

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  
81523-g76LJ BY NEIL R. & RANDA J. )  
MCALPIN )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on August 26, 1994. Objectors Leonard and Sadie Haack filed timely exceptions to the Proposal for Decision but did not request an oral argument hearing.

The Proposal recommended granting Beneficial Water Use Permit 81523-g76LJ to Neil R. and Randa J. McAlpin to appropriate ground water at a rate of 130 gallons per minute up to 76.28 acre-feet per year by means of a well and pump at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  in Government Lot 3, Section 7, Township 22 North, Range 19 West in Lake County for irrigation of 75 acres in the amount of 75 acre-feet per year and stock water in the amount of 1.28 acre-feet per year. The places of use for irrigation would be 35 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 3 and 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 4. The places of use for the stock water would be the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 3 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 4. The period of diversion for irrigation would be from April 1 through September 30, inclusive of each year and the period of diversion for stock water would be from January 1 through December 31, inclusive of each year.

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For this review, the Department must accept the Proposal's findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1993) and Mont. Admin. R. 36.12.229 (1994). The Department has considered the exceptions and reviewed the record under these standards and the Department finds that the Proposal for Decision is supported by the record and properly applied the law to the facts.

The crux of the exceptions is the Objectors did not have notice of Applicants' test pumping such that the Objectors could have measured interference with their well. Although such notice is not required by law, Objectors' point is well taken. The Proposal for Decision suggests that Objectors would need baseline well measurements taken from two to three days before pumping by Applicants' to observe possible interference with the Objectors' well. Obviously, it was not possible for Objectors to take such measurements without prior notice of Applicants' pumping.

Objectors' request that the permit be conditioned such that Objectors receive advance notice of Applicants' pumping is therefore reasonable and the permit will be so conditioned. However, Objectors are cautioned that the static water level in their well is not necessarily protected just because they have a senior right. See Conclusion of Law 9. The Department recommends that if the Objectors and other similarly situated water users believe the aquifer is being depleted to their

detriment, they explore petitioning for a controlled ground water area. See Mont. Code Ann. § 85-2-506 (1993).

Having given the exceptions 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 81523-g76LJ is hereby granted to Neil R. and Randa J. McAlpin to appropriate ground water at a rate of 130 gallons per minute up to 76.28 acre-feet per year by means of a well and pump at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  in Government Lot 3, Section 7, Township 22 North, Range 19 West in Lake County for irrigation of 75 acres in the amount of 75 acre-feet per year and stock water in the amount of 1.28 acre-feet per year. The places of use for irrigation shall be 35 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 3 and 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 4. The places of use for the stock water are the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 3 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 in Government Lot 4. The period of diversion for irrigation is from April 1 through September 30, inclusive of each year and the period of diversion for stock water is from January 1 through December 31, inclusive of each year.

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 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 Permittees any equity or vested right against the Tribes. The Permittees are hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the Permittees' risk.

Issuance of this permit by the Department shall not reduce Permittees' 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 Permittees 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. ADV 92-745 Montana First Judicial District Court, Lewis and Clark County, Helena - filed May 15, 1992, and in Cause No.

CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division - filed May 15, 1992) which cases are currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

C. This permit is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

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

D. This permit is subject to the condition that the appropriator shall measure and record the static water level once each year in the permitted well within each of the following time periods: 1) March 15 to 31; 2) August 1 to 15; and 3) October 15 to 31. Each record must include the water level, method of measurement, date and time of measurement, and description of the point on the well from which the measurement is taken. The measurement shall be made at a time when the well has not been pumped for at least 24 hours prior to measurement. Further this permit is subject to the condition that the Permittees shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittees shall keep a written record of the flow rate and

volume of all waters diverted, including the period of time, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 3220 Hwy. 93 S., P.O. Box 860, Kalispell, MT 59903 PH: (406) 752-2288.

E. Permittees shall notify all objectors two to three days before commencing irrigation so they will have an opportunity to measure the static water level of their wells prior to such pumping. Permittees shall notify all objectors within two to three days after pumping ceases so that the static water level may again be measured.

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

G. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by Permittees' exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittees' exercise of this permit.

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 2<sup>nd</sup> day of November, 1994.

*Larry Holman*

Larry Holman, Chief  
Water Rights Bureau  
Department of Natural Resources  
and Conservation  
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 3<sup>rd</sup> day of November, 1994, as follows:

Neil R. & Randa J. McAlpin  
P.O. Box 276  
Polson, MT 59860

Leonard & Sadie Haack  
1361 Dupuis Rd.  
Polson, MT 59860

Panorama Water Assoc.  
% Ed Holland, Sec.  
9571 Haack Rd  
Polson, MT 59860

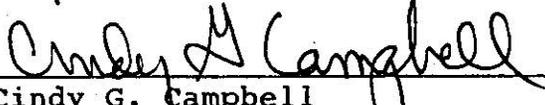
Keith McCurdy  
McCurdy Law Firm, PC  
P.O. Box 1172  
Polson, MT 59860-1172

Roy E. Burton, Jr.  
Water Administrator  
Confederated Salish &  
Kootenai Tribes  
P.O. Box 278  
Pablo, MT 59855

John C. Chaffin  
Office of the Solicitor  
U.S. Dept of the Interior  
P.O. Box 31394  
Billings, MT 59107-1394

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
3220 Highway 93 South  
P.O. Box 860  
Kalispell, MT 59903-0860  
(via electronic mail)

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

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

**CASE #** 81523

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

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IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     PROPOSAL FOR DECISION  
81523-g76LJ BY NEIL R. & RANDA J.     )  
MCALPIN                                     )

\* \* \* \* \*

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 July 12, 1994, in Polson, Montana, to determine whether a Beneficial Water Use Permit should be granted to Neil R. and Randa J. McAlpin (Applicants) for Application 81523-g76LJ under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants appeared at the hearing *pro se*.

Objectors Leonard and Sadie Haack appeared at the hearing in person and by and through counsel, Keith McCurdy.

Objector Tree House Panorama Water Association appeared at the hearing by and through Ed Holland.

Marshall Corbett, Hydrogeologist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Charles Brasen, Manager of the Department's Kalispell Water Resources Regional Office, appeared at the hearing.

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Maureen Theiler<sup>1</sup>, Fran Wilson, and Elwin Bennington appeared at the hearing as interested persons.

EXHIBITS

Objectors Haack offered four exhibits for inclusion in the record. All were accepted into the record without objection.

Objectors Haack's Exhibit B is a photocopy of Certificate of Water Right 59285-g76LJ issued to Leonard G. and Sadie Haack with a priority date of February 7, 1985 at 4:10 p.m.

Objectors Haack's Exhibit C is a very poor photocopy<sup>1</sup> of a well log for a well drilled February 11, 1985, by Andersen Drilling for Leonard Haack.

Objectors Haack's Exhibit D is a photocopy of a static water level measurement made by Main Harbor Plumbing on July 23, 1993, for Leonard Haack.

Objectors Haack's Exhibit E is a photocopy of a bill from Main Harbor Plumbing to Leonard Haack for pulling the pump to remove a bobber from wire and pipe. A static water level was taken at that time, March 14, 1994.

The Department offered five exhibits for the record. Objectors Haack objected to Department's Exhibits 2, 3, and 4. The remaining were accepted into the record without objection.

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<sup>1</sup>Mrs. Theiler was allowed to testify during the hearing. She testified her water right was a Certificate of Water Right with a priority date of April 1993 which is later than the priority date of the instant application, May 19, 1992. Therefore, the Theilers' water right cannot be adversely affected because the priority date is junior to Applicants' priority date.

<sup>1</sup>The photocopy is of such poor quality that the Hearing Examiner obtained a copy from the Department files.

Department's Exhibit 1 consists of four pages. The first is a photocopy of a USGS quad map upon which numbers and a red line, blue line, and a green line have been added. The numbers represent wells and the line joining them show a similarity of static water levels and geologic formations in those wells. The second page is an illustration of the formations in the area of Applicants' well and the wells drilled into these formations. This illustration corresponds with line "A" on the first page. The third page is an illustration of the formations and the wells drilled into them in the area of line "B" on the first page. The fourth page is an illustration of the formations and the wells completed into them in the area of line "C" on the first page.

Department's Exhibit 2 is a computerized graph of the static ground water level in the O'Halloran well while the Polson Ready Mix well is in normal use. Objectors Haack objected to the inclusion of Exhibits 2, 3, and 4 being accepted into the record on the basis that these wells are too distant from Applicants' well to reflect the conditions concerning Applicants' well. Although these wells are not located in the same area as the Applicants' well, these graphs give a general illustration of what is happening in the entire aquifer. Objection is overruled and Exhibits 2, 3, and 4 are accepted into the record.

Department's Exhibit 3 is a computerized graph of the static ground water level in the Pioneer Chevrolet, Bob Wert well, while the Polson Ready Mix well is in normal use.

Department's Exhibit 4 is a computerized graph of the static ground water level in the Barnoski well while the Polson Ready Mix well is in normal use.

Department's Exhibit 5 is a computerized graph showing the total wells of record that have been installed in the Polson area from 1960 to 1992.

The Department file was made available for review by all parties who had no objections to any part of the file; therefore the Department file was accepted into the record in its 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. Mont. Code Ann. § 85-2-302 (1993) 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. Applicants duly filed Application 81523-g76LJ with the Department on May 19, 1992, at 12:10 p.m. (Department file.)

3. Pertinent portions of the application were published in the *Lake County Leader*, a newspaper of general circulation in the area of the source, on March 11, 1993. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be

interested in or affected by the proposed appropriation. Four timely objections were received and Applicants were notified of the objections by a letter from the Department dated April 21, 1993. (Department file.)

4. Applicants seek to appropriate ground water at a rate of 130 gallons per minute up to 76.28 acre-feet per year by means of a well and pump at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , in Government Lot 3, Section 7, Township 22 North, Range 19 West in Lake County' for irrigation of 75 acres in the amount of 75 acre-feet per year and stock water in the amount of 1.28 acre-feet per year. The proposed places of use for irrigation are 35 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 3 and 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 4. The proposed places of use for the stock water are the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 3 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 4. The proposed period of diversion for irrigation is from April 1 through September 30, inclusive of each year and the proposed period of diversion for stock water is from January 1 through December 31, inclusive of each year. (Department file.)

5. Applicants' well was completed at a depth of 235 feet by a licensed water well driller. It was pumped at a rate of 100 to 130 gallons per minute for a period of 129 hours beginning on August 19, 1992, and ceasing on August 25, 1992. During this time, the Confederated Salish and Kootenai Tribes (Tribes)

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'Unless otherwise specified, all land descriptions in this Proposal are located in Township 22 North, Range 19 West, Lake County, Montana.

monitored four wells and concluded there was no indication that Applicants' well was impacting the measured wells. It was further pumped for approximately one week to determine how many sprinkler heads Applicants could use. (Testimony of Neil McAlpin and Department file.)

6. Applicants' well would be used to supplement the water Applicants receive from the Flathead Irrigation Project. At present, Applicants do not receive sufficient water to irrigate any crop other than pasture. Applicants desire to raise more profitable crops such as potatoes or mint. (Testimony of Neil McAlpin.)

7. Applicants own the property where the water will be put to use. (Testimony of Neil McAlpin and Department file.)

8. Objectors Haack indicated during the hearing they would not object if the permit were issued subject to the conditions that the pumping of Applicants' well would not cause a drawdown in their well. Objectors Haack hold Certificate of Water Right 59285-g76LJ for a well located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7 that is used for domestic, lawn and garden, and stock at a rate of 25.00 gallons per minute up to 10.70 acre-feet per year. This water right has a priority date of February 7, 1985. Objectors Haack contend their static water level dropped seven feet during the testing of Applicants' well; however, they were unable to provide a static water level measurement taken of their well before the McAlpin well was pumped or a measurement taken shortly

after the pumping ceased. The measurements they did provide were taken on July 23, 1993, and March 14, 1994.

To determine whether a well will interfere with another well, measurements must be taken from at least two or three days before the testing begins, continued during the pumping, and ending a few days after pumping ceases. (Objectors Haack's Exhibits B, D, and E and testimony of Leonard Haack.)

9. Objector Tree House Panorama Water Association holds Certificate of Water Right 85348-g76L for a well located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 13, Township 22 North, Range 20 West, Lake County, to appropriate 26.00 gallons per minute up to 6.5 acre-feet per year for multiple domestic and lawn and garden use. This water right, even though the well was completed June 9, 1977, has a priority date of March 26, 1993, which is later than Applicants' priority date of May 19, 1992. The pump is located approximately one and one-half feet off the bottom of the well. The depth of the well is 189 feet with a static water level of 178 feet. This well serves five families. (Testimony of Ed Holland and Department records.)

10. There are three types of geological materials in the Polson Moraine. The first is the moraine itself which is glacial till. Most of that material has been carried in the ice of the glacier that occupied the area and deposited as a result of melting at the front of the glacier during a still stand. Out in front of that till to the south, wells can be completed in clean gravels at rather shallow depths in the glacial outwash which is

material that has been gleaned from the moraine due to overflow and spread in rather shallow sheets. This material is extremely good, permeable and conductive which makes an excellent aquifer. The till itself is not a good aquifer. Glacial till, in spite of the boulders, cobbles, and gravels, also contains a lot of clays and silts which clog the pore spaces between the boulders, cobbles, and gravels rendering the material not completely conductive or permeable for water. There are pockets of gravel in the till that contain less clays and can produce water. Under the till at the depth of many wells in the area, there is a more sorted material which was deposited by stream action in a rough sinuous fashion across the flood plain. That is the valley fill. Most of the productive deep wells are located in the valley fill. Some of the other wells just barely reach the outer pockets of the till. These wells are not as productive as those completed in the valley fill. Applicants' well is completed in the valley fill. Objectors Haack's well, which is 76 feet shallower than Applicants' well, is located in till or reworked till and not quite down into the valley till resulting in a poorer production well than Applicants' well. The water levels, however, are one and the same. All the water in the moraine and valley fill are the same water. That is, it is considered one aquifer which is saturated at the same level. (Department's Exhibit 1 and testimony of Marshall Corbett.)

11. Since 1988, there have been drought years, i.e., years with limited snowfall. There was a great amount of rainfall in

1993; however, half the rainfall is lost down the streams and rivers, while snow thaws slowly and flows into the fractures and soaks down into the valley fill and into the gravels. In conjunction with the drought years, the number of wells in the Polson area have increased tenfold or more since 1960.

The static water levels in wells completed in the 1970's have declined 10 to 12 feet. Wells completed in the 1980's show a decline in static water levels of seven or eight feet. Static water levels in wells completed in the 1990's have declined two or three feet. The discharge from this aquifer has been exceeding the recharge. However, as a whole, the amount of water flowing through this aquifer in the deeper gravels is far and above the amount that could ever be used by the current development. The problem lies with property owners never asking a well driller to penetrate the entire aquifer. Instead, as a rule, a land owner will tell a well driller to stop drilling as soon as water is reached, penetrating only the top of the aquifer. (Testimony of Marshall Corbett and Department's Exhibit 5.)

12. There are no planned uses or developments for which a permit has been issued or a reservation granted in the source of supply. (Department records and file.)

#### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or

rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 2 and 3.

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

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

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

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

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

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

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

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

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

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

....

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

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

5. The proposed uses, irrigation and stock water, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993). Applicants will ultimately receive a monetary benefit if they are able to grow crops other than pasture and provide adequate water for their stock. See Finding of Fact 6.

6. Applicants have proven by a preponderance of evidence that 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, in the amount Applicants seek to appropriate and that during the period in which Applicants seek to appropriate the amount requested is reasonably available. See Findings of Fact 4, 5, 6, 10, and 11.

7. Applicants have proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

8. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 9, 10, 11.

Objector Tree House Panorama Water Association's water right is junior to Applicants' priority date and therefore cannot be adversely affected by Applicants' proposed appropriation. See Finding of Fact 9. It matters not that the well has been in use since October 18, 1977. After July 1, 1973, a new well owner does not have a water right for that well until a notice of completion of ground water development has been filed with the Department. Mont. Code Ann. § 85-2-306 (1993).

Objectors Haack made allegations but had nothing to support those allegations. See Finding of Fact 8. Bare assertion that test pumping Applicants' well caused a seven feet decline in the static water level of Objectors Haack's well is not sufficient to prove adverse effect. The measurements the Haacks submitted were taken long after the test pumping was completed. The first static water level measurement in Haacks' well was taken on July

23, 1993, nearly a year after Applicants' test pumping was completed. The second static water level measurement was taken on March 14, 1994, approximately a year and a half after Applicants' testing was completed.

The water level in the aquifer is declining, not from Applicants' use, but from drought years and the growing number of wells completed in the aquifer. Nevertheless, there are unappropriated waters in the source of supply over and above the amount that could be used by the current development without an adverse effect to prior water rights. See Finding of Fact 11.

9. Mont. Code Ann. § 85-2-401(1) and (2) (1993) provides in relevant part:

(1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310(3) and 85-2-313.

The objectors whose water use rights have priority dates senior to those of Applicants' application in this matter have the right to make reasonable use of their water rights without adverse effect from Applicants. These rights are protected to the extent that the water is being beneficially used and the means of diversion are reasonable and adequate, taking into account the customary means of diversion and water uses in the

area. *State ex rel. Crowley v. District Court*, 108 Mont. 89, 88 P.2d 23 (1939), *Worden v. Alexander*, 108 Mont. 208 (1939).

Here, Applicants' well is completed in the valley fill at the bottom of the aquifer while several wells are completed in the higher glacial till, some barely penetrating the aquifer. These wells are reasonable diversions; however, they are not protectable diversions. To hold that an appropriator is entitled to maintenance of a certain static water level or a shallow well barely penetrating the aquifer against any subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier and less costly. Both case law and statutes controvert such a result.

At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. Schodde v. Twin Falls Land & Co., 224 U.S. 107, 119, 32 S.Ct. 470, 56 L.Ed 686. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches such a shallow depth into the available water supply that a shortage would occur to such a senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand.

*City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961) at 555. See also *Alamosa-La Jara v. Gould*, 674 P.2d 914 (1983).

The principle that no appropriator should be allowed to command the source simply so that he may have a convenient method

of diversion also is consistent with the State of Montana's stated policy of maximizing the beneficial use of water. Mont. Code Ann. § 85-2-101(3) (1993).

10. Applicants have proven by a preponderance of evidence the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 12.

11. Applicants have proven by a preponderance of evidence they have 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. See Finding of Fact 7.

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 is hereby granted to Neil R. and Randa J. McAlpin to appropriate ground water at a rate of 130 gallons per minute up to 76.28 acre-feet per year by means of a well and pump at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , in Government Lot 3, Section 7, Township 22 North, Range 19 West in Lake County for irrigation of 75 acres in the amount of 75 acre-feet per year and stock water in the amount of 1.28 acre-feet per year. The places of use for irrigation shall be 35 acres located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 3 and 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 4. The places of use for the stock water are the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in

Government Lot 3 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, in Government Lot 4. The period of diversion for irrigation is from April 1 through September 30, inclusive of each year and the period of diversion for stock water is from January 1 through December 31, inclusive of each year.

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 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.

C. This permit is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

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

D. This permit is subject to the condition that the appropriator shall measure and record the static water level once each year in the permitted well within each of the following time periods: 1) March 15 to 31; 2) August 1 to 15; 3) October 15 to 31. Each record must include the water level, method of measurement, date and time of measurement, and description of the point on the well from which the measurement is taken. The measurement shall be made at a time when the well has not been pumped for at least 24 hours prior to measurement. The appropriator shall submit said records by November 30 of each year to the Kalispell Water Resources Regional Office, PO Box 860, Kalispell, MT 59903.

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

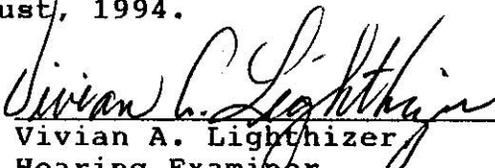
F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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 26<sup>th</sup> day of August, 1994.

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

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 26<sup>th</sup> day of August, 1994, as follows:

Neil R. & Randa J. McAlpin  
P.O. Box 276  
Polson, MT 59860

Panorama Water Assoc.  
% Ed Holland, Sec.  
9571 Haack Rd  
Polson, MT 59860

Leonard & Sadie Haack  
1361 Dupuis Rd.  
Polson, MT 59860

John C. Chaffin  
Office of the Solicitor  
U.S. Dept of the Interior  
P.O. Box 31394  
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McCurdy Law Firm, PC  
P.O. Box 1172  
Polson, MT 59860-1172

Roy E. Burton, Jr.  
Water Administrator  
Confederated Salish &  
Kootenai Tribes  
P.O. Box 278  
Pablo, MT 59855

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
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Kalispell, MT 59903-0860  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary