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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 APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G128984-s76D BY JERRY M.)
SYTH, D/B/A MEADOW CREEK GOLF COURSE)

* * * * *

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 August 4, 1989 Proposal for Decision, Correction and Amendment of Proposed Order dated September 8, 1989, and incorporates them herein by reference, except to include the period of use for irrigation and commercial from April 1 to November 1 of each year which was omitted from the Proposed Order.

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

ORDER

Subject to the terms, conditions, restriction, and limitations specified below, Application for Change of Appropriation Water Right No. G128984-s76D is hereby granted to Jerry M. Syth, d/b/a Meadow Creek Golf Course, to change a portion of Claimed Water Right No. W128984-s76D, as follows: diversion of 250

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gallons per minute up to 42.5 acre-feet per year of the waters of Deep Creek, to be diverted from April 1 to November 1 of each year, at an additional point of diversion located on Fortine Creek in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West, to be used for irrigation of 17 acres, commercial use and emergency fire protection on Meadow Creek Golf Course, all in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West in Lincoln County, Montana.

This Change Authorization is subject to the following express terms, conditions, restrictions, and limitations:

A. The Change Authorization is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of the Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Appropriator shall keep a written record of the flow rate of Deep Creek beginning with a reading before turning the system on for the season and once a month on the first day of the month throughout the irrigation season except in years with below average precipitation. The Appropriator will then be required to keep a written record of the flow rate of Deep Creek beginning with a reading before turning the system on for the

season and bimonthly on the first and fifteenth day of each month throughout the irrigation season. Further, the Permittee shall keep a written record of the flow rate and volume diverted from Fortine Creek and shall submit said records to the Department's Kalispell Field Office at the end of each irrigation season or more frequently if the need arises.

The Appropriator shall install the measuring device at or near the confluence of Deep Creek and Fortine Creek.

D. Any Fortine Creek withdrawal is limited to the flow of Deep Creek into Fortine Creek or 250 gallons per minute, whichever is less.

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 13 day of October, 1989.



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

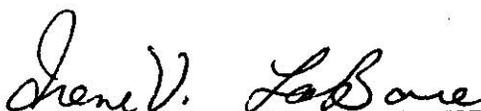
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of October, 1989, as follows:

Jerry M. Syth
Meadow Creek Golf Course
P.O. Box 131
Fortine, MT 59918

Charles E. Cope
Route 1, Box 203
Eureka, MT 59917

Chuck Brasen
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59903-860



Irene V. LaBare
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 CHANGE OF APPROPRIATION) CORRECTION AND AMENDMENT
WATER RIGHT NO. G128984-s76D) OF PROPOSED ORDER
BY JERRY M. SYTH, D/B/A)
MEADOW CREEK GOLF COURSE)

* * * * *

The point of diversion for this change is an additional point of diversion. All references to this point of diversion shall be changed from "new" to "additional".

Item 3 of the Proposed Conclusions of Law used the criteria enacted by the 1989 Legislature. This Application was submitted in 1988 and is not subject to these criteria. The criteria in Item 3 is amended as follows:

- (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.

Condition C of the Proposed Order is not specific regarding how often the Applicant should record the flow rate of Deep Creek. Applicant's irrigation system is computerized and is activated several times in on 24-hour period. This system is in operation continually throughout the irrigation season. One could interpret Condition C to mean the Appropriator would be required to take a reading of the flow rate of Deep Creek each

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time the system is activated. That is not the intention of the Hearing Examiner. To clarify the intention, Condition C is amended as follows:

C. The Appropriator shall keep a written record of the flow rate of Deep Creek beginning with a reading before turning the system on for the season and once a month on the first day of the month throughout the irrigation season except in years with below average precipitation. The Appropriator will then be required to keep a written record of the flow rate of Deep Creek beginning with a reading before turning the system on for the season and bimonthly on the first and fifteenth day of each month throughout the irrigation season. Further, the Permittee shall keep a written record of the flow rate and volume diverted from Fortine Creek and shall submit said records to the Department's Kalispell Field Office at the end of each irrigation season or more frequently if the need arises.

The Appropriator shall install the measuring device at or near the confluence of Deep Creek and Fortine Creek.

NOTICE

This Amendment extends the time for filing exceptions to the Proposed Order with the Hearing Examiner to 20 days after this Amendment is served upon the parties.

Dated this 8th day of September, 1989.


Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 1269
Glasgow, Montana 59230

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 8th day of September, 1989, as follows:

Jerry M. Syth
Meadow Creek Golf Course
P.O. Box 131
Fortine, MT 59918

Charles E. Cope
Route 1, Box 203
Eureka, MT 59917

Chuck Brasen
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P.O. Box 860
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Irene V. LaBare
Irene V. LaBare
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 CHANGE OF APPROPRIATION)
WATER RIGHT NO. G128984-s76D) PROPOSAL FOR DECISION
BY JERRY M. SYTH, D/B/A)
MEADOW CREEK GOLF COURSE)

* * * * *

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 May 16, 1989, in Kalispell, Montana.

Meadow Creek Golf Course, the Applicant in this matter, appeared by and through Jerry Syth.

Objector Charles E. Cope appeared pro se.

Noel Williams, Lincoln County Commissioner, appeared as a witness at the request of both the Applicant and Objector.

Mrs. Charles Cope appeared as an interested party.

Charles F. Brasen, Field Manager of the Kalispell Water Rights Field Office, Department of Natural Resources and Conservation (hereafter Department or DNRC), appeared at the hearing.

PRELIMINARY MATTERS

This Application was filed in the name of Meadow Creek Golf Course. The Statement of Claim on which this Application is based was filed under the name of Jerry M. Syth. Department records show no Water Right Transfer Certificate has been filed to transfer part of that claimed right to Meadow Creek Golf

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Course. Meadow Creek Golf Course and Jerry M. Syth are one and the same. That being the case, the Applicant in this matter is Jerry M. Syth, d/b/a Meadow Creek Golf Course.

STATEMENT OF THE CASE

On October 25, 1988, Applicant filed an Application for Change of Appropriation Water Right No. G128984-s76D. Applicant seeks to change the purpose of use and add a point of diversion. The method of diversion for the changed portion of the water right would be by means of a pump instead of the original gravity flow headgate and pipeline diversion. The new point of diversion would be located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West of Fortine Creek. The new place of use for the changed portion of the water right would be 17 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 25, with a change of purpose from municipal use to irrigation use.

One timely objection to the Application was filed by Charles E. Cope on the basis that the water right had not been used for several years, that with the other new users and the old users, there is not enough water in Fortine Creek. Mr. Cope stated that Fortine Creek went dry before it got to his place last year and he lost his second cutting of hay.

The contested case hearing in this matter was completed on May 16, 1989, and the record was closed at the end of the hearing.

EXHIBITS

The Applicant offered 11 exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 consists of six pages; five pages of stream flow records of Deep Creek taken by the United States Forest Service at various dates in the years 1960, 1962, 1964, 1965, 1970, 1971, and 1972, and one page is a photocopy of a photograph of a Crest-stage Gage at a forest highway bridge located in the NE $\frac{1}{4}$ of Section 23, Township 35 North, Range 25 West, in Lincoln County, Montana. The stream flow records were taken in said Section 23, the SE $\frac{1}{4}$ of Section 14 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, all in Township 35 North, Range 25 West.

Objector objected to this exhibit because it is outdated and does not include the later water users, especially Crystal Lake. Applicant contends there are no new users since these measurements were taken. A decision on the objection was reserved until later. The Hearing Examiner has examined the exhibit and finds that the only years with measurements taken during the irrigation season are 1965, 1971, and 1972. These random measurements are not enough to indicate a general pattern of the flow of Deep Creek, through dry years as well as those years with normal precipitation. Objection sustained.

Applicant's Exhibit 2 is a photocopy of a portion of a Forest Visitors Map of Kootenai National Forest which has been enhanced to show the location of Fortine Creek and Deep Creek, the location of the gaging stations, the Applicant's old point of diversion, Applicant's new point of diversion, and Objector's point of diversion.

Applicant's Exhibit 3 is a photocopy of a portion of the United States Forest Service listing of "Water Rights of Others on Deep Creek". The portion of this copy circled in blue ink is the average annual water yield estimated at 27,000 acre-feet at an average flow rate of 37 cubic feet per second (cfs) from 19 square miles. Applicant has also entered his name in the water right listing for the City of Fortine.

Applicant's Exhibit 4 is an enlargement of the same map submitted for Applicant's Exhibit 2 and has the same enhancements with the addition of an X in blue ink indicating where the Objector took pictures. The latter being added by Objector during the hearing.

Applicant's Exhibit 5 is an enlarged photocopy of the USGS Fortine, Montana Quadrangle map, 1963. This map shows the location of the Town of Fortine and has been enhanced to show the new point of diversion and the new water line to the place of use.

Applicant's Exhibit 6 is a map of the Town of Fortine which has been enhanced to show the new point of diversion and the location of the new water line to the place of use. This map is a larger scale than Applicant's Exhibit 5.

Applicant's Exhibit 7 consists of four pages and is photocopy of an application for a 310 Permit, required by the Natural Streambed and Land Preservation Act of Montana, a Team Member Report, the Board's Decision, which shows the permit has been

approved, and the cover letter sent to Applicant by the Lincoln Conservation District.

Applicant's Exhibit 8 consists of 20 pages and is the condemnation proceedings of Applicant's original water lines brought by the State of Montana, Department of Highways.

Applicant's Exhibit 9 is a photocopy of the original water right filed May 25, 1916, by P. V. Klinke.

Applicant's Exhibit 10 is a photocopy of a Private Artificial Lake or Pond License issued to Jerry Syth on May 24, 1965, by the Montana Department of Fish and Game.

Applicant's Exhibit 11 is a blue line copy of the plans and specifications for Applicant's Par 3 - 9 Hole Golf Course.

Applicant's Exhibits 2 through 11 were accepted for the record without objection.

Objector's Exhibit 1 consists of two photographs showing two different views of a sign advertising Jerry's Saloon and Meadow Creek Golf Course.

Objector's Exhibit 2 consists of two photographs showing two different views of a pipeline which Objector identified as Applicant's pipeline that is patched together with inner tubes. This section is located three quarters of a mile below Applicant's old point of diversion.

Objector's Exhibit 3 consists of three photographs showing three different views of a waterway which Objector identified as Deep Creek. Objector marked the location on Applicant's Exhibit

4 with a blue X in the NW¼ of Section 29, Township 35 North, Range 25 West.

Applicant objected to this exhibit because it does not show the full flow of the creek. Objector agreed that some water was going down the other tributary. Objection sustained.

Objector Exhibit 4 consists of three photographs showing three different views of Applicant's water works. Objector intended to show some of the deterioration in general, more specifically of the dam.

Objector's Exhibits 1, 2, and 4 were accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

PROPOSED FINDING OF FACT

1. Section 85-2-402, MCA, states, in relevant part, "[a]n 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, the legislature." The requirement of legislative approval does not apply in this matter.

2. Application for Change of Appropriation Water Right No. G128984-s76D was duly filed with the Department of Natural Resources and Conservation on October 25, 1988, at 8:08 a.m.

3. The pertinent portions of the Application for Change

0 were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on December 14, 1988.

4. The source of the water for the claimed water right is Deep Creek. The new point of diversion will be on Fortine Creek below the mouth of Deep Creek. Both Deep Creek and Fortine Creek are perennial streams according to the USGS Quadrangle maps, Fortine, Montana, Edna Mountain, Montana, and Mt. Marston, Montana.

Department records indicate that several Statements of Claim for Existing Rights and one other Application for Change have been filed on Fortine Creek and Deep Creek, but that no permits have been issued or water reserved for any planned uses or developments.

0 5. The original water right, the basis of this Application for Change, was filed by P. V. Klinke on May 25, 1916, in Lincoln County for 30 cfs of the waters of Deep Creek, a tributary of Fortine Creek. The claimed use was domestic, power development, and irrigation. The point of diversion was described as measured from the said point of diversion as an initial point, the following well known natural objects and permanent monuments are distant as follows, to wit: the northeast corner of Section 32, Township 35 North, Range 25 West is distant 700 feet in a northeasterly direction. The appropriators were P. V. Klinke and A. E. Johnson.

A Statement of Claim before the Water Courts of Montana, based on the above filed right, was filed by Jerry M. Syth on

March 15, 1982, for a claimed appropriation of 1000 gallons per minute (gpm) up to 100 acre-feet of the waters of Deep Creek by means of a headgate with ditch or pipeline for municipal purposes. The claimed point of diversion is the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32, Township 35 North, Range 25 West. The claimed places of use are the S $\frac{1}{2}$ of Section 25, Township 35 North, Range 26 West; the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 30, the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 31 and the NW $\frac{1}{4}$ of Section 29, all in Township 35 North, Range 25 West.

The Temporary Preliminary Decree on Kootenai River Basin issued by the Montana Water Court shows an Abstract of Water Right essentially the same as the Statement of Claim described above. (Department file, Applicant's Exhibit 9.)

6. Applicant purchased the water system in 1964 and operated it as a business to supply the Town of Fortine, for development of water power, irrigation, and other water uses generally described as municipal. Applicant gradually phased down the municipal use as the Department of Health and Environmental Sciences' regulations became more stringent. Then he used the water in a pond for a fish hatchery until a fungus developed and the fish started to die. The pond was drained in 1979 in an attempt to kill the fungus. People were still using water up above the highway, although they were not charged for it and no records were kept. Applicant was unable to kill the fungus. He decided to construct a par three, nine-hole golf course in the lake bottom and started construction in the spring

of 1988. Applicant intended to use the water for the golf course.

7. Applicant's pipeline was two and a half miles long and ran across and down the right-of-way of the highway. A new highway is now under construction. The Department of Highways told Applicant that the pipeline had not been used for a number of years and it would be quite costly to replace that 1500 feet of the pipeline. Applicant was told the pipeline was to be condemned unless he could prove to them it was a workable pipeline. Applicant attempted to put water through the line and had water in the first mile of the line when a contractor tore up part of the pipeline when burying a cable. The contractor did not replace the pipeline and Applicant was unable to meet the deadline set by the Department of Highways so his pipeline easement was condemned. Department of Highways suggested Applicant take the water out below the highway. That is when Applicant filed this Application for Change. (Testimony of Applicant.)

8. Applicant's water line for the most part went down the right-of-way underneath a county road and was a significant problem in the maintenance of that road. The Lincoln County Commissioners recommended that, rather than attempt to maintain, repair, and improve the line, the Applicant move his point of diversion to Fortine Creek below the mouth of Deep Creek which they felt would be the same water. They also suggested if that could occur they would provide easements on the streets and roads

in Fortine for the distance required to get the water from the point of diversion to his business. (Testimony of Noel Williams.)

9. The water would be diverted by means of a 10 to 15 horsepower pump through three inch PVC pipe to the place of use. The actual flow rate to be used for irrigation would be approximately 105 gpm. The original flow rate on this Application was 200 gpm. Applicant amended the Application on December 7, 1988, to 250 gpm for fire protection purposes. A minimum flow rate of 250 gpm is necessary for a reduced fire insurance rate. A flow rate of 250 gpm would be used only for emergency fire protection purposes. The water would be used for irrigation of the golf course, Applicant's lawn and garden, and the grass in the RV parks in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West. The water will also be used to fill the water hazards in the golf course. (Testimony of Applicant, Applicant's Exhibit 11.)

10. The Objector has filed a Statement of Claim for irrigation purposes and a Statement of Claim for instream stock watering purposes from Fortine Creek. The priority date of both Claims is July 18, 1932. (Department file.)

11. Objector's point of diversion for irrigation of 65 acres in the NE $\frac{1}{4}$ of Section 16, is located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15, Township 35 North, Range 26 West. (Department file.)

12. Objector's means of diversion is a diversion dam about two-thirds of the width of the creek, hand placed in Fortine

Creek at a place where the creek is approximately 25 feet wide. The water is diverted into a ditch which empties into a catch basin where the water is pumped to the place of use. When asked if Objector knew the flow rate needed in Fortine Creek to use his diversion means, he replied no. (Testimony of Objector.)

13. One of the Objector's objections is that Crystal Lake is probably using more than six times the amount of water on their water right and therefore Deep Creek does not have that amount of water in it. During the irrigation season of 1988 when the Objector was short of water, he went to a junior appropriator to ask if he would stop using the water until Objector could finish his irrigation and the junior appropriator refused. Objector contacted the Department's Kalispell Field Office and was told, nothing could be done about the matter except by taking the matter to district court as mandated by § 85-2-406, MCA. (Testimony of Objector.)

14. There would be no adverse effect on the Objector's water right if Deep Creek was flowing at 250 gpm or more and Applicant diverted no more than 250 gpm. (Testimony of Objector.)

15. Applicant would not appropriate water from Fortine Creek unless there was a like amount flowing in Deep Creek. (Testimony of Applicant.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria have been 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.

(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.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 9.

6. Applicant has provided substantial credible evidence that the proposed use would not adversely affect any planned uses

or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 4.

7. The source of the water would not actually be changed as indicated on the Application. The source would still be Deep Creek but the Applicant would be taking that water out of Fortine Creek. By using Fortine Creek as a carrier or means of conveyance of the waters of Deep Creek, Applicant would be able to use the water right on Deep Creek without a pipeline under the highway which would be better for both the Applicant and Department of Highways. This method of conveyance would also be better for Lincoln County. See Findings of Fact 8, 13, and 14.

8. The place of use will not be changed as indicated on the Application. The proposed place of use in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West, is within the claimed place of use. See Findings of Facts 5 and 9.

9. The purpose of use is not all irrigation as indicated on the Application. The uses would be some irrigation, for watering the grass in the golf course, RV parks, and Applicant's lawn and garden, some commercial for the water hazards in the golf course and if the need arises, the water would also be used for emergency fire protection. See Finding of Fact 9.

10. The proposed use will not adversely affect the water rights of other persons so long as the 250 gpm to be diverted is supplied to Fortine Creek by Deep Creek. Applicant's water right has a claimed priority date of May 25, 1916, which is senior to Objector's water right with a claimed priority date of July 18,

1932. If there is water in Deep Creek and Applicant is able to use it, he may do so regardless of whether Objector has water or not, simply by right of priority which is the very basis of Montana water law. Applicant, however, cannot take unfair advantage by pumping from Fortine Creek, when that same amount of water is not available for appropriation in Deep Creek. See Findings of Facts 14 and 15.

Applicant has expressed a reluctance to keeping written records of the flow rate in Deep Creek and of the amount pumped from Fortine Creek. A condition to this effect would not place undo hardship on the Applicant and would protect him from accusations that he was appropriating more water than what was available in Deep Creek. The other alternative would be to install an automatic recording gage in Deep Creek and another in the delivery system. These gages are expensive but they would keep an accurate record of the flow rates in both places and the volume of water diverted.

11. Regarding Objector's allegation of adverse effect due to illegal conduct of an appropriator other than the Applicant, Objector's frustration is certainly understandable, however, these occurrences have nothing to do with the Applicant and cannot be used as a basis for objection to this Application. See Finding of Fact 13.

12. Objector contends Applicant's proposed appropriation is not a change but rather a new water right, citing portions of § 85-2-404, MCA, especially that portion in subsection (2) that

states, "[i]f an appropriator ceases to use all or part of his appropriation right . . . for a period of 10 successive years . . .". However, subsection (4) states, "[s]ubsections (1) and (2) do not apply to existing rights until they have been determined in accordance with part 2 of this chapter", which is the adjudication process. The Department does not adjudicate water rights existing before 1973; that must be done by the Water Court. Until adjudicated, the Department must, as directed by § 85-2-227, MCA, accept a Statement of Claim as "prima facie proof" of the existence of a water right until the issuance of a final decree.

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

PROPOSED ORDER

Subject to the terms, conditions, restriction, and limitations specified below, Application for Change of Appropriation Water Right No. G128984-s76D is hereby granted to Jerry M. Syth, d/b/a Meadow Creek Golf Course, to change a portion of Claimed Water Right No. W128984-s76D, as follows: diversion of 250 gallons per minute up to 42.5 acre-feet per year of the waters of Deep Creek at a new point of diversion located on Fortine Creek in the SE¼NE¼SW¼ of Section 25, Township 35 North, Range 26 West, to be used for irrigation of 17 acres, commercial use and emergency fire protection on Meadow Creek Golf Course, all in the

SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 35 North, Range 26 West in Lincoln County, Montana.

This Change Authorization is subject to the following express terms, conditions, restrictions, and limitations:

A. The Change Authorization is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of the Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Appropriator shall keep a written record of the flow rate of Deep Creek during the periods he is diverting from Fortine Creek. Further, the Permittee shall keep a written record of the flow rate and volume diverted from Fortine Creek and shall submit said records to the Department's Kalispell Field Office at the end of each irrigation season or more frequently if the need arises.

D. Any Fortine Creek withdrawal is limited to the flow of Deep Creek into Fortine Creek or 250 gallons per minute, whichever is less.

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 (P.O. Box 1269, Glasgow, MT 59230); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

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

Dated this 4th day of August, 1989.



Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 1269
Glasgow, Montana 59230

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 4th day of August, 1989, as follows:

Jerry M. Syth
Meadow Creek Golf Course
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