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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF BENEFICIAL WATER USE PERMIT NO. G55348-76M AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER WATER RIGHT NO. G99591-76M BY BROOKSIDE ESTATES, INC.	)	FINAL ORDER

* * * * * * * *

On June 30, 1989, a Proposal for Decision was issued in the captioned matter. On July 14, 1989, exceptions thereto were timely filed by Objectors Braun. On July 17, 1989, exceptions thereto were timely filed by Applicant. On July 27, 1989, Amendments to the Proposal for Decision were entered. Said Amendments resolved the exceptions of the Applicant. No exceptions to the Amendments were received.

Regarding the exceptions of Objectors Braun, (1) the typographical error in page 6, paragraph 12 of the Proposal for Decision is hereby corrected. The Finding of Fact referred to therein should be Finding of Fact 11, not Finding of Fact 10. (2) Minimal recordkeeping requirements on Appropriator, which would help effectuate proposed Condition F, are not unduly burdensome. The type of fertilizers, pesticides, and other chemicals used by Appropriator could easily be recorded by noting the information on receipts and keeping same, or by otherwise writing the information down. Monitoring the temperature of the outflow of the ponds during any discharge made into Rattlesnake Creek during the summer months would require no more than a thermometer

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and a few minutes time prior to the opening of the valve effectuating the discharge and daily thereafter as long as the discharge occurs. Condition F is modified accordingly.

Therefore, having given the matter full consideration, the Department adopts the Findings of Fact and Conclusions of Law contained in the Proposal for Decision, as previously amended and herein corrected, and incorporates them by reference.

WHEREFORE, based on the foregoing, the Department makes the following:

FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Beneficial Water Use Permit No. G55348-76M is granted to Brookside Estates, Inc., to add an additional point of diversion located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, and to add an additional means of diversion, a pump, at said additional point of diversion; and, subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. 99591-76M is granted to Brookside Estates, Inc., to change the purpose of use of 55 gpm up to 40 acre-feet of water per annum of claimed Water Right No. W99591-76M from irrigation to recreational use, i.e., aesthetic use; to change the place of use of said amount to a one acre-foot pond located in the NE¼SW¼ of said Section 11; and to change the original point of diversion for the entire claimed right, i.e., 29 M.I. (325 gpm), to two points: one, the pump site located in

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the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, and a second, the headgate of the Hollenbeck Ditch located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West.

Both Change Authorizations are issued subject to the following express terms, conditions, restrictions, and limitations:

A. Any rights evidenced herein are 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 Appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce Appropriator's liability for damages caused by the exercise of this Authorization, nor does the Department, in issuing this Authorization acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

C. Appropriator shall not withdraw more water from the source at either or both of the points of diversion herein authorized than it has a right to withdraw under Permit No. G55348-76M and Statement of Claim No. W99591-76M, and in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

D. Appropriator shall remove three acres from irrigation under Statement of Claim No. W99591-76M, to wit: one acre located in the SE¼NW¼SW¼, and two acres located in the S½NE¼SW¼, of Section 11, Township 13 North, Range 19 West.

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E. Appropriator shall keep records as to when and how much water it diverts from Rattlesnake Creek at the pump site located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, under either the Permit or the Claimed Water Right here changed; and shall keep records as to when and how much water is returned to Rattlesnake Creek at said pump site.

F. Any and all water returned to Rattlesnake Creek at the pump site must be of substantially the same quality as it was when it was removed from Rattlesnake Creek. In order to help facilitate this requirement, but not in lieu thereof, Appropriator shall keep records as to the type of any fertilizer, pesticide, herbicide, or other chemical used in maintaining the grounds of Brookside Estates, and shall further record the temperature of any effluent discharged from the ponds directly into Rattlesnake Creek during the period June 1 to September 30, once each day such effluent is discharged. Such records shall be made available to the Department upon request.

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.

Dated this 18 day of October, 1989.

Laurence Siroky

Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

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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 18th day of October, 1989, as follows:

Brookside Estates, Inc.
P.O. Box 7007
Missoula, MT 59807

Gordon and Jessie Opel
707 Dickinson
Missoula, MT 59802

Loren L. Rogers
218 East Front
Missoula, MT 59801

Paul and Karen Overland
3321 Old Pond Road
Missoula, MT 59802

Mary Ellen Collins
3019 Old Pond Road
Missoula, MT 59802

Chris King
3117 Old Pond Road
Missoula, MT 59802

Thomas and Bettie Collins
3023 Old Pond Road
Missoula, MT 59802

Dave Pengelly
Knight, Maclay and Masar
P.O. Box 8957
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Harold and Arlene Braun
2614 Sycamore
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Dennis and Phyllis Washington
3121 Old Pond Road
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Rebecca L. Summerville
Central Square Building
201 West Main
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Janis L. Michaelson
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Doreen M. Shafizadeh
3015 Old Pond Road
Missoula, MT 59802

Mike McLane, Field Manager
P.O. Box 5004
Missoula, MT 59806

Irene V. LaBare
Irene V. LaBare
Legal Secretary

CASE # 55348

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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF BENEFICIAL WATER USE PERMIT NO. G55348-76M AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G99591-76M BY BROOKSIDE ESTATES, INC.	)	AMENDMENTS TO PROPOSAL FOR DECISION

* * * * * * * *

The Examiner hereby amends the Proposal for Decision in this matter, which was issued June 30, 1989.

The amended Findings of Fact, set forth below, replace the correspondingly numbered Findings of Fact in the June 30 Proposal; the amended Proposed Order, also set forth below, replaces the Proposed Decision in the June 30 Proposal. All other elements of the June 30, 1989 Proposal for Decision remain unaltered and are incorporated herein by reference.

AMENDED FINDINGS OF FACT

8. By Application No. G99591-76M, Applicant seeks to change the purpose of use of 55 gpm up to 40 acre-feet per annum of claimed Water Right No. W99591-76M from irrigation to recreational use, i.e., aesthetic use; to change the place of use of said amount to a one acre-foot pond located in the NE¼SW¼ of said Section 11 (referred to as "Pond #1", it is not one of the ponds described in Finding of Fact 7, but is an additional pond which is part of that pond system); to change the original point of diversion for the entire amount of said right to the location

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of the pump described in Finding of Fact 7, supra; and to add an additional point of diversion for the entire amount of said right, to wit: the headgate of the Hollenbeck Ditch, located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West. Applicant would remove three acres from irrigation, to wit: one acre located in the SE¼NW¼SW¼, and two acres located in the S½NE¼SW¼, of said Section 11.

9. The general purpose of the requested change described in Finding of Fact 7 is to allow Applicant to divert water directly from Rattlesnake Creek into its four pond system, as an alternative to its present ability to supply said pond system with water through the Hollenbeck ditch. The purpose of the requested change described in Finding of Fact 8 is twofold: to supply a fifth pond (Pond #1) with additional water, either through the Hollenbeck Ditch or directly from Rattlesnake Creek by means of the pump described in Finding of Fact 7; and to provide two new points of diversion for its irrigation right, replacing the old point of diversion. Applicant would utilize the Hollenbeck Ditch as its primary diversion, using the pump site only if it could not divert sufficient water by means of the ditch.

10. The Hollenbeck Ditch, from its headgate to Pond #1, is capable of carrying many times more water than is needed by all users on the ditch. (Testimony of Warren Wilcox.) Thus, it is adequate to convey an additional 29 M.I. (325 gpm) of water to Pond #1. Irrigation water (270 gpm) would be removed from Pond

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#1 by a pump (different than the pump which supplies the pond system).

The pump and pond system is presently successfully operated at 500 gpm, and the use of water, formerly used for irrigation, to supply water to Pond #1 to compensate for evaporation therefrom will not affect the operation of the system. The addition of valves to allow pumping directly from Rattlesnake Creek will not affect Applicant's ability to regulate pond levels, or the flow down Hollenbeck Ditch below Applicant's property, or otherwise impair the present success of the system. As the pump and pond system is presently capable of handling 500 gpm, the use of the system to deliver 275 gpm of water for irrigation (diverted directly from Rattlesnake Creek, run through the upper ponds, and removed at Pond #1) will be of no consequence to the operation of the system; it will simply require a slight modification of operation method, i.e., that, when the 275 gpm of irrigation water is diverted from the creek by pump, only 225 gpm be diverted from, and returned to, Rattlesnake Creek pursuant to Permit No. 55348-s76M.

AMENDED PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Beneficial Water Use Permit No. G55348-76M is granted to Brookside Estates, Inc., to add an additional point of diversion located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, and to add an additional means of diversion, a pump, at said additional point

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of diversion; and, subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. 99591-76M is granted to Brookside Estates, Inc., to change the purpose of use of 55 gpm up to 40 acre-feet of water per annum of claimed Water Right No. W99591-76M from irrigation to recreational use, i.e., aesthetic use; to change the place of use of said amount to a one acre-foot pond located in the NE¼SW¼ of said Section 11; and to change the original point of diversion for the entire claimed right, i.e., 29 M.I. (325 gpm), to two points: one, the pump site located in the SE¼NW¼SW¼ of Section 11, Township 13, North, Range 19 West, and a second, the headgate of the Hollenbeck Ditch located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West.

Both Change Authorizations are issued subject to the following express terms, conditions, restrictions, and limitations:

A. Any rights evidenced herein are 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 Appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce Appropriator's liability for damages caused by the exercise of this Authorization, nor does the Department, in issuing this Authorization acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

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C. Appropriator shall not withdraw more water from the source at either or both of the points of diversion herein authorized than it has a right to withdraw under Permit No. G55348-76M and Statement of Claim No. W99591-76M, and in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

D. Appropriator shall remove three acres from irrigation under Statement of Claim No. W99591-76M, to wit: one acre located in the SE¼NW¼SW¼, and two acres located in the S½NE¼SW¼, of Section 11, Township 13 North, Range 19 West.

E. Appropriator shall keep records as to when and how much water it diverts from Rattlesnake Creek at the pump site located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, under either the Permit or the Claimed Water Right here changed; and shall keep records as to when and how much water is returned to Rattlesnake Creek at said pump site.

F. Any and all water returned to Rattlesnake Creek at the pump site must be of substantially the same quality as it was when it was removed from Rattlesnake Creek.

NOTICE

The proposal, as hereby amended, is a recommendation, not a final decision. All parties are urged to review carefully the terms of the amended proposed order, including the legal land descriptions. Any party adversely affected by the amended Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana

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59620-2301); the exceptions must be filed and served upon all parties within 20 days after the amended proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the amended proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the amended proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional

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exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 27th day of July, 1989.

Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amendments to Proposal for Decision was duly served upon all parties of record at their address or addresses this 27th day of July, 1989, as follows:

Brookside Estates, Inc.
P.O. Box 7007
Missoula, MT 59807

Gordon and Jessie Opel
707 Dickinson
Missoula, MT 59802

Loren L. Rogers
218 East Front
Missoula, MT 59801

Paul and Karen Overland
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Mike McLane, Field Manager
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Missoula, MT 59806

Irene V. LaBare
Legal Secretary

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BB

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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF BENEFICIAL WATER USE PERMIT NO. G55348-76M AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G99591-76M, BY BROOKSIDE ESTATES, INC.	)	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 20, 1989 in Missoula, Montana.

Applicant appeared by and through Dave Pengelly, attorney at law, of the firm Knight, Maclay and Masar. Mr. Pengelly called witnesses Warren Wilcox, Rudyard Jennings, George Tabish, Mike McLane, and adverse witness Arlene Braun.

Objectors Arlene and Harold Braun appeared pro sese.

Objectors Tom and Mary Ellen Collins appeared pro sese.

Objectors Dennis and Phyllis Washington appeared by and through Rebecca Summerville, attorney at law, of the firm Datsopoulos, MacDonald and Lind.

Objectors Paul and Karen Overland appeared by and through said Karen Overland.

Untimely Objector Richard Boehmler appeared pro se.

Michael P. McLane, Manager of the Missoula Field Office of the Department of Natural Resources and Conservation (hereafter,

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"Department" or "DNRC") Water Rights Bureau, was present at the hearing.

The record was left open after the hearing for receipt of closing briefs. The record closed on March 3, 1989.

EXHIBITS

Applicant introduced three exhibits for inclusion in the record.

Applicant's Exhibit 1, a map entitled "Brookside on the Rattlesnake - Ditch/Pond/Irrigation System" was admitted without objection.

Applicant's Exhibit 2, a photocopy of a map of Township 13 North, Range 19 West, showing the location of various irrigation ditches in the Missoula area, was admitted without objection.

Applicant's Exhibit 3, two photocopied pages of a DNRC computer printout entitled "Water Right Listing by Source Name by Land Description", was admitted without objection.

None of the Objectors introduced exhibits.

There was no objection to any of the contents of the Department files; therefore, they remain part of the record herein in their entirety.

PROPOSED FINDINGS OF FACT

1. Section 85-2-402, MCA, provides "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department. . .".

2. The captioned Applications were duly filed on May 28, 1987. Both were amended and refiled on February 5, 1988.

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3. The pertinent facts of both Applications were published in the Missoulian, a newspaper of general circulation in the area of the source, on June 15, 1988. Timely objections to both Applications were received from Harold and Arlene Ward Braun, Loren L. Rogers, Dennis and Phyllis Washington, Paul and Karen Overland, Mary Ellen Collins, Janis L. Michaelson, Chris King, Doreen M. Shafizadeh, Thomas J. and Bettie B. Collins, and Montana Department of Fish, Wildlife and Parks (MFWP). MFWP withdrew its objection on September 22, 1988.

4. Warren Wilcox, one of the owners of Applicant Brookside Estates, Inc., has filed Statement of Claim No. W-99591-76M, wherein he claims the right to divert by pump 29 miner's inches (M.I.) up to 261 acre-feet per year of water from Rattlesnake Creek, a tributary of the Clark Fork River, from April 1 to October 1, inclusive, each year, at a point located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, for irrigation use on 25 acres located in the SW¼ of above-described section. The claimed priority date is August 29, 1890.

5. Applicant presently holds Permit No. 55348-s76M, which authorizes Applicant to divert 500 gpm up to 800 acre-feet per year of water from Rattlesnake Creek, a tributary of the Clark Fork River, at a point located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West (the headgate of the "Hollenbeck Ditch"), for year round recreational use in the SW¼NE¼SW¼ of above-described Section. The priority date is April 16, 1984.

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6. Under Permit No. 55348-76M, Applicant presently and successfully supplies water to four ponds (known as the "upper ponds") located on Applicant's property. This is accomplished by diverting water into the Hollenbeck Ditch, pumping it therefrom into the uppermost pond, allowing the water to flow down through the other three ponds, and finally returning it to the Hollenbeck Ditch. If there is more water in the Hollenbeck Ditch at this point than the downditch users require, the excess is returned to Rattlesnake Creek by means of a pump which draws from the Hollenbeck Ditch.

7. By Application No. G55348-76M, Applicant seeks to add an additional point of diversion and an additional means of diversion to Permit No. G55348-76M the additional point of diversion would be located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, at which point Applicant would utilize the additional means of diversion, i.e., the pump which is now in place and which presently supplies the pond system with water from the Hollenbeck Ditch, to divert water directly from Rattlesnake Creek into the pond system.

8. By Application No. G99591-76M, Applicant seeks to change the purpose of use of 55 gpm up to 40 acre-feet per annum of claimed Water Right No. W99591-76M from irrigation to recreational use, i.e., aesthetic use; to change the original point of diversion for said amount to the location of the pump described in Finding of Fact 7, **supra**; to add an additional point of diversion for said amount, to wit: the headgate of the

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Hollenbeck Ditch, located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West; and to change the place of use of said amount to a one acre-foot pond (referred to as "Pond #1") located in the NE¼SW¼ of said Section 11. (This pond is not one of the ponds described in Finding of Fact 7; it is an additional pond which is part of that pond system.) Applicant would remove three acres from irrigation, to wit: one acre located in the SE¼NW¼SW¼, and two acres located in the S½NE¼SW¼, of said Section 11.

9. The general purpose of the requested change described in Finding of Fact 7 is to allow Applicant to divert water directly from Rattlesnake Creek into its four pond system, as an alternative to its present ability to supply said pond system with water through the Hollenbeck ditch. Applicant would not utilize both points of diversion simultaneously. The purpose of the requested change described in Finding of Fact 8 is to supply a fifth pond (Pond #1) with water, either through the Hollenbeck Ditch or directly from Rattlesnake Creek by means of the pump described in Finding of Fact 7.

10. The means of diversion and operation of the pond system through the Hollenbeck Ditch are presently in place and are successfully operated. The use of water, formerly used for irrigation, to supply water to Pond #1 will not affect the operation of the system. The addition of valves to allow pumping directly from Rattlesnake Creek will not affect Applicant's

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ability to regulate pond levels, or the flow down Hollenbeck Ditch, or otherwise impair the present success of the system.

11. Several of the Objectors (Braun, Boehmler, Collins, Washington) allege that diversion of water in order to supply ponds which are used for purely aesthetic reasons is not a recreational use, nor in fact is it even a beneficial use, of such water.

12. Objectors Arlene and Harold Braun claim an existing water right for a domestic well located adjacent to Rattlesnake Creek. Beyond joining in the objection described in Finding of Fact 10, they allege that because they were not notified of the original Application for Permit No. G55348-76M, the Permit is invalid and Applicant thus has no present right to divert water from Rattlesnake Creek thereunder. They also allege that such water as is returned to Rattlesnake Creek via the outlet leading directly into the Creek (see Finding of Fact 6) will be polluted with various chemicals and bioorganisms which will adversely affect their domestic well water, which is derived from creek water at a point downstream from said outlet.

13. Neither untimely Objector Boehmler nor Objectors Washington has claimed a right to divert water from Rattlesnake Creek. There is no evidence that Objectors Overland have rights to divert water from Rattlesnake Creek.

14. Objector Collins claims a right to divert water from Rattlesnake Creek for lawn and garden use. In addition to the allegation that the Applicant's proposed use is not beneficial,

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Collins alleges adverse affect to their right by reduction in Rattlesnake Creek flow.

15. The mere addition of an alternate point of diversion, as contemplated under Application No. 55348-76M, will not increase the amount of water diverted from the source, or lessen the amount returned thereto after use.

16. Applicant has taken certain steps to prevent degradation of the water used in its pond system. To reduce the amount of fertilizer, pesticides and herbicides entering the ponds from the surrounding landscape, a 10 - 15 foot buffer strip has been established around the ponds; in this zone, none of these chemicals are applied. Water is continuously circulated and is not allowed to stagnate.

17. Approximately 4.8 acre-feet per annum of water were consumed on the three irrigated acres which Applicant intends to remove from production. The maximum annual consumption in Pond #1 (which is almost entirely due to evaporation, as the pond is lined), is 2.28 acre-feet.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, Chapter 2, Part 3, MCA.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Examiner.

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3. All those Objectors who did not appear at the hearing, except Objector Shafizadeh who was excused, are hereby declared in default and their Objections are dismissed. ARM 36.12.208.

4. The Department must issue a change authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402, MCA, are met:

> (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
> (b) the proposed means of diversion, construction, and operation of the appropriation works are adequate.
> (c) The proposed use of water is a beneficial use.

5. Objectors Braun allege that the grant of the original Application for Beneficial Water Use Permit No. G55348-76M to appropriate water from Rattlesnake Creek resulted in adverse effect to their water right, and that Brauns were denied due process because the Department did not send them personal notice of that Application. Whatever the merit of these allegations, the Examiner does not have jurisdiction in this proceeding to make determinations regarding the propriety of the issuance of Permit No. G55348-76M. Accordingly, for purposes hereof, the Permit is regarded as duly and properly issued.

6. In order to be approved, the proposed use under the Change Application must be a beneficial use. However, it has been averred that the use of water for its intrinsic aesthetics, such as is here applied for, is not a recreational use, and further that it is not a beneficial use under Montana law. The

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Examiner believes that such use is a recreational use of water; however, even if it is not technically a recreational use, it is nonetheless a beneficial use.

"Recreation" is defined as "refreshment of one's mind or body after labor through diverting activity; play." The American Heritage Dictionary of the English Language (New College ed. 1980). That the sight and sound of running water can refresh one's mind is obvious; in fact, it is this aspect or the natural environment which forms one of the main attractions thereof. Further, although allowing running water to impress upon the senses is admittedly a low energy activity, this is essentially what one does in birdwatching, or sightseeing, i.e., "activities" which are generally regarded as recreation. At any rate, there appears to be no sharp line of demarcation separating the observation of, listening to, smelling, or touching running water from other low energy, primarily sensory, activities which are generally considered recreation. Thus, the Examiner believes that such use is a recreational use.

Whether or not aesthetic enjoyment is considered "recreation" per se, so long as it is a beneficial use under Montana law, water may be appropriated therefor. Objectors Braun argue that, under the principle of ejusdem generis, aesthetic use is not a "beneficial use" of water in that it is not of the basic kinds or classes of "use" as are specified in § 85-2-102(2), MCA, i.e., utilization of water for sustaining life or for permitting commercial production. However, what constitutes "beneficial

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use" under state law also includes recreational use. Accordingly, the kinds or classes of use envisioned by the legislature are broader than first characterized by the Objectors; that is, they also include "enhancements to the quality of life", as Objectors Braun so aptly put it in their brief of February 17, 1989. Aesthetic enjoyment would seem to fall into this class; at least, this Examiner cannot conceive of a rational basis on which to distinguish it.

If it were held that the enjoyment of running water for its own aesthetic is not beneficial, enjoyment of noncommercial grass and flower crops should also be held nonbeneficial, for the nature of the activity is the same. However, the category of domestic use, specifically set forth in the statute, has long been held by the Department to encompass the utterly uncommercial and nonlifesustaining practice of growing lawn grass and flowers. Such holding would thus constitute a reversal of Department precedent, unjustified so long as any use which "contributes to the quality of life" is recognized as beneficial.

Objectors Braun have cited in their brief several cases which allegedly support their contention that the use of water for its intrinsic aesthetics is not a beneficial use. However, of these, only Empire Water and Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913) would seem to support that contention. In Empire, the Court held that use of water to support a recreational facility was a beneficial use. However, it refused to enjoin defendant Empire from diverting water from a

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stream which naturally supplied Cascade Falls with water, stating that plaintiff Cascade Town Co., which relied on the falls as part of its attraction to the public, was not entitled to a continuance of the falls solely for their scenic beauty. Nevertheless, it did hold that Cascade Town Co. was entitled to protection of that amount of water reasonably required for the growth of native and introduced vegetation on its grounds, and for a fountain and an artificial lake it had constructed.

The only indication of how the Court distinguished between the scenic value of the falls, which it did not protect as a beneficial use of water, and the scenic value of the vegetation, fountain, and artificial lake, which were protected as such, is the statement ". . . we think complainant is not entitled to a continuance of the falls solely for their scenic beauty. The state laws proceed upon more material lines". It thus appears that while the Court considered the falls, the vegetation, the lake and fountain all to be of scenic benefit, it did not consider that the first was a material <u>use</u> of the water by the plaintiff. Further statements in the opinion indicate that, in order for there to be a "use" of water, either actual diversion of the water by the appropriator is required, or the water itself must effect the intended benefit by naturally diverting itself from its watercourse.

Under such a rule, water supplying the fountain and artificial lake would be considered "used" because water was actually diverted by Cascade Town Co. to supply them, and the

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water from the falls which irrigated the vegetation on the grounds would be considered "used" because, the falls "diverted" water from the watercourse in the form of the spray, which in turn sprinkled vegetation, the growth of which was the intended benefit. The falls themselves would not be considered "used" by Cascade Town Co. under this test because Cascade Town Co. did not actually divert water to create them, and because the intended benefit (the natural scenic beauty) of the falls is intrinsic to them, i.e., is not created by natural diversion of water from the watercourse.

At base, Empire echoes a basic principle of Montana law that, in order for there to be an appropriation, diversion of water must occur. That such diversion may be held to have occurred as a result of natural processes reflects a liberal construction of such principle; however, that there must be actual diversion of the water, whether through human or natural agency, remains the primary indicium of whether a use of water, and therefore an appropriation, has been made. In the instant case, it is clear that water is diverted by human agency; thus, this appropriation is equivalent to the appropriation of water for the artificial lake and fountain in Empire, a beneficial use recognized therein.

Based on the foregoing, the Examiner holds that the diversion of water simply for its intrinsic aesthetic value, i.e., for the sensory appreciation of the water itself, is a

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beneficial use of water, whether or not such use is properly classified as a recreational use.

7. The proposed means of diversion construction and operation of the appropriation works are adequate. Findings of Fact 6, 7, 8, 9, 10.

8. Objector Braun has alleged a plausible case of adverse effect to its domestic well water right: If Applicant discharges water, degraded by recirculation through its ponds (which have the potential to collect and concentrate various herbicide and/or pesticide residues used on the Brookside landscape, and/or foster the growth of bioorganisms which are not natural to the Creek because water temperatures may be heightened by recirculation), into Rattlesnake Creek at the pump site, such water could, especially during periods of low creek flow, reduce the potability and usefulness of Objector's well which draws from river gravels located under the Creek just downstream from said pump site. Applicant did not deny that its system had the potential to degrade water and thus to adversely affect the Objector's right, but stated it had taken steps to prevent degradation of the water.

As long as the water discharged into Rattlesnake Creek by Applicant is not degraded, there will be no such adverse effect to Objector, and Applicant has taken steps to prevent such degradation. However, in order to ensure that Applicant (or its successors) continues to prevent degradation of Rattlesnake Creek, the Authorization will contain the condition that such

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water as is discharged into Rattlesnake Creek from the system be of substantially the same quality as it was when removed therefrom.

9. There will be no increase in the net depletion of the source due to the exercise of the Permit and claimed water right under the proposed changes. Findings of Fact 15 and 17. Accordingly, there will be no adverse effect to other appropriators as a result thereof.

WHEREFORE, based on the foregoing, the Examiner propounds the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Beneficial Water Use Permit No. G55348-76M is granted to Brookside Estates, Inc., to add an additional point of diversion located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, and to add an additional means of diversion, a pump, at said additional point of diversion; and, subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. 99591-76M is granted to Brookside Estates, Inc., to change the purpose of use of 55 gpm up to 40 acre-feet of water per annum of claimed Water Right No. W99591-76M from irrigation to recreational use, i.e., aesthetic use; to change the original point of diversion for said amount to two points: one, the pump site located in the SE¼NW¼SW¼ of Section 11, Township 13, North, Range 19 West, and a

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second, the headgate of the Hollenbeck Ditch located in the NE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West; and to change the place of use of said amount to a one acre-foot pond located in the NE¼SW¼ of said Section 11.

Both Change Authorizations are issued subject to the following express terms, conditions, restrictions, and limitations:

A. Any rights evidenced herein are 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 Appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce Appropriator's liability for damages caused by the exercise of this Authorization, nor does the Department, in issuing this Authorization acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

C. Appropriator shall not withdraw more water from the source at either or both of the points of diversion herein authorized than it has a right to withdraw under Permit No. G55348-76M and Statement of Claim No. W99591-76M, and in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

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D. Appropriator shall remove three acres from irrigation under Statement of Claim No. W99591-76M, to wit: one acre located in the SE¼NW¼SW¼, and two acres located in the S½NE¼SW¼, of Section 11, Township 13 North, Range 19 West.

E. Appropriator shall keep records as to when and how much water it diverts from Rattlesnake Creek at the pump site located in the SE¼NW¼SW¼ of Section 11, Township 13 North, Range 19 West, under either the Permit or the Claimed Water Right here changed; and shall keep records as to when and how much water is returned to Rattlesnake Creek at said pump site.

F. Any and all water returned to Rattlesnake Creek at the pump site must be of substantially the same quality as it was when it was removed from Rattlesnake Creek.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be

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restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 30 day of June, 1989.

Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 30th day of June, 1989, as follows:

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