fact 8.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 9.

8. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. See Finding of Fact 10.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 79387-G76LJ is granted to Polson Ready Mix Concrete, Inc. to appropriate 121 gallons per minute of groundwater per year with no increase in volume for industrial use at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 22 North, Range 20 West, in Lake County, Montana. The period of use is from January 1 through December 31, inclusive of each year. The place of use is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 13. The means of diversion shall be an existing well with the existing pump. The means of conveyance is the existing 4,000 feet of four-inch pipe.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject

to any final determination of existing water rights, as provided by Montana law.

B. This permit is associated with Certificate of Water Right 70015-g76LJ. They share a common well. The total flow rate shall not exceed 220 gallons per minute. Applicant shall install a permanent flow restricter to limit the flow rate diverted to 220 gallons per minute.

C. Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. Permittee shall keep a written record of the flow rate and volume of all waters diverted and shall submit said records to the Department upon demand and/or no later than November 30, each year to the Kalispell Water Resources Regional Office, P.O. Box 860, Kalispell, MT 59903-0860.

D. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the Permittee any equity or vested right against the Tribes. The Permittee is hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the Permittee's risk.

Issuance of this permit by the Department shall not reduce 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. The Department does not acknowledge liability for any losses that Permittee may experience should they be unable to exercise this permit due to the future exercise of reserved water rights.

The state of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division - filed May 15, 1992) which case is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

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

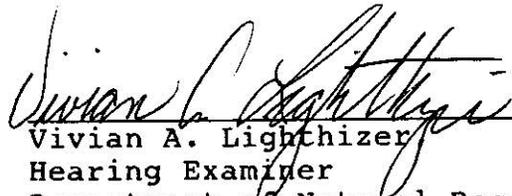
#### NOTICE

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 exception and copies must be sent to all parties. No new evidence will be considered.

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

Dated this 15<sup>th</sup> day of February, 1995.

  
Vivian A. Lighthizer  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6615

MEMORANDUM

Due to the extended period of little snowpack to recharge the aquifer and the influx of people, many of whom are drilling private wells, those persons whose wells extend only into the top of the aquifer are experiencing loss of water in their wells. These people are vexed with the Department because they believe the State should "protect their water right." Unfortunately, the Department has no control over the factors causing the aquifer to decline. It is all the users of the ground water, the lack of precipitation, and the ability of any person to have a well with less than 35 gallons per minute flow rate drilled at any time without permission from the Department that are causing the declining water level in the aquifer. The only way to protect the water level in the aquifer is to petition the Board of

Natural Resources and Conservation to have the area designated a controlled ground water area as set forth in Mont. Code Ann. § 85-2-506 (1993). With this designation, a person may appropriate ground water only by applying for and receiving a permit from the Department. The Department may not grant a permit if the withdrawal would be beyond the capacity of the aquifer in the ground water area to yield ground water within a reasonable or feasible pumping lift.

This permit is granted only because Applicant is not appropriating an additional volume of water. Consequently, the aquifer will not decline further because of this permit.

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 15<sup>th</sup> day of February, 1995, as follows:

Polson Ready Mix Concrete Inc.  
% Larry Hancock  
57093 Hwy 93  
Polson, MT 59860-9727

Clayton Matt  
Confederated Salish & Kootenai  
Tribes  
P.O. Box 278  
Pablo, MT 59855

Thomas A. O'Halloran  
Madeleine O'Halloran  
P.O. Box 38  
Polson, MT 59860

Thomas & Agnes Brown  
86 Fair Meadow Ln  
Polson, MT 59860

Ivanhoe Water District Inc.  
% H.D. Walker  
56813 Hwy 93  
Polson, MT 59860

Richard L. & Carol J. Schafer  
1060 Schafer Rd.  
Polson, MT 59860

Stephen R. Brown  
Garlington, Lohn & Robinson  
P.O. Box 7909  
Missoula, MT 59807-7909

Clinton J. Fischer  
Attorney at Law  
15 Third Avenue East  
P.O. Box 879  
Polson, MT 59860

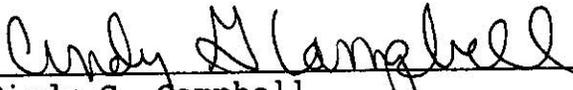
Dean Allred  
P.O. Box 1268  
Polson, MT 59860

Clinton A. McGiffin  
Elizabeth A. McGiffin  
397 Orchard Ln  
Polson, MT 59860

Charles A. Harball  
Attorney at Law  
20 9th St. E  
Kalispell, MT 59901

Joseph L. Barnoski  
P.O. Box 362  
Polson, MT 59860

Chuck Brasen, Manager  
Marshall Corbett, Hydrologist  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary