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

* * * * * * * * *

IN THE MATTER OF THE	)	
APPLICATIONS FOR TEMPORARY	)	
BENEFICIAL WATER PERMITS	)	FINAL
42C-103576, 42C-103601, AND	)	ORDER
43C-104945 BY EMPIRE SAND	)	
AND GRAVEL CO., INC.	)	

* * * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the March 18, 1999, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water User Permit**

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42C-103576 is granted to Empire Sand & Gravel Co., Inc. to appropriate 150 gallons per minute up to 50 acre-feet per year of groundwater for industrial use, highway construction, from January 1 through December 31 of each year. The permitted points of diversion are wells in SW¼SE¼SE¼ of Section 20, NW¼NE¼SE¼ and NE¼SW¼SE¼ of Section 19, Township 03 South, Range 48 East, Powder River County, Montana. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ Section 30 into Section 29, Township 03 South, Range 48 East.

A. ** WATER MEASUREMENT RECORDS REQUIREMENT:

Permittee shall measure the static water levels in these wells on a weekly basis from April through October. Static water level measurements shall be taken monthly throughout the remainder of the year. Permittee shall tabulate and update graphs to show water level trends. Permittee shall make measurement records available to the Department at any time.

B. ** GROUNDWATER WASTE AND CONTAMINATION -- ACCESS PORT:

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This right is subject to section 85-2-505, MCA, requiring 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(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

C. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

D. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary permit expires December 31, 2000.

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water Use Permit 42C-103601** is granted to Empire Sand & Gravel Co., Inc. to

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appropriate up to 50 acre-feet of the waters of Home Creek by means of pump(s) in ponded areas at points beginning in the SE¼NE¼ Section 24, Township 03 South, Range 46 East, and ending at the eastern edge of Section 28, Township 03 South, Range 47 East, in Powder River County, Montana, for industrial use, highway construction, from January 1 through December 31 of each year. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ of Section 30 into Section 29, Township 03 South, Range 48 East.

A. ** WATER MEASUREMENT RECORDS REQUIREMENT:

Permittee shall keep weekly written records of the volume (acre-feet) of water appropriated from Home Creek, including the dates and times water is appropriated during the period from April through October. The records must be available to the Department at any time.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the

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appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary right expires December 31, 2000.

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water Use Permit 42C-104945** is granted to Empire Sand & Gravel Co., Inc. to appropriate up to 70 acre-feet of the waters of Pumpkin Creek by means of a pump at a point in the SW¼SW¼SE¼ of Section 18, Township 04 South, Range 48 East. The permitted use is industrial use, highway construction, from January 1 through December 31 of each year. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ Section 30 into Section 29, Township 03 South, Range 48 East.

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A. ** WATER MEASUREMENT RECORDS REQUIREMENTS:

Permittee shall measure and record the water level elevations in Knudson's pond, the Knudson Red Tank Well and piezometer K1 weekly from May through October and monthly during winter and inactive construction periods throughout the period of this temporary permit. Written records must be available to the Department at any time.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary right expires December 31, 2000.

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 this Final Order.

If a petition for judicial review is filed and a party to

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

Dated this _____day of April, 1999.

Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this _____ day of April, 1999, as follows;

EMPIRE SAND AND GRAVEL
PO BOX 1215
BILLINGS MT 59103

SHY RANCH
GEORGE SHY
HCR 71
ASHLAND MT 59003

TOM AND SUZANNE TRUSLER
PO BOX 155
ASHLAND MT 59003

TIM FORTNER
HCR 89 BOX 15
BROADUS MT 59317

EVANGELINE M LEVEQUE
MARY P LEVEQUE
HC 89 SONNETTE RT
BROADUS MT 59317

DONALD AND LUCILLE OTTESEN
TEN MILE ROAD HC 87
SONNETTE MT 59348

RUSSELL E AND CAROL S
GREENWOOD
SOUTH PUMPKIN CREEK ROAD
BROADUS MT 59317

JOSEPHINE STEADMAN
RANDY SHANNON
HC 87 BOX 52
VOLBERG MT 59315

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
P.O. 201601
HELENA, MT 59620-1601

KEITH KERBEL, MANAGER
MARTY VAN CLEVE, WRS
BILLINGS WATER RESOURCES
REGIONAL OFFICE
1371 RIMTOP DRIVE
BILLINGS, MT 59105-1978

_____
Mandi Shulund
Hearings Assistant

CASE #

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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR TEMPORARY BENEFICIAL WATER PERMITS 42C-103576, 42C-103601, AND 43C-104945 BY EMPIRE SAND AND GRAVEL CO., 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 matter on December 9, 1998, in Billings, Montana, to determine whether temporary beneficial water use permits should be issued for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-311 (1)and (5) (1997).

APPEARANCES

Van Hildreth, Construction Engineer; Ron Degenhart, Project Manager; and Bill Oberlander, Field Engineer, all with Empire Sand and Gravel Company, Inc. (Applicant) appeared at the hearing and testified for Applicant. Tom Osborne of Osborne McDevitt *EnviroScience* LLC also testified for Applicant.

Lucille Ottesen and Russell E. Greenwood each objected to Application 42C-104945. Mrs. Ottesen and Mr. Greenwood appeared at the hearing and presented testimony. George and Eva Shy, owners of Shy Ranch which objected to Application 42C-103576 appeared at the hearing and presented testimony. Tim Fortner

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objected to Applications 42C-103601 and 42C-103576. Mr. Fortner appeared at the hearing and presented testimony.

Objectors Tom and Suzanne Trusler, Evangeline M. and Mary P. LeVeque, and Josephine Steadman and Randy Shannon did not appear at the hearing; therefore, in accordance with Mont. Admin. R.36.12.208, they are in default and their interests in this proceeding are dismissed. Knudson Ranch Company withdrew its objection on November 5, 1998.

Marty Van Cleave, Water Resource Specialist with the Department's Billings RO, attended the hearing and verified some statements concerning times of use by consulting his records.

EXHIBITS

The only exhibit offered for the record was Objector Fortner's Exhibit 1 which was accepted without objection. Objector Fortner's Exhibit 1 consists of three pages. The first page contains random static water level measurements taken between May 8 and December 8. The second page is a copy of Certificate of Water Right 42C-48683 issued to Donald and Lucille Ottesen. The third page is a copy of a well log for a well drilled for Don Ottesen.

PRELIMINARY MATTERS

Although not shown on the public notices or the applications in this matter, it was discovered during the hearing that these applications for beneficial water use permit are for temporary permits. The omission of this information caused no prejudice as all parties were aware of the temporary nature of the project.

During the hearing Applicant amended Application 42C-104945 to 50 acre-feet rather than the 70 acre-feet as originally

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applied for and stated in the public notice. Since this is a reduction there can be no prejudice to any party.

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

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit (Application) 42C-103576 in the name of Empire Sand and Gravel Co., Inc. and signed by Van Hildreth was received in the Billings Water Resources Regional Office (Billings RO) of the Department of Natural Resources and Conservation (Department) on May 22, 1998. Application 42C-103601 in the name of Empire Sand and Gravel Co., Inc. and signed by Van Hildreth was received in the Billings RO on June 3, 1998. Application 42C-104945 in the name of Empire Sand and Gravel Co., Inc. and signed by Leo Zwemke was received in the Billings RO of the Department on June 22, 1998. (Department file.)

2. Pertinent portions of Applications 42C-103576 and 42C-103601 were published in the *Billings Gazette*, a newspaper of general circulation in the area of the source, on July 8, 1998. Pertinent portions of Application 42C-104945 were published in the *Powder River Examiner*, a newspaper of general circulation in the area of the source, on August 20, 1998. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Four timely objections were received by the Department for Application 42C-103576. Three timely objections were received by the Department for Application 42C-

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103601. Four timely objections were received by the Department for Application 42C-104945. Applicant was notified of the objections to Applications 42C-103576 and 42C-103601 by a letter from the Department dated August 5, 1998, and of the objections to Application 42C-104945 by a letter from the Department dated September 16, 1998. (Department file.)

3. For Application 42C-103576 Applicant proposes to appropriate 150 gallons per minute up to 50 acre-feet per year of groundwater for industrial use, highway construction, from January 1 through December 31 of each year. The proposed points of diversion are wells in SW¼SE¼SE¼ of Section 20, NW¼NE¼SE¼ and NE¼SW¼SE¼ of Section 19, Township 03 South, Range 48 East, Powder River County, Montana. The proposed places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing on across the N½ Section 30 into Section 29, Township 03 South, Range 48 East.

For Application 42C-103601, Applicant proposes to appropriate up to 50 acre-feet of the waters of Home Creek by means of pumps in ponded areas at points beginning in the SE¼NE¼ Section 24, Township 03 South, Range 46 East and ending at the eastern edge of Section 28, Township 03 South, Range 47 East, in Powder River County, Montana, for industrial use, highway construction, from January 1 through December 31 of each year. The proposed places of use are the same as listed above for Application 42C-103576.

For Application 42C-104945, Applicant proposes to

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appropriate up to 50 acre-feet of the waters of Pumpkin Creek by means of a pump at a point in the SW¼SW¼SE¼ of Section 18, Township 04 South, Range 48 East. The proposed use is industrial use, highway construction, from January 1 through December 31 of each year. The places of use are the same as listed above for Application 42C-103576. (Department file.)

4. For all applications, Applicant has proven by a preponderance of evidence there is water physically available at the proposed points of diversion in the amount Applicant seeks to appropriate and water can reasonably be considered legally available, in the amount requested, during the period Applicant seeks to appropriate.

Applicant's consultant, Osborne McDevitt *EnviroScience* LLC (Osborne McDevitt) calculated the capacity of the alluvial aquifer in the Home Creek valley, finding there is approximately 1,034 acre-feet of groundwater in storage. Applicant's proposed use, 50 acre-feet per year from three wells and 50 acre-feet per year from small storage ponds which are primarily fed by groundwater, represents less than 10 percent of the total groundwater in storage. Additionally, Applicant's water would be taken from overflow of Phillips Spring. The Phillips Spring water would most likely be lost to local evapotranspiration and unavailable to other appropriators during the summer months. Comparing the water physically available to the existing water use, shows there is adequate water physically and legally available in the Home Creek valley.

In the Pumpkin Creek valley, withdrawals of water from the pond would have a localized effect on groundwater levels within

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the alluvial aquifer. However, since the pond is recharged by alluvial groundwater within the immediate vicinity, it could not be pumped enough to cause effects outside the Knudson Ranch property, upstream or downstream. Knudson Ranch is the only user of the Pumpkin Creek alluvial aquifer for a distance of nearly two miles downstream or upstream. (Testimony of Thomas Osborne.)

5. For all applications, Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right would not be adversely affected.

Osborne McDevitt performed a hydrogeologic evaluation of the Home Creek valley and existing wells, springs, and other water uses from the source. Thomas Osborne concluded that Applicant's proposed appropriation of 50 acre-feet from surface water below Phillips Spring, and another 50 acre-feet from the three wells each at 50 gallons per minute, for a period of one or two years would not have temporary or long term adverse effects on existing water appropriators in the Home Creek valley.

Earlier, during the use of Home Creek, Objector Fortner experienced some water shortage. As soon as Mr. Fortner told Applicant there was a problem, Applicant ceased to use water at that point. This is in conformance with the essence of the priority system. When a senior user is affected, that senior user calls the source by contacting the most junior water user. Having to call the source is not an adverse effect.

Objector Fortner noticed the water in his well would raise a couple inches on weekends and holidays when Applicant was not using the water from the wells. However, Mr. Fortner testified

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he had sufficient water. (Testimony of Tim Fortner, Van Hildreth, and Thomas Osborne.)

Objector Shy Ranch has three wells in Section 23, Township 03 South, Range 45 East. These wells are located in or near Home Creek approximately seven miles down stream from Applicant's wells. Osborne McDevitt using the Theis Non-equilibrium Equation to evaluate the well interference and drawdown, found that it would take 30 days of continuous pumping at 75 gallons per minute to produce a drawdown of one foot, at a distance of 100 feet from the pumped well. After 90 days, the predicted drawdown would be 1.23 feet. At 1,000 feet from the pumped well, the drawdowns would be 0.2 feet after 30 days of pumping and 0.6 feet after 90 days of pumping. Applicant's pumping intermittently at 150 gallons per minute would be immeasurable at Objector Shy Ranch's wells some seven miles downstream. (Department file and testimony of Thomas Osborne.)

Osborne McDevitt also performed an evaluation of the Pumpkin Creek area and existing wells, springs, and other water uses from the source. Thomas Osborne concluded Applicant's appropriation of up to 70 acre-feet from the Knudson pond for a period of one or two years would not have a temporary or long-term adverse effect on other water appropriators within or along the Pumpkin Creek valley. It is more likely the size of the pond and the local hydraulic and soil conditions immediately around it would pose a larger limitation on the amount of water which can be withdrawn. Applicant's use of the water of Pumpkin Creek would not have a temporary or long term adverse effects on other water appropriator within or along the Pumpkin Creek valley.

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(Testimony of Thomas Osborne.)

Objectors Ottesen have two wells, both located in Section 12, Township 05 South, Range 47 East, approximately eight miles upgradient from Applicant's Pumpkin Creek pond. One was completed September 13, 1982, and the other was completed July 16, 1988. A third well is located in Section 18, Township 05 South, Range 48 East. It was completed on September 15, 1982. All of Objectors Ottesen's water rights, groundwater and surface water, are located several miles upgradient of Applicant's proposed point of diversion. The possibility of Applicant's appropriation from the pond having an adverse effect on Objectors Ottesen's water right is very remote. Like all fluids, including groundwater, can flow only down gradient. Applicant would withdraw water from the Pumpkin Creek alluvial aquifer which consists of fine to medium sand and gravel with silt and clay. Objectors Ottesen believe because they are pumping at a depth of approximately 400 feet and the difference in elevation of their property and the proposed pump site, they must be appropriating from the same aquifer. This is simply not the case. The Pumpkin Creek alluvial aquifer is approximately 1,500 to 2,500 feet wide with a saturated thickness estimated to range from 10 to 25 feet. The formations encountered in the Ottesen wells are brown and gray shale and coal layers. There are no corresponding sand and gravel layers in any of the Ottesen wells.

Objector Russell Greenwood's well is located in Section 7, Township 04 South, Range 48 East. The well is 340 feet deep and obtains water from a sandstone bed at 284 to 324 feet below the ground surface. The sandstone aquifer supplying the Greenwood

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well is separated from the Pumpkin Creek alluvium by approximately 150 feet of intervening shale, plus at least one coal bed and another sandstone layer. Since the alluvial aquifer is from 10 to 25 feet thick, it is clear these wells are not directly connected and there would be no adverse effect to Objector Greenwood by Applicant's proposed appropriation. (Department file and testimony of Thomas Osborne.)

6. For all applications, Applicant has provided a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate.

For Application 42C-103576, the means of diversion would be three wells completed by a well driller licensed by the State of Montana. The well logs submitted contain evidence the wells were completed in substantial accordance with the guidelines set by the Board of Water Well Contractors and the State of Montana. (Mont. Code Ann. Title 37, Chapter 43 (1997) and Mont. Admin. R. Title 36 Chapter 21 (1997). The pumps in the wells were sized for available water.

For Application 42C-103601, pump(s) would be placed in the ponded areas with hoses and water would be pumped into a holding tank or pond or the water wagon for use at the construction site.

For Application 42C-104945, the water would be pumped directly into tanker trucks and transported to the construction site for use. (Department file)

7. Applicant has proven by a preponderance of evidence the proposed use is a beneficial use. Industrial use of water is a beneficial use. *See* Mont. Code Ann. § 85-2-102(2) (1997). These

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amounts have proved to be reasonable for road construction in the past. Therefore, the amounts are not wasteful and constitute a beneficial use. (Department file and testimony of Van Hildreth.)

8. Applicant has proven by a preponderance of evidence it has a possessory interest, or the written consent of the person with the possessory interest in the property where the water would be put to beneficial use.

Applicant has a contract with the Montana Department of Transportation to construct NH37-3(9)77 Camps Pass - East (Highway 212). (Department file)

9. No objections relative to water quality were filed against these applications nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of that permit. (Department file.)

Based upon the foregoing Findings of Fact and 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. Mont. Code Ann. § 85-2-402 (1997).

2. Applicant has met all the criteria for issuance of beneficial water use permits for the three applications. *See* Findings of Fact 3 through 9. Mont. Code Ann. § 85-2-402 (1997).

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

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PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water Use Permit 42C-103576** is granted to Empire Sand & Gravel Co., Inc. to appropriate 150 gallons per minute up to 50 acre-feet per year of groundwater for industrial use, highway construction, from January 1 through December 31 of each year. The permitted points of diversion are wells in SW¼SE¼SE¼ of Section 20, NW¼NE¼SE¼ and NE¼SW¼SE¼ of Section 19, Township 03 South, Range 48 East, Powder River County, Montana. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ Section 30 into Section 29, Township 03 South, Range 48 East.

A. ** WATER MEASUREMENT RECORDS REQUIREMENT:
Permittee shall measure the static water levels in these wells on a weekly basis from April through October. Static water level measurements shall be taken monthly throughout the remainder of the year. Permittee shall tabulate and update graphs to show water level trends. Permittee shall make measurement records available to the Department at any time.

B. ** GROUNDWATER WASTE AND CONTAMINATION -- ACCESS PORT:
This right is subject to section 85-2-505, MCA, requiring 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

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stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

C. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

D. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary permit expires December 31, 2000.

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water Use Permit 42C-103601** is granted to Empire Sand & Gravel Co., Inc. to appropriate up to 50 acre-feet of the waters of Home Creek by means of pump(s) in ponded areas at points beginning in the SE¼NE¼ Section 24, Township 03 South, Range 46 East, and ending at the eastern edge of Section 28, Township 03 South, Range 47 East, in Powder River County, Montana, for industrial use, highway construction, from January 1 through December 31 of each year. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ of Section 30 into Section 29, Township 03 South, Range 48 East.

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A. ** WATER MEASUREMENT RECORDS REQUIREMENT:

Permittee shall keep weekly written records of the volume (acre-feet) of water appropriated from Home Creek, including the dates and times water is appropriated during the period from April through October. The records must be available to the Department at any time.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary right expires December 31, 2000.

Subject to the terms, conditions, restrictions, and limitations listed below, **Temporary Beneficial Water Use Permit 42C-104945** is granted to Empire Sand & Gravel Co., Inc. to appropriate up to 70 acre-feet of the waters of Pumpkin Creek by means of a pump at a point in the SW¼SW¼SE¼ of Section 18, Township 04 South, Range 48 East. The permitted use is industrial use, highway construction, from January 1 through December 31 of each year. The permitted places of use are: beginning in Section 24, Township 03 South, Range 46 East, crossing Sections 19, 20, S½S½ Section 21, N½N½ Section 28, S½S½ Section 22, S½S½ Section 23, S½SW¼ Section 24, and N½N½ Section 25, all in Township 03 South, Range 47 East, continuing across the N½ Section 30 into Section 29, Township 03 South, Range 48

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East.

A. ** WATER MEASUREMENT RECORDS REQUIREMENTS:

Permittee shall measure and record the water level elevations in Knudson's pond, the Knudson Red Tank Well and piezometer K1 weekly from May through October and monthly during winter and inactive construction periods throughout the period of this temporary permit. Written records must be available to the Department at any time.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** TEMPORARY RIGHT EXPIRATION DATE:

This temporary right expires December 31, 2000.

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. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded

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little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. 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.

Dated this 18th day of March, 1999.

Vivian A. Lighthizer
Hearing Examiner
Water Rights Bureau
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CASE #

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Continuance was served on all parties listed below on this 18th day of March, 1999, as follows;

EMPIRE SAND AND GRAVEL
PO BOX 1215
BILLINGS MT 59103

SHY RANCH
GEORGE SHY
HCR 71
ASHLAND MT 59003

TOM AND SUZANNE TRUSLER
PO BOX 155
ASHLAND MT 59003

TIM FORTNER
HCR 89 BOX 15
BROADUS MT 59317

EVANGELINE M LEVEQUE
MARY P LEVEQUE
HC 89 SONNETTE RT
BROADUS MT 59317

DONALD AND LUCILLE OTTESEN
TEN MILE ROAD HC 87
SONNETTE MT 59348

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SOUTH PUMPKIN CREEK ROAD
BROADUS MT 59317

JOSEPHINE STEADMAN
RANDY SHANNON
HC 87 BOX 52
VOLBERG MT 59315

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL RESOURCES & CONSERVATION
P.O. 201601
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KEITH KERBEL, MANAGER
MARTY VAN CLEVE, WRS
BILLINGS WATER RESOURCES REGIONAL OFFICE
1371 RIMTOP DRIVE
BILLINGS, MT 59105-1978

M.S. Shulund

Mandi Shulund
Hearings Assistant

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