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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 71680-s40J AND APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHT G(P)000960-s40J AND G(W)114281-s40J BY GORDON CATTLE COMPANY	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 7, 1992, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application for Beneficial Water Use Permit 71680-s40J and Applications for Change of Appropriation Water Right G(P)000960-s40J and G(W)114281-s40J by Gordon Cattle Company are hereby denied.

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.

FILMED
NOV 16 1992
BY

CASE #

Dated this 6th day of October, 1992.

for Gerhard M. Knudsen

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 6th day of October, 1992 as follows:

Gordon Cattle Co.
% Henry C. Gordon
Rt 70 Box 35
Chinook, MT 59523

Donald A. Ranstrom
Sias & Ranstrom PC
PO Box 188
Chinook, MT 59523

USA Dept of Interior
Bureau of Reclamation
P.O. Box 30137
Billings, MT 59107-0137

Francis Bardanouve
Box 367
Harlem, MT 59526

S Bar B Ranch Co.
% Jack W. Davies, Pres.
Box 699
Chinook, MT 59523

Richard S. Tilleman
Rt 70 Box 54B
Chinook, MT 59523

Stuart MacKenzie
Burns, Solem, and MacKenzie
PO Box 248
Chinook, MT 59523

Randy Perez
Crystal Fox
Fort Belknap Agency
PO Box 98
Harlem, MT 59526

John C. Chaffin
Office of Solicitor
Bureau of Reclamation
PO Box 31394
Billings, MT 59107-1394

Bob Larson & Marvin Cross
Havre Water Resources
Regional Office
P.O. Box 1828
Havre, MT 59501
(via electronic mail)

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Bruce A. or Doris E. Johnson
Snake Creek Ranch
Rt 1 Box 140
Harlem, MT 59526

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59602-2301

Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 71680-s40J AND APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHT G(P)000960-s40J AND G(W)114281-s40J BY GORDON CATTLE COMPANY	))))))	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 matters on March 10, 1992, in Chinook, Montana, to determine whether a Beneficial Water Use Permit should be granted to Gordon Cattle Company for Application 71680-s40J under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1989) and whether Authorizations to Change Appropriation Water Right should be granted to Gordon Cattle Company for Applications G(P)000960-s40J and G(W)114281-s40J under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1989).

APPEARANCES

Applicant Gordon Cattle Company appeared at the hearing by and through Henry Gordon and counsel Donald A. Ranstrom.

Randy Hinebaugh, owner of Rainbow Irrigation, appeared at the hearing as a witness for the Applicant.

Alan Petersen, owner of Petersen Construction, appeared at the hearing as a witness for the Applicant.

Objector Francis Bardanouve appeared at the hearing pro se.

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Objectors Bruce A. and Doris E. Johnson appeared at the hearing in person and by and through counsel Stuart MacKenzie.

Objector Richard S. Tilleman appeared at the hearing in person and by and through counsel Stuart MacKenzie.

Objector S Bar B Ranch Company (S Bar B) appeared at the hearing by and through Jack Davies and counsel Stuart MacKenzie.

Randy Perez, Water Resources Coordinator with the Fort Belknap Indian Reservation, appeared at the hearing.

Crystal Fox of the Fort Belknap Indian Reservation appeared at the hearing.

Marvin Cross, Civil Engineering Specialist with the Havre Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Dixie Shiflett, Water Resources Specialist with the Department's Havre Water Resources Regional Office, appeared at the hearing.

Dan Cole, Water Resources Specialist with the Department's Havre Water Resources Regional Office, appeared at the hearing.

Bob Larson, Manager of the Department's Havre Water Resources Regional Office, appeared at the hearing.

Objector U.S. Bureau of Reclamation (Bureau) did not appear at the hearing. The Bureau had agreed to the issuance of Permit for Application 71680-s40J provided certain conditions were placed on the Permit. The Bureau had also agreed to the issuance of Authorizations to Change Appropriation Water Right for Applications G(W)114281-s40J and G(P)000960-s40J provided the

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Authorizations would be subject to certain conditions. The Bureau retains its status as a party to this case.

EXHIBITS

Applicant's Exhibit 1 is a chart showing the amount of water saved by using a sprinkler system rather than a flood system. Objectors objected to this exhibit being accepted into the record because the circumstances under which these statistics were generated were different than the circumstances in Applicant's position. Since this exhibit is the only evidence produced as to the efficiency of the various irrigation systems and did show the ratio of water savings, the objection was overruled.

Objectors' Exhibit A is a copy of a Notice of Appropriation filed by Henry C. Kuhr on March 21, 1900.

Objectors' Exhibit B is a copy of a Notice of Appropriation filed by Henry Kuhr on May 31, 1897.

Objectors' Exhibit C is a copy of a USDA map with certain parcels shaded and/or outlined in blue. This exhibit was accepted into the record without objection.

Objectors' Exhibit D is a photograph of Snake Creek taken by Doris Johnson on March 10, 1992, showing Snake Creek approximately one-half mile east of the Johnsons' home. This exhibit was accepted into the record without objection.

The Hearing Examiner expressed an intent to take administrative notice of the Department records which would include Objectors' Exhibits A and B. There were no objections

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expressed to this intent; therefore the Hearing Examiner does take notice of these materials.

The Department files were made available for review by all parties. Applicant did not object to any part of the file, but wanted to explain that the estimated acreage in a drainage area of Snake Creek stated on a supplement to the application received by the Department on November 13, 1990, was but a small part of the total Snake Creek drainage and included only that part of the drainage that produces the water which would be used by the proposed project. Counsel for the Objectors objected to that portion of the change files that pertained to the net depletion calculations performed by Marvin Cross because Mr. MacKenzie had not had sufficient time to review the files since he had been retained only the day before the hearing. Mr. MacKenzie requested copies of the files and additional time to examine the files. The Department files were entered into the record subject to Mr. MacKenzie's review and right to object to any part of the files. Mr. MacKenzie did not object to any part of the file after review. Therefore, the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

Randy Perez of the Fort Belknap Indian Reservation stated that neither the U.S. Department of Interior, Bureau of Indian Affairs nor the Fort Belknap Indian Reservation were notified of the hearing and that the Fort Belknap Tribes held water rights on Snake Creek dating back to 1889.

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The Department is not required to give individual notice to all appropriators in the area of the source if records do not provide reason to believe the effects of the project will extend that far. In re Application 64464-g43E by Casagrande. The Department is required to serve notice by first class mail upon water users who, according to the Department's records, may be adversely affected by a proposed appropriation or change. The Department may also serve notice on any state agency or other person the Department feels may be interested in or affected by the proposal. The Department then must publish a notice containing the pertinent facts of the proposal in a newspaper of general circulation in the area of the source. The Department must file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail. Mont. Code Ann. § 85-2-307 (1989). In the Department files there are affidavits that clearly show the Billings Area Director of the Bureau of Indian Affairs[1] as well as other agencies were served notices by first class mail. There are also affidavits in the files from the *Chinook Opinion* that the applications were published in the newspaper. The Department fulfilled the requirements for notice of an application set forth in Mont. Code Ann. § 85-2-307 (1989).

The Department must serve notice of a hearing by certified mail on the applicant and the objectors to an application. The

[1] Mr. Perez acknowledged the Fort Belknap Indian Reservation had not requested the Department to send the Tribes notices of Applications as well as the Bureau of Indian Affairs.

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Bureau of Indian Affairs did not file an objection to the Applications; therefore, they did not receive notice of the hearing. The record shows a properly constituted Notice of Hearing was served upon all parties on December 4, 1991, by certified mail, return receipt requested. That hearing was vacated and a new notice was sent out rescheduling the hearing on February 6, 1992. See Mont. Admin. R. 36.12.204(1) (1989). The Department met the requirements for notice of a hearing. Mont. Code Ann. § 85-2-309 (1989).

Neither the Bureau of Indian Affairs nor the Fort Belknap Indian Reservation are granted status as parties to these proceedings. However, any water right or change of water right granted in this matter would be subject to all prior Indian reserved water rights in the source of supply.

Mr. Perez requested the right to submit a brief within 30 days after the hearing which was granted. The Hearing Examiner did not receive a brief from the Fort Belknap Indian Reservation.

During the hearing, Applicant deleted approximately 22 acres of existing irrigated acreage from the proposed places of use. The public notice and the applications indicate a total of 419 acres would be irrigated. With the reduction, the total acreage to be irrigated is 397. The 22 acres to be deleted from the Applications are circled in red ink in Application G(P)000960-s40J on the acreage calculation map. The locations and approximate number of acres to be deleted are 0.50 acre in the NW¼NE¼NW¼ of Section 24; 5.00 acres in the N½NW¼NW¼ and 3.00

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acres in the SW¼SW¼ of Section 13; 5.00 acres in the E½NE¼NE¼ of Section 14; and 2.00 acres in the SE¼SE¼SE¼, 0.50 acre in the SW¼NE¼SE¼, and 6.00 acres in the SE¼NE¼ of Section 11.

An Application for Beneficial Water Use Permit or an Application to Change Appropriation Water Right may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, *i.e.*, those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. In re Applications G19282-s41E and 19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli. Since the amendment is a reduction of place of use, the Objectors or potential objectors would not be prejudiced; therefore, there is no need to publish the notice of application again.

After the hearing, Applicant and Objectors S Bar B, Bruce A. and Doris E. Johnson, and Richard S. Tilleman entered into

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negotiations. On April 9, 1992, Stuart MacKenzie telephoned the Hearing Examiner to request an extension of time in which to file his brief. Applicant's attorney agreed. An extension of twenty days was verbally granted. The Hearing Examiner telephoned Mr. MacKenzie on May 11, 1992, to remind him his brief was due. Mr. MacKenzie withdrew his request to file a brief and stated he had proposed conditions to settle some of the issues. Applicant was expected to agree to the proposed conditions and send copies to the Hearing Examiner within a week. On May 15, 1992, Don Ranstrom telephoned the Hearing Examiner to inform her that he had undergone knee surgery and that he would send the information the next week. Mr. Ranstrom telephoned the Hearing Examiner again around May 22, 1992. There were some things that needed to be worked out concerning the proposed conditions, but negotiations were still proceeding. On June 17, 1992, the Hearing Examiner received a letter from Don Ranstrom stating agreement with the conditions proposed in Stuart MacKenzie's letter to settle the objections. However, the Department is mandated by the statutes to issue permits or water right changes only if certain criteria are met. Therefore, regardless of the agreement, the Department must review the record to determine if those criteria have been met.

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

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FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302 (1989) 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. Mont. Code Ann. § 85-2-402(1) (1989) states in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

3. Gordon Cattle Company duly filed Application for Beneficial Water Use Permit 71680-s40J with the Department on January 11, 1990, at 2:30 p.m. Application for Change of Appropriation Water Right G(P)000960-s40J by Gordon Cattle Company was filed with the Department on March 1, 1991, at 2:40 p.m. Application for Change of Appropriation Water Right G(W)114281-s40J was filed by Gordon Cattle Company on January 11, 1990, at 2:15 p.m. (Department file.)

4. Pertinent parts of Application 71680-s40J were published in the *Chinook Opinion* on April 24, 1991. Pertinent parts of Applications G(P)000960-s40J and G(W)114281-s40J were published in the *Chinook Opinion* on May 8, 1991. Additionally the Department served notice by first-class mail on individuals and

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public agencies which the Department determined might be interested in or affected by the Application.

The Department received five objections to Application 71680-s40J, four objections each to Application G(P)000960-s40J and Application G(W)114281-s40J. Applicant was notified by the Department of the objections to Application 71680-s40J by a letter dated May 20, 1991, and of the objections to Applications G(P)000960-s40J and G(W)114281-s40J by a letter dated June 3, 1991. (Department file.)

5. Applicant seeks by Application 71680-s40J to appropriate 2.00 cubic feet per second (cfs) up to 300 acre-feet of water per year of the waters of Snake Creek at a point in the SW¼NW¼NE¼ of Section 26, Township 30 North, Range 19 East, in Blaine County,[1] for irrigation and stock water. A reservoir will also appropriate water from an unnamed tributary at a point in the SW¼NW¼SW¼ of Section 24. However the total amount of water appropriated from both sources would not exceed 300 acre-feet per year. Two cfs up to 294 acre-feet of water per year would be used for irrigation and six acre-feet of water per year would be used for stock water. The proposed places of use for irrigation are 41.5 acres in the E½E½ of Section 11; 47.00 acres in the W½ of Section 12; 297.50 acres in Section 13; 2.00 acres in the SE¼SE¼NE¼ of Section 23; and 9.00 acres in the N½ of Section 24. The proposed places of use for stock water are the SW¼SW¼ of

[1]Unless otherwise specified, all land descriptions in this Proposal are located in Township 30 North, Range 19 East, in Blaine County.

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Section 24, the NW¼NW¼NW¼ of Section 25, and the NE¼NE¼NE¼ of Section 26. The proposed means of diversion on Snake Creek is an existing headgate with pipeline in Section 26 and the proposed means of diversion on the unnamed tributary of Snake Creek is a dam in Section 24. The proposed place of storage is a reservoir with a capacity of 300.00 acre-feet to be located in the W½W½SW¼ of Section 24 and the NE¼NE¼NE¼ of Section 26. The proposed period of diversion is January 1 through December 31, inclusive of each year. The proposed period of use for the irrigation is from March 1 through October 15, inclusive of each year and for the stock water from November 1 through June 1, inclusive of each year. (Testimony of Henry Gordon and Marvin Cross and Department file.)

6. Application G(W)114281-s40J seeks to change the place of use of Statement of Claim W114281-s40J. Application G(P)000960-s40J seeks to change the place of use of Permit 000960-s40J. The proposed change for both Applications is to add 92 acres to the place of use and remove 22 acres of existing irrigation. The additional 92 acres is the same acreage for both Applications: 8.00 acres in the N½SW¼SW¼ of Section 12; 30 acres in the W½ and 51 acres in the W½E½ of Section 13; 2.00 acres in the NE¼NE¼NW¼ and 1.00 acre in the NW¼NW¼NE¼ of Section 24. The 22 acres of irrigation that will be taken out of irrigation are 0.50 acre in the NW¼NE¼NW¼ of 24; 5.00 acres in the N½NW¼NW¼ and 3.00 acres in the SW¼SW¼ of Section 13; 5.00 acres in the E½NE¼NE¼ of Section 14; and 2.00 acres in the SE¼SE¼SE¼, 0.50 acre in the SW¼NE¼SE¼,

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and 6.00 acres in the SE¼NE¼ of Section 11. (Department file and testimony of Henry Gordon and Marvin Cross.)

7. Applicant is changing from flood irrigation to sprinkler irrigation by a means of center pivot systems except approximately 23 acres outside the two proposed pivot areas which would be irrigated by gated pipe. Applicant is also changing from an open ditch delivery system to a closed pipeline. Center pivots will not use as much water as a flood system and a closed pipeline will eliminate seepage, evaporation, and other losses associated with an open ditch. Applicant proposes to use the water believed to be saved by the change of irrigation method and the change of conveyance on the additional acreage.

8. If a Permit is granted for Application 71680-s40J, the water appropriated under the proposed change applications may be stored in the reservoir created by the dam that would be located in the SW¼NW¼SW¼ of Section 24. (Testimony of Henry Gordon, Randy Hinebaugh, and Marvin Cross, Department files and Applicant's Exhibit 1.)

9. At the present time, there is a rock dam located at a point in the SW¼NW¼NE¼ of Section 26. The dam consists of huge rocks that have been pushed into the creek. The dam has silted in some over the years, but water still flows through the dam to flow on down Snake Creek. After the water is diverted from Snake Creek through a headgate on a 22 inch culvert, it flows into an unlined ditch, through a parshall flume located approximately 400 feet down the ditch, then into an unlined ditch for 400 or 500

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feet more, then it goes through a tunnel. The tunnel is 689 feet long and 15 inches in diameter. The tunnel then empties into an unnamed tributary of Snake Creek. From there the water flows into an existing horseshoe shaped reservoir (horseshoe reservoir) with a capacity of approximately 88 acre-feet. There is a six-inch valve in the horseshoe reservoir that releases water into an unlined ditch which takes the water down to flood irrigate approximately 209 acres. The water then goes into the lower reservoir, which has a capacity of 70 acre-feet, where it is released into a ten-inch pipeline which supplies a center pivot irrigation system (Pivot #1) that irrigates approximately 84 acres. Applicant also has a permitted reservoir with a capacity of 150 acre-feet located in the NE¼SW¼NE¼ of Section 26 on Ganty Creek[1]. The water stored in this reservoir can be released and used through the system or it can be released through a pipeline into Snake Creek. (Testimony of Henry Gordon and Department files.)

10. The new reservoir would be equipped with a gate that would allow the release of the water into a natural waterway which would then run through the horseshoe reservoir. A 15 inch pipe would be connected to the six-inch pipe on the horseshoe reservoir with an adaptor. Because there is approximately 28 to 30 feet of fall from the bottom of the horseshoe reservoir to the pivot head, the water pressure would be great enough to fill the

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[1]The permitted capacity of this reservoir under Beneficial Water Use Permit 960-s40J is 80 acre-feet.

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15 inch pipeline. The water would be piped through the 15 inch pipe to the center of the uppermost pivot (Pivot #2) for irrigation of 160 acres. From there a ten-inch pipe would deliver the water to the middle pivot (Pivot #3) which would irrigate 130 acres. The ten-inch pipe would then continue to a tee where the water could be routed to Pivot #1 or to the lower reservoir. Proposed pivot systems #2 and #3 will be powered by diesel engines. (Testimony of Henry Gordon and Randy Hinebaugh.)

11. A sprinkler irrigation system must have a steady reliable source of water. The proposed reservoir and the existing reservoirs would supply that source. If Applicant could fill the proposed reservoir, the Ganty Creek reservoir, the horseshoe reservoir, and the lower reservoir in the winter months and during the early spring runoff, no water would be appropriated during the rest of the year. Normally flood irrigation would start around April 15 when the water is available. By constructing and using off-stream reservoirs, sprinkler irrigation can be started later in the season when the danger of damage to the equipment by freezing is past. (Testimony of Henry Gordon and Randy Hinebaugh.)

12. Approximately 36.2 acres of the proposed place of use located in the W½ of Section 13 and a portion of the dam and reservoir in the W½W½SW¼ of Section 24 are on land owned by the State of Montana. Applicant holds a lease for this property and has received permission from State Lands to proceed with the

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proposed project. Applicant owns the remainder of the proposed place of use. (Department file and testimony of Henry Gordon.)

13. Applicant filed an application for hazard determination with the Department. The Department determined the proposed dam to be a high-hazard dam on the basis that failure of the proposed dam would inundate Highway 240. Since the proposed dam is rated as high-hazard, a construction permit is necessary before construction of the dam. A construction permit application consists of construction plans and specifications, as well as a design report prepared by an engineer experienced in the design and construction of dams. An engineer must be in charge of and responsible for inspections during the construction of the dam. Mont. Code Ann. §§ 85-15-209, 210, and 211 (1989). Mr. Gordon stated at the hearing that he intended to fulfill the statutory requirements to construct a high-hazard dam and that he is working with the Soil Conservation Service. (Department file and testimony of Henry Gordon and Marvin Cross.)

14. The flow of water Applicant can appropriate from Snake Creek by means of its existing diversion system is limited by the size of the tunnel. The capacity of the tunnel, assuming a head of three feet, is 2.2 cfs. This flow rate limited the amount of water appropriated in the past to approximately 76 percent of the water needed to adequately flood irrigate his existing irrigated acreage. (Testimony of Marvin Cross.)

15. In the past, Applicant irrigated 327 acres. According to the Net Depletion Calculations (NDC) worksheet in the files,

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calculated by Marvin Cross, 730 acre-feet of water per year was appropriated to irrigate that acreage. The total amount of water needed to adequately irrigate 327 acres of alfalfa, according to the NDC worksheet, is 477 acre-feet of water per year. To deliver 477 acre-feet of water per year would require diversion of 955 acre-feet of water per year, Mr. Cross assumed a 50 percent efficiency of the existing flood irrigation system. Only 730 acre-feet or 76 percent of the total estimated diversion requirement can be diverted through the tunnel. Assuming a delivery efficiency again of 50 percent, as Mr. Cross did, then 365 acre-feet were used by the plants, approximately 76 percent of the plants' need. Therefore, according to the Net Depletion Calculations worksheet, 365 acre-feet of water per year was consumed by the plants. Mr. Cross assumed that 50 percent of the remaining water, 183 acre-feet per year, made it back to the source either as runoff or underground seepage, thus the net depletion of the source would be 547 acre-feet of water per year.

By changing the method of irrigation to a more efficient method and changing the method of conveyance to a more efficient method, Applicant believes more acreage could be irrigated with the same amount of water, without exceeding the net depletion of the source. However, the Applicant did not provide any measurements or other documentation to support the net depletion theory, especially as to delivery and conveyance efficiency, set forth in Mr. Cross' Net Depletion Calculations worksheet, which clearly makes several assumptions to arrive at the net depletion

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figure. Clearly the topography, subsurface soils and other physical factors of comparison between the present place of use and the new place of use and are a few of the parameters that must be considered to determine if the proposed change in place of use will adversely affect other water users. (Department file, testimony of Marvin Cross, Randy Hinebaugh, and Henry Gordon.)

16. The documentation of water right which accompanies Statement of Claim W114281-40J filed by Gordon Cattle Company does not reflect the present place of use. However, all parties agreed Applicant did irrigate the claimed acreage prior to 1973. This acreage was irrigated in 1967 when the State Water Conservation Board performed the water resources survey in Blaine County. (Testimony of Henry Gordon, Department records and Objectors' Exhibits A, B, and C.)

17. In the summer of 1991, when the Objectors visited Applicant's existing diversion there was water flowing by the rock dam. A few days later, Objector Bardanouve checked on his yearlings in the Norheim lease which is just below Objector Tilleman's ranch on Snake Creek, approximately 10 miles downstream from Applicant's rock dam. At that time, a small garden hose without much pressure could have run all the water that was in Snake Creek. Neither S Bar B nor Richard Tilleman had appropriated the water; it simply disappeared into the ground. The bed of Snake Creek is composed of sand and gravel.

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Once the Creek dries up, it takes a lot of water to recharge it. (Testimony of Francis Bardanouve and Jack Davies.)

18. Objector Bardanouve stated if it weren't for an artesian well located near Snake Creek, his cattle would not have water. Mr. Bardanouve did not file a Statement of Claim for stock water from Snake Creek. (Department records and testimony of Francis Bardanouve.)

19. Objectors Bruce and Doris Johnson have filed Statements of Claim W044209-40J, W044212-40J, W044213-40J, W044215-40J, W044216-40J, and W044217-40J with the Water Court. Each claims a point of diversion in the SE¼SE¼NE¼ of Section 24, Township 32 North, Range 21 East. All except Statement of Claim W044213-40J claims to irrigate 20 acres in the SW¼SW¼, 20 acres in the W½SE¼SW¼, and 40 acres in the SW¼SE¼ of Section 18; 100 acres in the NE¼ of Section 19; and 100 acres in the NW¼ of Section 20, all in Township 32 North, Range 22 East. Statement of Claim W044209-40J claims 160 miner's inches up to 640 acre-feet per year of the waters of Snake Creek with a priority date of March 31, 1894. Statement of Claim W044212-40J claims 25 cubic feet per second (cfs) up to 310 acre-feet per year with a priority date of April 1899. Statement of Claim W044215-40J claims 160 miner's inches up to 640 acre-feet per year of the waters of Snake Creek with a priority date of October 1, 1892. Statement of Claim W044316-40J claims 160 miner's inches up to 640 acre-feet per year of the waters of Snake Creek with a priority date of September 30, 1939. Statement of Claim W044217-40J claims

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1000 miner's inches up to 640 acre-feet per year of the waters of Snake Creek with a priority date of March 18, 1896. Statement of Claim W044213-40J claims to irrigate 20 acres in the SW¼SW¼, 20 acres in the W½SE¼SW¼, and 40 acres in the SW¼SE¼ of Section 18. Also on this Claim are listed 100 acres in the NE¼; however no Section, Township or Range is listed and an additional 100 acres have been listed with no quarter sections, Section, Township or Range. This Statement of Claim claims 200 miner's inches up to 680 acre-feet per year of the waters of Snake Creek with a priority date of October 1, 1909. The Johnsons did not claim stock water rights from Snake Creek. (Department records.)

20. The Johnsons have not been able to water their stock from Snake Creek for the last three years and currently are renting wells from their neighbors for stock water. Because of the water shortage, the Johnsons have not been able to utilize pastures adjacent to Snake Creek. The Johnsons have not been able to exercise their right to irrigate 280[1] acres in the last seven or eight years. Doris and Bruce Johnson's points of diversion are located approximately 30 miles downstream of Applicant's point of diversion. The Johnsons have asked Applicant to let some of the water down to no avail. (Testimony of Bruce and Doris Johnson.)

21. S Bar B filed Statement of Claim W144936-40J with the Water Court claiming stock water use at 30 gallons per minute

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[1]Bruce Johnson testified he irrigated 300 acres; however only 280 acres were claimed.

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(gpm) up to 50 acre-feet per year of the waters of Snake Creek with a priority date of 1915. S Bar B filed Statements of Claim W144993-40J, W144997-40J, and W144998-40J for irrigation. Statement of Claim W144993-40J claims irrigation of 320 acres at a rate of 10 cfs up to 1,280 acre-feet per year with the waters of Snake Creek claiming a priority date of February 14, 1912. Statement of Claim W144997-40J claims irrigation of 113 acres at a rate of 160 miner's inches up to 452 acre-feet per year with the waters of Snake Creek claiming a priority date of October 31, 1891. Statement of Claim W144998-40J claims irrigation of 69 acres at a rate of 3.00 cfs up to 276 acre-feet per year with the waters of Snake Creek claiming a priority date of November 3, 1906. (Department records.)

22. S Bar B has not had adequate water for stock and has installed shallow stock water wells in the bottom of Snake Creek to supply stock water. There are times when there is water above S Bar B and Mr. Davies believes that some of those times there has been water diverted upstream when it could have been used by S Bar B. Mr. Davies believes S Bar B is entitled to at least the stock water even though it does have a prior right for irrigation water also. In the last 20 years, Mr. Davies believes that Mr. Gordon has irrigated 19 out of the 20 years and many of those years S Bar B did not have sufficient water to irrigate. There have been times S Bar B has called Mr. Gordon for water and received it. S Bar B property is adjacent to Applicant's property, yet is sometimes quite awhile before the Snake Creek

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water gets down to S Bar B. In February of 1992, S Bar B called the Applicant to release water for its calving operation. Water did arrive at S Bar B; however, it was approximately three weeks later after calving was mostly completed. (Testimony of Jack Davies.)

23. Richard Tilleman had signed a consent form withdrawing his objection to the instant Application. During the hearing, Mr. Tilleman withdrew his consent. Mr. Tilleman's concern is that there is no way to release the water back into Snake Creek and the confusion of when Applicant would be required to release water from the proposed reservoir and when it would not be. Mr. Tilleman stated he would not object to Applicant's proposal if Applicant would provide a way to release the water into Snake Creek. Mr. Tilleman's property is located approximately 10 miles downstream from Applicant. (Testimony of Richard Tilleman.)

24. Richard Tilleman filed Statements of Claim W153764-40J, W153765-40J, W153766-40J, W153768-40J, W153769-40J, W153772-40J, and W153773-40J with the Water Court. Statement of Claim W153764-40J claims irrigation of 34 acres at a flow rate of 8.5 cfs up to 121 acre-feet of the waters of Snake Creek per year with a priority date of 1926. An Authorization to Change was issued to add 160 acres to the place of use claimed by Statement of Claim W153764-40J. Statement of Claim W153765-40J claims irrigation of 32 acres at a flow rate of 5.00 cfs up to 154 acre-feet per year of the waters of Snake Creek with a priority date of December 2, 1909. Statement of Claim W153766-40J claims

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irrigation of 33 acres at a flow rate of 3500 gpm up to 118 acre-feet per year of the waters of Snake Creek with a priority date of October 20, 1904. An Authorization to Change was issued to add 140 acres to the place of use claimed by Statement of Claim W153766-40J. Statement of Claim W153768-40J claims irrigation of 24 acres at a flow rate of 160 miner's inches up to 144 acre-feet per year of the waters of Snake Creek with a priority date of September 10, 1897. Statement of Claim W153769-40J claims irrigation of 37 acres at a flow rate of 6.00 cfs up to 178 acre-feet per year of the waters of Snake Creek with a priority date of September 4, 1909. Statement of Claim W153773-40J claims irrigation of 28 acres at a flow rate of 4.00 cfs up to 135 acre-feet per year of the waters of Snake Creek with a priority date of June 30, 1900. Statement of Claim W153772-40J claims irrigation of 15 acres at a flow rate of 2,400 gpm up to 72 acre-feet per year of the waters of Snake Creek with a priority date of March 20, 1969. Richard Tilleman also holds Beneficial Water Use Permits 29607-s40J, 29608-s40J, and 54676-s40J. Permit 29607-s40J authorizes Mr. Tilleman to appropriate 980 gpm up to 196 acre-feet per year of the waters of Snake Creek for irrigation of 140 acres. Permit 29608-s40J authorizes Mr. Tilleman to appropriate 800 gpm up to 242 acre-feet per year of the waters of Snake Creek for irrigation of 88.8 acres. Permit 54676-s40J authorizes Mr. Tilleman to appropriate 1,040 gpm up to 178 acre-feet per year of the waters of Snake Creek for supplemental irrigation of 160 acres.

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25. On May 24, 1989, the Havre Water Resources Regional Office received a complaint that Richard Tilleman was adversely affecting a prior right by exercising a permit or permits. Marvin Cross field investigated the matter on that same day. Mr. Cross found that except for a few beaver dams and pot holes which were retaining water in the Snake Creek channel, there was no flow in Snake Creek on the Tilleman property and that the off-stream reservoir had not been filled. The pivot was not in operation; the pump used to pump Snake Creek water was not in operation; and the pumps had not been turned on that season at all. However, Box Elder Creek, a stream that flows generally parallel to and a few miles south of Snake Creek had a substantial flow. (Department records.)

26. If a permit is issued for Application 71680-s40J, measuring devices must be installed. It is imperative that the waters be measured so the Department would know, as precisely as possible, when Applicant's water use would change from use authorized by the Authorizations to Change, if issued, to the new water right. The new Application is for unappropriated waters. If the waters would be coming through the tunnel, Applicant's existing water right activates on March 1. The unappropriated waters would have been collected before that time except for what might come down the unnamed drainage on which the proposed reservoir would be built. It is important the Department know how much water would be in the proposed reservoir on March 1. Otherwise, there would be no way of knowing how much water was

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stored in the proposed reservoir under the new permit. The most effective way to measure these waters would be to install some sort of elevation marker on the reservoir and to perform a corresponding survey so the Department would know how much water was in the reservoir at a given elevation. Then it would be necessary to measure how much water went through the tunnel from March 1 through August 31 under the Authorizations to Change because there is also the possibility of a cloud burst and some of the water from the cloud burst may need to be released into Snake Creek. It is also necessary for the Department to know how much water would go out to the pivots and be actually used. (Testimony of Marvin Cross.)

Applicant has agreed to the installation of measuring devices. There is some disagreement over the location of these measuring devices although Applicant stated he would install them where the Department wanted them. (Testimony of Henry Gordon.)

27. There are no planned uses for which a permit has been granted or for which water has been reserved that would be interfered with unreasonably by the proposed project. (Testimony of Henry Gordon.)

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 relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly

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before the Hearing Examiner. See Findings of Fact 1, 2, 3, and 4.

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4), (1989) are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and
> (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.
> . . .
> (4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific

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field studies, demonstrating that the criteria are met.

4. The Department must issue an Authorization to Change if the Applicant proves by substantial credible evidence that the following criteria, set forth in Mont. Code Ann. § 85-2-402(2) (1989) 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) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
>
> (c) The proposed use of water is a beneficial use.
>
> (d) 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.
>
> (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

5. The use proposed by all the above-entitled Applications, irrigation, is a beneficial use. Mont. Code Ann. § 85-1-102(2) (1989). Applicant would beneficially use all the water diverted. There is no evidence in the record that Applicant would waste water. See Findings of Fact 5, 6, and 7.

6. For all the above-entitled Applications, Applicant has provided substantial credible evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 7 through 11, 13, 14, and 26.

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7. For all the above-entitled Applications, Applicant has provided substantial credible evidence of possessory interest and written consent of the persons with possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 12.

8. For all the above-entitled Applications, Applicant has provided substantial credible 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 27.

9. For Permit Application 71680-s40J, Applicant has not provided substantial credible evidence there are unappropriated waters in the sources of supply at the proposed point of diversion at times when the water can be put to the use proposed in the amount Applicant seeks to appropriate and that during the period in which the Applicant seeks to appropriate, the amount requested is reasonably available. Applicant did not provide hydrologic or other evidence to show the amount of water flowing in the sources throughout the proposed period of diversion. Applicant did say, several times, that he would not be appropriating any more water than he had used in the past, but that he would be taking it at a time when other users would not be appropriating. However, no measurements of water were provided that were taken during that period. All of the Objectors showed there is a serious question whether water is

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available. See Findings of Fact 5, 16, 17, 18, 20, 22, 25, and 11.

10. For Permit Application 71680-s40J the Applicant has not provided substantial credible evidence the water rights of a prior appropriator would not be adversely affected. See Findings of Fact 17 through 22, 24, and 25. Bruce and Doris Johnson have experienced an adverse effect for the last seven or eight years from the existing upstream diversions. S Bar B has experienced an adverse effect from upstream diversions. Richard Tilleman has experienced an adverse effect from upstream diversions. Francis Bardanouve has experienced an adverse effect from upstream diversions. The adverse effects have not all been caused by Applicant, rather it is the cumulative effect of all the upstream diversions.

The argument was made that if the water would not get down to these prior right owners, one should not be required to release that water. The bed of Snake Creek needs to be recharged. If the water is not released, the creek bed will never be recharged and water will not reach the downstream users.

On the ladder of priority, water users with a priority date after October 31, 1891, should not appropriate Snake Creek water until S Bar B has been able to exercise its claimed water right with this priority date. Then water users with a priority date after October 1, 1892, should not appropriate Snake Creek water until Bruce and Doris Johnson have exercised their claimed water right with the October 1, 1892, priority date. It is true the

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Johnsons are located 30 miles downstream and water released by Applicant may never reach them; however, if the water appropriated by the Applicant were left in Snake Creek it would help recharge the streambed to help carry water to the Johnsons. See In re Application 19535-s76H by Campbell. Snake Creek water users with very early claimed priority dates are being deprived of their claimed waters, to allow a new right on this stream would only worsen the situation.

11. The Johnsons and Francis Bardanouve have stock water rights on Snake Creek even though they did not file statements of claim for this use. Claims for existing rights for livestock based upon instream flow were exempt from the filing requirements of Mont. Code Ann. § 85-2-221(1) (1991). See Mont. Code Ann. § 85-2-222 (1991).

12. For Applications G(P)000960-s40J and G(W)114281-s40J, Applicant has provided substantial credible evidence of water rights on which the Applications for Change are based. See Findings of Fact 6, 9, and 16

13. For Applications G(P)000960-s40J and G(W)114281-s40J, the Applicant has not presented substantial credible evidence the water rights of prior appropriators would not be adversely affected by the proposed use and that the proposed water saving methods will salvage at least the amount of water asserted by the Applicant. See Findings of Fact 15.

The statute clearly states the appropriator must prove by substantial credible evidence the criteria set forth in Mont.

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Code Ann. § 85-2-402(2) are met before the Department can grant an Authorization to Change Appropriation Water Right. The Applicant in the instant case did not provide any evidence to substantiate the amount of water to be saved by changing from flood irrigation to sprinkler irrigation. Nor did the Applicant provide any information concerning the amount of water saved by changing from an open ditch delivery system to a pipeline. It is accepted fact sprinkler irrigation does not use as much water as flood irrigation and that a pipeline is a much more efficient method of conveyance than an open ditch; however the Applicant must prove by measurements and/or other documentation to support the net depletion theory such as delivery and conveyance efficiencies or standards and guidelines established by Federal and State agencies that the amount of water claimed to be salvaged is truly salvaged before the Department can issue an Authorization to Change for expanded acreage.

In an area where little water is available, such as Snake Creek, physical factors of the old and new places of use must be clearly comparable to assure no adverse effect. Acres irrigated is not an independent determinate of the extent of a water right. The type of crop, the efficiency of the irrigator, the extent of flood ditches, type of soils, and other factors affect the total number of acres to which water can be applied. In re Applications G136329-41O, G136330-41O, and G136331-41O by DeBruycker. The record does not contain sufficient evidence to

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make a determination that the proposed water saving methods will salvage at least the amount of water asserted by the Applicant.

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

PROPOSED ORDER

Application for Beneficial Water Use Permit 71680-s40J and Applications for Change of Appropriation Water Right G(P)000960-s40J and G(W)114281-s40J by Gordon Cattle Company are hereby denied.

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 within 20 days after service of the exception. However, 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 7th day of July, 1992.

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6626

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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 7th day of July, 1992, as follows:

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