

RECEIVED

JAN 30 2009

D.N.R.C.

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 G(W)015930-76H BY UNIFIED         )  
INDUSTRIES                                    )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on April 23, 1992. Objectors Gramza, Golden, Knutson, and Ryan filed timely exceptions to the Proposal but did not request an oral argument hearing. Applicant filed timely exceptions to the Proposal and requested an oral argument hearing. The oral argument hearing was held on Wednesday, August 12, 1992, in Missoula, Montana. Present at the oral argument hearing were Ted J. Doney, Attorney for the Applicant; Jesse L. Nuttall, Manager of Pinesdale Water Department; Lee Yelin, Water Rights Specialist with Land and Water Consulting Inc.; Tom Gale, Water Commissioner; and Faye Bergan, Attorney for the Department of Natural Resources and Conservation (Department).

Objectors John Lee, Jr., Roger, Marjorie G., Barbara Jean, and John Lee Ryan, Sr.; Miles S. Knutson; Leslie B. and Agnes M. Golden; and Darlene and Raymond Gramza were unable to attend the hearing but had contacted the Hearing Examiner to be excused and therefore retain their status as parties.

The Proposal recommended issuance of a conditional Authorization to Change Appropriation Water Right to Unified Industries to change the purpose of use, point of diversion and place of use of: 0.0625 gallons per minute up to 0.1014 acre-feet

per year of Sheafman Creek water from January 1 through December 31 of each year pursuant to water right 76H-W015930-00 as documented by the Statement of Claim for Existing Water Right, Authorization to Change Appropriation Water Right issued February 22, 1990, and In re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990; and 149.23 gallons per minute up to 84.92 acre-feet per year of Sheafman Creek water from April 1 through October 31 of each year pursuant to claimed water rights 76H-W017858-00 and 76H-W019709-00 as documented by the Statement of Claim for Existing Water Right, Authorization to Change Appropriation Water Right issued February 22, 1990, and In Re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990. The Proposal recommended approval of a change in purpose of use of W015930 from stock watering to municipal and the purpose of use of W017858 and W019709 from irrigation to municipal. The Proposal recommended approval of a change in the point of diversion of all three water rights from the Heckathorn Ditch in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, to a headgate and catch basin in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The Proposal recommended approval of a change in the place of use of all three rights from 35 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 28 and 5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 7 North, Range 21 West, to the city limits of the City of Pinesdale which includes parts of Sections 19, 20, 27, 28, 33, and 34, in Township 7 North, Range 21 West, Ravalli County, Montana.

Applicant excepts to the adoption of the volume amount of 84.92 acre-feet for Water Rights 76H-W017858-00 and 76H-W019709-00, the two irrigation water rights which would be changed to municipal use under the Proposal, arguing that the Hearing Examiner simply adopted the volume amount for these two rights that was previously adopted by the Department in the Allred decision. Applicant further argues that volume amount is an error that has no basis in fact or in law; a clerical error that can now be corrected by the Department. Applicant admits it did not file an exception to the Allred Proposal. Nor did Applicant raise the issue of the volume authorized by the Allred decision during the evidentiary hearing in the instant case. Now Applicant wants the Department to change the volume for that Authorization to Change, contending the volume is a clerical error. Further, Applicant wants the volume calculated on constant use basis, 24 hours a day from May 1 through September 30, a period of 153 days, at a rate of 20 miner's inches according to its written exception. However, in its oral argument Applicant stated the underlying rights for these claimed water rights have been amended to reflect a period of use from April 1 through October 31, a period of 214 days, and the volume to be changed in the instant case should be calculated on that period of use.

The volume in the Allred Proposal is not a clerical error. Statement of Claim 17858-76H claimed a flow rate of 11 miner's inches up to 66.75 acre-feet. Statement of Claim 19709-76H

claimed a flow rate of 11.5 miner's inches up to 86.25 acre-feet. The total flow rate of the two claims is 22.5 miner's inches. The total flow rate was reduced to 20 miner's inches in Finding of Fact 9 of the Allred Proposal. Twenty miner's inches is 89 percent of 22.5 miner's inches. Eighty-nine percent of Applicant's first rights (153 acre-feet) is 136.17 acre-feet. The amount of carriage water left in the Burke Ditch is 51.25 acre-feet which is 33.5 percent (6.7 miner's inches is 33.5 percent of 20 miner's inches) of the total claimed first right of 153 acre-feet. Subtracting 51.25 acre-feet from 136.17 acre-feet leaves 84.92 acre-feet. Applicant did not challenge the figure by filing an exception to the Allred Proposal and arguing the point at oral argument. Furthermore, the allegation that the historical use was a constant use, 24 hours a day, for a period of 153 days, as stated in Applicant's written exception, or 214 days as stated in its oral argument, is not supported by any documentation. The Hearing Examiner in the instant case found, based upon the record of the Allred case, the record In re Applications 69638-s76H and 69659-s76H by City of Pinesdale, and the testimony of Darlene Gramza and Tom Gale, that the historic diversion of water from Sheafman Creek under the claimed rights was not a constant 20 miner's inches for 24 hours per day for 214 days. According to Finding of Fact 16 in the Proposal (to which Applicant did not take exception), only one-quarter of the first right (40 miner's inches) was dependably available in the creek for full service irrigation every year, another 60 miner's inches

(or only 100 miner's inches total) was ordinarily available later than August 15 each year, and water was ordinarily available to satisfy the full first right only until August 1 each year.

The measure of an appropriation is that quantity of water put to beneficial use over a reasonable period of time. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Whitcomb v. Helena Water Works, 151 Mont. 443, P.2d 301 (1968); See also Head v. Hale, 38 Mont. 302, 100 P. 222 (1909). It was established in Allred that the use of the water had been flood irrigation to grow wild hay. The water had been used two seasons, 1986 and 1988, since 1985 which was the year Allreds purchased the old place of use to which the water rights were originally appurtenant. However, no pattern of use was established. The new place of use on the Heckathorn Ditch was to be irrigated by flood and sprinkler systems. The crops to be irrigated were alfalfa, grass, and an apple orchard. It was established in the instant case that after the high runoff period, water could not enter the Heckathorn Ditch except in the rare case of excessive precipitation which did occur in October of 1990, when a rain storm occurred and doubled the flow of the creek. This occurred at the same time the hydropower plant was not in operation. The Heckathorn Ditch diversion is in that portion of Sheafman Creek that is dry while Applicant's hydropower plant is in operation. Thus the evidence available is the original statement of claim of existing water right filed by Joelina Holt, the original statement of claim of existing water

right filed by Ronald Jeckel, the physical use by the Allreds on the Burke Ditch and later on the Heckathorn Ditch, and Finding of Fact 16 in the Proposal for the instant case. None of this evidence indicates a constant use, 24 hours a day, for a period of 153 days or 214 days.

The Department has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if the criteria set forth in Mont. Code Ann. § 85-2-402 have been met. In re Application 20736-s41H by City of Bozeman and Application 20737-s41H by Lichtenberg; In re Application 9782-s76M by Bladholm; In re Application G31227-41F by T-L Irrigation; In re Application G31227-02-41F by Combs Cattle Co.; In re Application G(W)028708-41I by Hedrich, Straugh, and Ringer. The hearing examiner in Allred determined that 13.3 miner's inches up to 84.92 acre-feet per annum of Sheafman Creek water claimed pursuant to Statements of Claim W17858-76H and W19709-76H could be changed without adversely affecting other water rights. In the Allred Final Order, it was mentioned that during a period when the other first right users were not using the first right water in the Burke Ditch, the full 20 miner's inches could be used in the Heckathorn Ditch by the Allreds. There was, however, no mention of changing the volume. Applicant has not shown that the volumes calculated as it proposes would not result in an increase in the historic consumption of the

right. The volume as stated in Conclusion of Law 5 and the Proposed Order will not be modified.

Applicant filed a Motion to Correct Clerical Errors with its Exceptions to the Proposal. For the reasons stated above, Motion to Correct Clerical Errors is DENIED.

Applicant excepts to the failure of the Hearing Examiner to provide for the carriage water. As noted above, the Final Order in Allred did mention that the Applicant could divert the full 20 miner's inches when the Burke Ditch first right users were not using their rights. However, this point was not carried forward into the actual Order. The Hearing Examiner in the instant case noted that Condition D of the Allred Authorization to Change Appropriation states that no change was granted to move the 6.7 miner's inches left in the Burke Ditch for use as carriage water by the other first right appropriators. Although it was mentioned in the Allred Final Order, Applicant did not except to the Allred Proposal, thus the matter of carriage water was not properly before the Assistant Administrator of the Water Resources Division when he was making the decision in the Allred Final Order.

Applicant excepts to the 10 percent reduction in flow and volume actually conveyed by the infiltration gallery collection pipe into the municipal distribution system from the amount diverted from the stream. Specifically, Applicant excepts to Finding of Fact 8, Conclusion of Law 9, and Condition E. The evidence in the record concerning this point is minimal and

unclear. In an effort to clarify the record, the Department proposed to reopen the record to allow the submission and acceptance into the record of three affidavits concerning the operation and workings of the infiltration gallery and testimony given during the hearing held on November 7, 1991. On August 14, 1992, notice was sent to all parties, except Objectors Ryan, Sr., who were to respond within 30 days after the service date on the Notice. The notice was sent to Objectors Ryan, Sr. on October 14, 1992, due to a misunderstanding of their mailing address. Applicant would then be allowed to rebut any response from any of the parties within five days. Timely comments from Objectors Gramza, Miles Knutson, and Leslie and Agnes Golden were received on September 15, 1992, all were postmarked September 14, 1992. A timely response was received from Objectors Ryan, Sr. on November 12, 1992. All were against the inclusion of "new" evidence into the record; however, neither Objectors Golden nor Objector Knutson presented statements or affidavits to counter the affidavits presented by Mr. Yelin, Mr. Gale, and Mr. Nuttall. Objectors Gramza opposed the affidavits of Mr. Gale and Mr. Nuttall, challenging Mr. Gale's statement that there was no loss of water through the north gallery system. The Gramzas also challenged Mr. Nuttall's affidavit as well as his qualifications to operate such a system. Gramzas stated that the affidavits were new testimony and the Objectors should be allowed to cross-examine the affiants under oath. Objectors Ryan, Sr. oppose the affidavits as attempts to alter recorded testimony. Objectors

Ryan, Sr. believe Applicant should be required to submit a full description of the diversion works including the engineering details of appropriation and distribution. Objectors Ryan, Sr. made many other comments and observations concerning other topics which must be disregarded because they are outside the area discussed in the affidavits.

The admission of these affidavits can in no way prejudice the Objectors. Whether Finding of Fact 8, Conclusion of Law 9, and Condition E are amended or left intact will not change the amount of water appropriated by Applicant from Sheafman Creek as proposed by the Hearing Examiner. The affidavits of Mr. Gale and Mr. Nuttall offer nothing significant to the issue; therefore, those affidavits will not be accepted into the record. Only the affidavit of Lee Yelin will be accepted into the record since it was his testimony that brought the Hearing Examiner to make Finding of Fact 8, Conclusion of Law 9, and Condition E.

Finding of Fact 8 was not erroneous based upon the record before the Hearing Examiner. However, the additional evidence submitted in the affidavit of Lee Yelin shows that Mr. Yelin did not, in fact, take any measurements to substantiate his statement that "at least 90 percent of all water diverted into these two-inch lines went through the gallery system." Mr. Yelin further adds in his affidavit that this statement was a rhetorical comment, not a statement of fact. Even without the affidavit of Mr. Yelin, his entire testimony concerning the operation of the infiltration gallery is weak. Mr. Yelin begins his testimony

concerning the infiltration gallery by saying, "I heard that there was some previous conversation between . . ." Then he continues testifying about a discussion between Michael McLane and Jesse Nuttall concerning the diversion works and infiltration gallery. Mr. Yelin then testifies to some measurements made by Jesse Nuttall during a test to check the amount of water going into a pipeline. Mr. Yelin further testifies that he thought Tom Gale was there during the test and that Mr. Gale could probably attest to it (the test results) better than he (Mr. Yelin) since Mr. Gale and Mr. Nuttall were the ones completing the test. Mr. Yelin did not testify that he took any measurements or that he was even present when the test was completed. He didn't testify that either Mr. Gale or Mr. Nuttall told him the results of the test. Mr. Yelin's testimony concerning the amount of water that passes through the infiltration gallery appears to have been purely speculative. Therefore Mr. Yelin's testimony regarding the amount of water that gets through the infiltration gallery after being injected into the catch basin designed for the infiltration gallery is considered and disregarded and Finding of Fact 8 is amended as follows:

The two two-inch pipes do not connect with the infiltration gallery's collection pipe. They end a few feet above the gallery pipe in the gallery's gravel medium. If the infiltration gallery is operated to collect and convey water under both the subject water rights and the rights to underground water simultaneously, the waters would be commingled.

Conclusion of Law 9 is based, in part, on Finding of Fact 8, therefore it is amended as follows:

Applicant has provided sufficient substantial credible evidence to prove the proposed diversion works will be adequate. See Findings of Fact 6, 7, 8, 9, 10, and 11. Therefore, the criterion in § 85-2-402(b), MCA, has been met.

To ensure that the limits of Applicant's water rights, including the water rights being changed, are not exceeded, all water diverted must be measured. Furthermore, in order for the water commissioner to regulate diversions through this system, the system must measure all water diverted. See Findings of Fact 9 and 10. The existing bypass lines around the gallery system measuring devices allow for unmeasured appropriation. See Finding of Fact 9. The change authorization must be conditioned to prohibit a system that allows for unmeasured diversion of water. See Mont. Code Ann. § 85-2-310(2) (1989). This can be accomplished by adding meters to the pipes that convey water from the catch basin to the infiltration galleries, by eliminating the bypasses around the gallery measuring devices, or returning the bypass water to the source rather than allowing it to go into the distribution system for use. See Finding of Fact 9.

It is clear the Hearing Examiner's intent in proposing Condition E was to ensure that Applicant would not divert water to which it did not have a right. Applicant has other water rights which are appropriated by the same infiltration gallery. The "north gallery" is the same infiltration gallery through which the surface water from the catch basin is routed. Conditioning the Permit to require measuring devices on all waters diverted, eliminates the need for Condition E. As long as the water appropriated by this gallery does not exceed the combined total water rights to be appropriated by this diversion, Applicant would not be in violation of the Water Use Act. Condition E is no longer necessary and is therefore deleted.

On June 22, 1992, Applicant filed a Motion to Dismiss Exceptions on the grounds that none of the exceptions were served

upon the Applicant or its attorney as required by the Proposal for Decision at page 29. Applicant alleged the failure to serve by the Objectors delayed the processing of the Application to the prejudice of the Applicant. If the Department would not dismiss the exceptions of the Objectors, Applicant requested the Department to enforce Mont. Code Ann. § 85-2-122 which provides that a person who violates or refuses or neglects to comply with the provisions of Chapter 2, any order of the Department, or any rule of the Board of Natural Resources and Conservation (Board) is guilty of a misdemeanor. Further, it provides that a person who violates or refuses or neglects to comply with the provisions of Mont. Code Ann. § 85-2-114, any order of the Department, or any rule of the Board is subject to a civil penalty not to exceed \$1,000 per violation with each day of violation being a separate violation. During the oral argument hearing, Applicant admitted the failure to serve by the Objectors had not prejudiced the Applicant except by the delay. However, Applicant had requested a continuance which resulted in a three week delay. The Motion to Dismiss is DENIED and the Department declines to enforce § 85-2-122 against the Objectors.

It is difficult to address Objectors Gramza's exception received by the Department on May 13, 1992. Objectors Gramza did not specifically set forth any portions of the Proposal to which an exception was taken. Gramzas apparently disagree with the Proposal in general believing the granting of an authorization to change appropriation water right will place additional demands on

Sheafman Creek. A change of appropriation water right cannot place an additional burden on the stream. It allows only that certain elements of the water right can be changed. The elements that can be changed include the point of diversion, place of use, place of storage, and/or the purpose of use. However, no additional burden can be placed on the source by a change authorization. Since Sheafman Creek is a decreed stream and a water commissioner is appointed every year to admeasure and distribute the water according to priority, the change as approved by the Department should not place an additional burden on the stream or on prior appropriators.

It is equally difficult to address the exception of Leslie B. and Agnes Golden. Objectors Golden did not set forth any portion of the Proposal to which an exception was taken. Mr. and Mrs. Golden allege havoc wrought on Sheafman Creek and the surrounding area by Applicant and that it has been allowed by the Department. The Department has no control over use of the land or the stream bed. The jurisdiction of the Department is limited to the administration, control, and regulation of water rights. Objectors Golden apparently believe that water decreed for irrigation and stock water purposes should not be changed to a municipal use. There is nothing in the statutes that forbid a change from agricultural use to municipal use as long as the criteria for issuance of an authorization to change appropriation water right are met. The Hearing Examiner in his Proposal determined the criteria were met. Mont. Code Ann. § 85-2-402(2)

(1991) provides that the Department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence the criteria are met. This means that if the criteria are met, the Department has no choice but to issue an authorization to change appropriation water right.

Objector Knutson's exception states that Sheafman Creek is over-decreed and that any water taken out will adversely affect him. The Hearing Examiner found that the changes would not adversely affect the rights of prior appropriators especially since Applicant's water will be admeasured and distributed by a water commissioner. Objector Knutson presented no evidence to the contrary. Objector Knutson's other observations are not relevant to the instant case. Objector Knutson did not set forth any portion of the Proposal to which an exception was taken.

It appears Objectors Ryan take exception to the water quantities set forth in Finding of Fact 12 of the Proposal. A review of the record shows the evidence concerning the population of the City of Pinesdale, the existing building lots and the number of community-type buildings was the only evidence entered into the record concerning these matters. The Objectors did not present any evidence to counter Applicant's evidence. The calculations made by the Hearing Examiner are based upon standards adopted by the Department for such uses. Objectors Ryan charge that the Proposal makes a water reservation for unimproved lots and for households of 8.7 persons that do not now exist. The Proposal does not reserve water for any use. Finding

of Fact 12 merely states the municipal needs and the basis for those needs. Finding of Fact 12 is based on substantial credible evidence and is not clearly erroneous.

Objectors Ryan except to Finding of Fact 13 based on no mention of well water. There is nothing in the record to indicate that wells are connected to Pinesdale's municipal water system. Finding of Fact 13 is based upon substantial credible evidence and is not clearly erroneous.

Objectors Ryan did not except to Finding of Fact 11 and the concerns expressed by Mr. Ryan concerning this Finding are not pertinent to the instant matter.

Objectors Ryan take exception to Conclusion of Law 3 challenging the finding that the change as authorized by the Department will not adversely affect the downstream water quantities and vested interests. The Hearing Examiner found that the change in point of diversion, place of use, and purpose of use will not place an additional burden on the stream and will therefore not adversely affect the water rights of the downstream users. This finding is based upon substantial credible evidence produced at the hearing by the Applicant. Objectors did not produce sufficient evidence to overcome the evidence produced by the Applicant.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law, with the exception of Finding of Fact 8 and Conclusion of Law 9 modified herein, are hereby adopted by the Department.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change Appropriation Water Right G(W)015930-76H is granted to Unified Industries to change the purpose of use, point of diversion, and place of use of: 0.0625 gallons per minute up to 0.1014 acre-feet per year of Sheafman Creek water from January 1 through December 31 of each year pursuant to water right 76H-W015930-00 as documented by the Statement of Claim to Existing Water Right, Authorization to Change Existing Water Right issued February 22, 1990, and In re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990; and, 149.23 gallons per minute up to 84.92 acre-feet per year of Sheafman Creek water from April 1 through October 31 of each year pursuant to claimed water rights 76H-W017858-00 and 76H-W019709-00 as documented by the Statement of Claim to Existing Water Right, Authorization to Change Existing Water Right issued February 22, 1990, and In re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990. The purpose of use of W015930 may be changed from stock watering to municipal. The purpose of use of W017858 and W019709 may be changed from irrigation to municipal. The point of diversion of all three water rights may be changed from the Heckathorn Ditch in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28 to a headgate and catch basin in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, Township 7 North,

Range 21 West, Ravalli County, Montana. The place of use of all three rights may be changed from 35 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 28 and 5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 7 North, Range 21 West, to the city limits of the City of Pinesdale which includes parts of Sections 19, 20, 27, 28, 33, and 34, Township 7 North, Range 21 West, Ravalli County, Montana.

A. This authorization is subject to all prior existing water rights in the source of supply. Further, this authorization is subject to any final determination of existing water rights, as provided by Montana law.

B. Appropriator shall authorize and allow the remaining first water right appropriators, who remove water from the Burke Ditch at a point below the divider box therein, to divert the 6.7 miner's inches of first right water, claimed under Statements of Claim 76H-W017858-00 and 76H-W019709-00, but for which no authorization to change has been granted, at the original point of diversion for continued use by said appropriators as carriage water for their water rights.

C. The water right changed by this authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

D. This authorization is subject to the condition that the Appropriator shall install and maintain adequate continuously reading flow measuring device in order to allow the flow rate and volume of all water diverted pursuant to water rights W015930, W017858, and W19709 to be recorded. The devices must be placed so that water cannot be diverted without being measured and recorded. Bypass or pressure relief lines, if necessary, must convey water through an alternative measuring mechanism or to the source. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records on demand and by November 30 of each year to the Missoula Water Resources Regional Office.

E. If, at any time after this authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show cause why the authorization should not be modified or revoked. The Department may then modify or revoke the authorization to protect existing water rights or allow the authorization to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

F. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused

by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

G. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriated court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Chuck Gividen  
Ronda Gividen  
449 Knapweed Lane  
Victor, MT 59875

Ted J. Doney  
Doney, Crowley & Shontz  
P.O. Box 1185  
Helena, MT 59624-1185

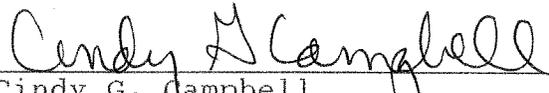
USA Fish Wildlife Service  
Wilber Ladd  
P.O. Box 25486 Denver Federal  
Center  
Denver, CO 80225

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

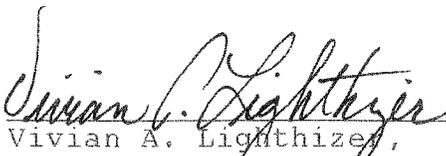
Miles S. Knutson  
1219 Creek View Lane  
Victor, MT 59875

John E. Stults,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

John Bertolero  
Donna Bertolero  
688 Sheafman Creek Road  
Hamilton, MT 59840

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

Dated this 23rd day of November, 1992.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 23<sup>rd</sup> day of November, 1992, as follows:

Unified Industries  
c/o Jess Nuttall  
P.O. Box 73  
Pinesdale, MT 59841

John O'Mailia  
Catherine O'Mailia  
369 Sheafman Creek Road  
Victor, MT 59875

Dan Browning  
Lorraine Browning  
544 Bourne Lane  
Victor, MT 59875

Charles K. Wheat  
Shirley A. Wheat  
447 Sheafman Creek Road  
Hamilton, MT 59840

Charles Prausa  
411 Sheafman Creek Road  
Hamilton, MT 59840

Les and Agnes Golden  
1220 Creek View Lane  
Victor, MT 59875

Ray Gramza  
Darlene Gramza  
1187 Creek View Lane  
Victor, MT 59875

Henry M. Winters  
Jeannette E. Winters  
399 Sheafman Creek Road  
Hamilton, MT 59840

John Lee Ryan, Sr.  
Marjorie G. Ryan  
2814 27th Ave. West  
Seattle, WA 98199

John Lee Ryan, Jr.  
Roger Whitney Ryan  
Barbara Jean Ryan  
708 Sheafman Creek Road  
Hamilton, MT 59840

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	PROPOSAL
FOR CHANGE OF APPROPRIATION WATER	)	FOR
RIGHT G(W)015930-76H BY UNIFIED	)	DECISION
INDUSTRIES	)	

\* \* \* \* \*

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on November 7, 1991, in Missoula, Montana, to determine whether the above-entitled Application should be granted to Unified Industries under the criteria in § 85-2-402(2), MCA.

APPEARANCES

Applicant appeared at the hearing by and through Ted J. Doney, attorney at law. Jesse L. Nuttall, employee of City of Pinesdale; Lee Yelin, Water Rights Specialist with Land & Water Consulting, Inc., of Missoula; and Tom Gale, Water Commissioner on Sheafman Creek, appeared as witnesses in behalf of Applicant. Lee Yelin was qualified as an expert witness in the area of the technical and procedural aspects of water right applications and the application process.

Objectors Ray and Darlene Gramza appeared by and through Darlene Gramza. Objector Miles Knutson appeared at the hearing on his own behalf. Objectors John Lee Ryan, Jr., Roger Whitney Ryan, Barbara Jean Ryan, Marjorie G. Ryan, and John Lee Ryan, Sr. appeared at the hearing by and through Roger Ryan.

Michael McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared as the Department's spokesperson and witness.

Objectors Henry M. and Jeannette E. Winters and Objectors Les and Agnes Golden contacted the Hearing Examiner prior to the hearing to request that they be excused from appearing at the hearing. The request was granted. Objectors Winters and Objectors Golden retain their status as parties in this matter.

Objector United States of America Fish and Wildlife Service notified the Hearing Examiner by a letter received November 11, 1991, that it was withdrawing its objection to this application. United States of America Fish and Wildlife Service is no longer a party in this matter.

Objectors John and Catherine O'Mailia, Dan and Lorraine Browning, Charles K. and Shirley A. Wheat, Chuck and Rhonda Gividen, John and Donna Bertolero, and Charles Prausa failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was properly served on all parties on October 4, 1991, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1984). Return receipts were received by the Department, each with a signature indicating receipt. The Hearing Examiner received no communication from the missing objectors prior to the hearing or subsequent to the close of the record.

The Hearing Examiner ruled at the hearing that all missing objectors were in default. That ruling is hereby confirmed. The defaulted objectors no longer retain the status of parties in this matter. Mont. Admin. R. 36.12.208 (1991). The objection forms of the defaulted objectors will remain a part of the record.

#### EXHIBITS

Applicant offered the following exhibit which was accepted into the record without objection.

Applicant's Exhibit C<sup>1</sup> consists of five pages, each being a photocopy of Department form, Acknowledgement of Water Right Transfer. Each is dated December 24, 1990. They are for Water Rights 76H-W-017858-00, 76H-W-019709-00, 76H-W-015930-00, 76H-W-015928-00, and 76H-W-019708-00.

Objector Gramza offered the following exhibit which was accepted into the record without objection.

Objector Gramza's Exhibit A is a one page letter from Kevin T. Horton, DVM, dated November 7, 1990.

Prior to and during the prehearing conference, all parties were expressly given opportunity to review the file maintained by the Department on this Application. No party expressed an objection to any contents of the file being accepted into the record.

---

<sup>1</sup> Identifiers "A" and "B" were assigned at the previous days hearing, In re Applications 74310-s76H by Unified Industries and 74311-g76H by City of Pinesdale, to the two maps that have been officially noticed in the present matter.

The file was accepted into the record at the hearing in its entirety.

Objectors Gramza requested the Hearing Examiner take official notice of the Department's entire record of the proceedings In re Application G15928-76H by Samuel T. and Virginia Allred (Final Order issued February 5, 1990). Applicant had intended to request notice of the Proposal for Decision and Final Order in that matter and had no objection to notice being taken of the entire record. The request was granted.

Applicant requested that the Hearing Examiner take official notice of elements of the proceedings In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale (Final Order issued April 4, 1991) having to do with beneficial use and the adequacy of the means of diversion. Applicant submitted a list on December 2, 1991, of the specific items in the record of those proceedings that pertain to this request for official notice. Applicant also requested that official notice be taken of Applicant's Exhibits A and B from the record of In re Applications 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale (Proposal for Decision pending), which had been heard the previous day. "Pinesdale Exhibit A" is a map of the Sheafman Creek drainage from the area of the proposed change downstream to the confluence with Mill Creek. It is an enlargement of a USGS topographic quadrangle map on which locations of features such as ditches, diversion structures, and measurement devices have been drawn. "Pinesdale Exhibit B" is a further

enlargement of the area around the proposed point of diversion with greater detail as to the features. No objection was expressed to either of Applicant's requests. The requests were granted. In addition, the Hearing Examiner has taken official notice of the Department's water rights records for Sheafman Creek.

#### PRELIMINARY MATTERS

I. Documents in the Department's file on this Application contradict each other as to the past place of use and point of diversion of the subject water rights. Both the October 4, 1991, Notice of Hearing and the file copy of the notice mailed to individuals, under the heading "Past Use of Water," identify the point of diversion as being in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, Township 7 North, Range 21 West, Ravalli County,<sup>2</sup> and place of use as having been 40 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 26. These were the point of diversion and place of use of these rights prior to being changed under the Authorization granted in Allred. They are not the point of diversion and place of use that would be given up if the instant change is authorized. The notarized July 31, 1991, Affidavit and Certification of Publication signed by Cindi Petrusaitis of the *Ravalli Republic* has the notice as the newspaper published it (apparently clipped from a standard copy of the edition on the publication date). Under "Past use of Water," the point of diversion is identified as having been in

---

<sup>2</sup> Unless otherwise stated, all legal land descriptions are in Township 7 North, Range 21 West, Ravalli County.

the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, and the place of use is identified as having been 35 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 28 and 5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33. These are the point of diversion and the place of use authorized in the Allred change and are the point of diversion and place of use that would be given up if the instant change is authorized.

Section 85-2-307(1), MCA, requires that notice be published in a newspaper of general circulation in the area of the source. As certified, this was accurately done. The statute also requires that individual notice be served on persons who may be affected by an application. It is not clear from the record that the individual notices accurately identified the place of use that would be given up. All parties at the hearing were well aware of the actual particulars of the Application, however. Also, statements made on objection forms indicate that objectors were aware of the actual particulars of the Application. Furthermore, the record in this case, the Allred case, and the City of Pinesdale winter and summer use cases show a history of awareness and close attention to the activities of Applicant by Sheafman Creek area water users. Nothing in the record indicates there was any misunderstanding of the proposal on the part of potentially affected persons. This can be interpreted to imply that the individual notices had been modified to match the published notice and that the file merely lacks the documentation.

While it cannot be shown that the individual notice was technically correct, no prejudice has been expressed or apparent. Without an expressed or apparent harm, there is no need to readvertise. See In re Application 56031-41S by Floyd R. Blair; see also In re Applications 32257-s76L, 32236-c76L, 32237-c76L, and 32238-c76L by Frank Pope; see generally In re Application 21956-g41A by Kyler Ranch; In re Application 26858-s40H by I X Ranch; In re Application 9849-s76C by Monk; In re Application 3614-s430 by Feist.

II. The published notice and individual notices of this Application identified the flow rate to be changed from the Heckathorn Ditch point of diversion in Section 28 as including the full 22.5 miner's inches of claimed water rights W017858-76H and W019709-76H as proposed by Applicant. The Allred Final Order, however, limited the flow rate that could be diverted into the Heckathorn Ditch under these two rights to 20 miner's inches so that 2.5 miner's inches remained at the Burke Ditch in Section 27. Recognizing this meant the notice was in error, and realizing that to correct it a new notice process and objection period would be needed, Applicant offered to amend the Application downward to change only the 20 miner's inches. An amendment that decreases the amount of water to be changed does not imply an increased burden on the source which would cause prejudice, but rather the opposite, and therefore need not be advertised. See In re Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc.; In re Application 50272-g42M by Joseph F.

Crisafulli. The combined flow rate Applicant proposes to change under claimed water rights W017858-76H and W019709-76H is 20 miner's inches or 224.4 gallons per minute (gpm).

#### FINDINGS OF FACT

1. Application to Change Appropriation Water Right G(W)15930-76H was filed with the Department of Natural Resources and Conservation on November 2, 1990, at 3:30 p.m. (Department's file)

2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the proposed source, on July 24, 1991. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. See Preliminary Matters, above. (Department's file)

3. Twelve timely objections were received by the Department. The principal issues raised by the objections were:

- Applicant's proposed changes would result in increased diversion or consumption of water which would adversely impact senior water rights.

- The means of diversion is incapable of accurate measurement and therefore is inadequate.

- The rights to Sheafman Creek water were decreed for stock and irrigation uses only.

- Sheafman Creek water is contaminated and cannot be used for municipal purposes.

(Department's file)

4. Objectors remaining as parties in this matter own rights to the use of waters from Sheafman Creek. See Appearances, above. (Department's file and records)

5. Applicant is applying for authorization to change the point of diversion, place of use, and purpose of use of three claimed water rights which are each documented by a Statement of Claim to Existing Water Right, the Authorization to Change Existing Water Right issued by the Department on February 22, 1990, and the In re Application G15928-76H by Samuel T. and Virginia Allred Final Order issued by the Department on February 5, 1990. See Preliminary Matters, I., above. The claimed water rights are: 76H-W015930-00 for stock water use from January 1 through December 31 of each year, with a priority date of July 28, 1882; 76H-W017858-00 for irrigation from April 1 through October 31 of each year with a priority date of July 28, 1882; and 76H-W019709-00 for irrigation from April 1 through October 31 of each year with a priority date of July 28, 1882.

Applicant proposes to change the purpose of use of all three rights to municipal purposes. Applicant proposes to change the point of diversion used for all three rights, which has been a headgate on Sheafman Creek in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, to a headgate and catch basin on Sheafman Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28. Applicant proposes to also change the place of use

of these three water rights, which has been 35 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 28 and 5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, to the city limits of the City of Pinesdale which includes parts of Sections 19, 20, 27, 28, 33, and 34.

6. The diversion structure Applicant proposes to use is steel 20-inch by 28-inch headgate with a 16-foot by 3-foot concrete ditch to a concrete catch basin presently used to divert Sheafman Creek water to the City of Pinesdale power plant. From the catch basin, water would be conveyed by two two-inch pipes that will release the water into an existing infiltration gallery, called the "north gallery." The two pipelines would descend approximately thirty feet in elevation from the catch basin to the infiltration gallery. The infiltration gallery collects water and conveys it through a valve station. From the valve station the water is conveyed to a reservoir tank, and thence into the pipelines of the City of Pinesdale municipal water distribution system. The infiltration gallery is also operated to appropriate surrounding underground water. (Pinesdale record, Department's file, and testimony of Jess Nuttall and Lee Yelin)

7. The two two-inch pipes are in place and have been used to deliver water from Sheafman Creek into the municipal system under rights to water in upper basin lakes. As calculated by the Department, they have a combined capacity of at least 236 gpm. Calculations by Lee Yelin indicated a capacity of 274 gpm. A test by Jess Nuttall indicated a capacity of 270 gpm. It is the

opinion of Lee Yelin that the system will be capable of diverting the combined flow rate of the three water rights. (Department's file and testimony of Jess Nuttall and Lee Yelin)

8. The two two-inch pipes do not connect with the infiltration gallery's collection pipe. They end a few feet above the gallery pipe in the gallery's gravel medium. ( During the testing of the pipes to determine their capacity it was determined that approximately 90 percent of the water that enters the two-inch pipes at the catch basin is picked up by the infiltration gallery collection pipe.) If the infiltration gallery is operated to collect and convey water under both the subject water rights and the rights to underground water simultaneously, the waters would be commingled. (Pinesdale record and testimony of Jess Nuttall and Lee Yelin)

9. The catch basin is primarily used as part of the diversion works for Pinesdale's hydroelectric power system. An eighteen inch Parshall flume for measuring water diverted into the hydroelectric power conveyance system is in place at the head of this conveyance system just as it leaves the catch basin. This flume was used to determine the capacity of the two two-inch pipes. According to Jess Nuttall, Tom Gale, and Lee Yelin it could be used successfully to measure the amount of water diverted under these three rights. However, as pointed out by Lee Yelin, this method of measurement would not provide a permanent mechanical reading and recording of the diversion; rather, flows through the Parshall flume must be read and recorded manually. A

measuring device that records mechanically would not be necessary for the diversion of the three rights into the two pipes to be administered by the water commissioner.

The infiltration gallery system is required to have a continuously reading flow measuring device adequate to allow the flow rate and volume of water diverted by the infiltration gallery to be recorded. This could be used to provide a check on the flow rate measurements being taken at the hydropower plant intake flume. It could also be used to mechanically record the volume diverted by the north gallery, including that volume diverted under the three subject water rights. It is the water commissioner's opinion that multiplying the metered flow rate by the time of operation between readings of the meter would be an adequate check to ensure that water is not being bypassed. This assumes that the flow rate is constant.

The configuration of the piping of the existing gallery system, however, has bypass pipes around the existing in-line water meters. This can allow water to be diverted to use without measurement. Furthermore, the flow rate does fluctuate in the gallery system, or an operator could assert that the system had been out of operation when actually water was being diverted through the bypass around the meters. In addition, at times the water passing through the gallery system meters would be a combination of the amount diverted under the subject water rights and underground water being collected under other water rights.

(Pinesdale record and testimony of Jess Nuttall, Lee Yelin, and Tom Gale)

10. On each daily visit to Sheafman Creek, the water commissioner already measures the water at the catch basin that is diverted into the hydropower system. The measurement of the water diverted into the municipal system could be done at the same time. It would be relatively simple to also measure the proposed change and would not cause the commissioner any problems. It would also not require the commissioner to spend significantly more time to measure and record the municipal diversion through the two pipes. (Testimony of Jess Nuttall, Lee Yelin, and Tom Gale)

11. The diversion and conveyance system have been and would continue to be used to divert water released into Sheafman Creek from upper basin lakes and water collected by the north gallery itself from the surrounding strata. The system would be capable of diverting all of Applicant's and City of Pinesdale's Sheafman Creek municipal water rights because of their staggered periods of use, and also because when multiple rights (such as lake water and first right water) are diverted simultaneously, creek flows are insufficient to satisfy the entire first right. See Finding of Fact 13, below. (Testimony of Jess Nuttall and Lee Yelin)

12. Pinesdale's present municipal needs are based on the water service requirements of 750 persons residing in 86 homes, plus 19 existing building lots and eight community-type buildings. The standards adopted by the Department for such uses are

one acre-foot per household (a household consists of five people, or portion thereof, in a dwelling and one dwelling may contain more than one household) plus a minimum of 0.5 acre-feet (AF) per dwelling for lawn and garden purposes. Given 105 dwelling units of two households each (750 divided by 86 equals 8.7 persons or two households), Applicant's municipal needs are greater than 262.5 AF as this does not include the community-type buildings or other functions normally associated with municipal systems such as fire protection and parks. (Pinesdale record)

13. During the dry season, a total of 220 gpm of water would be available to the City of Pinesdale for municipal use if the proposed change is authorized: 20 gpm from the north gallery (other water rights), 50 gpm from the creek gallery, 100 gpm from lake water, plus 50 gpm first right (the proposed change). Given the 86 dwellings presently in Pinesdale, this is substantially less per household than the 5 gpm minimum required by FHA for home loans. (Testimony of Jess Nuttall and Lee Yelin)

14. The City of Pinesdale has been experiencing shortages in the supply of water for existing municipal demand and has had to ration water. The Montana Department of Health and Environmental Sciences, Water Quality Bureau, has been pressuring the city to improve their municipal water supply system and increase the amount of water available to a minimum of 250 gpm. (Pinesdale record)

15. The volumes in acre-feet per year of the three subject water rights as identified on the original claim forms are:

0.1014 AF for W015930, 66.75 AF for W017858, and 86.25 AF for W19709. Together this equals 153.1014 AF per year, for irrigation and stock watering.

On January 14, 1991, Applicant amended the claims to water rights W017858 and W19709 to increase the claimed volume to the maximum Water Court guideline for irrigation, 9.4 AF per acre per year. The individual volume of each separate water right was amended to 188 AF for a combined volume of 376 AF per year.<sup>3</sup> Thus, when combined with W015930 the total volume is 376.1014 AF per year for irrigation and stock watering. As identified by Lee Yelin, it is impossible for the flow rates of these claims to produce the amended volume in the period of use.

The present change application as stated in the public notices and the hearing notice proposes a total of 238.74 AF be changed to municipal use through the infiltration gallery. This amount was set after many revisions of the Application, which was originally submitted with the volume amount left blank. This figure was based on a flow rate of 22.4 miner's inches (MI). The maximum flow rate that could be changed, however, is only 20 MI. At the hearing Lee Yelin calculated the maximum volume obtainable by a constant (24 hours per day) flow of 20 MI throughout the period of use to be 212.216 AF per year.<sup>4</sup> Applicant indicated that this should be the combined proposed volume of the requested

---

<sup>3</sup> 40 acres multiplied by 9.4 AF per acre per year.

<sup>4</sup> (20MI times 11.22 gallons/MI times 1440 min./day times 214 days of use per year) divided by 325851 gallons per AF equals 212.216 AF per year.

change of the two irrigation rights. (Department's file and records and testimony of Lee Yelin)

16. The historic diversion of water from Sheafman Creek under the two irrigation water rights was not a constant 20 MI for 24 hours per day for all 214 days in the period of use. The Soil Conservation Service determined in 1947 that only one quarter of the first right (40 MI) was dependably available in the creek for full service irrigation every year, another 60 MI (or only 100 MI total) was ordinarily available later than August 15 each year, and water was ordinarily available to satisfy the full first right (160 MI) only until August 1 each year.<sup>5</sup> The testimony of the Objectors in this hearing and testimony in the Pinesdale and Allred hearings supports this conclusion, as does the testimony of the water commissioner. Furthermore, no evidence was provided by the Applicant to support their contention that the historic diversion had ever been a constant 20 MI for 24 hours of each of the 214 days in the period of use. (Allred record, Pinesdale record, and testimony of Darlene Gramza and Tom Gale)

17. The water rights being changed are Applicant's first rights (priority date July 28, 1882) to divert water from Sheafman Creek at the Heckathorn Ditch for irrigation and stock watering uses in Section 28. See Preliminary Matters, above. Applicant has no rights or portions of rights to divert water

---

<sup>5</sup> Objector OML Exhibit 1 in Allred.

from Sheafman Creek into the Burke Ditch under a July 28, 1882, priority date. (Allred record and Department's file and records)

18. Water rights W015930, W017858, and W019709 were all changed in 1990 to the place of use and point of diversion in Section 28, Heckathorn Ditch. All prior use through Burke Ditch on the place of use in Section 26 was replaced by the new use. The Final Order in Allred authorized changing the full volume of W15930 (0.1014 AF), but limited the combined volume of W017858 and W19709 that could be used after the change to 84.92 AF. Together, Allred established 85.0214 AF per year to be total combined volume of the three water rights resulting from the change to the point of diversion in Section 28 for irrigation and stock watering. (Allred record)

19. The 1990 change was authorized limiting the flow rate of water rights W017858 and W019709 to 13.3 MI (149.23 gpm) rather than the 20 MI of the prior use through the Burke Ditch. Condition D of the change states that no change was granted to the 6.7 MI difference between the two flow rates, which was to remain at the Burke Ditch for use as carriage water by the other first right appropriators. Taking into account the flow rate of W015930, the total flow rate for all three water rights is 149.2925 gpm. (Allred record)

Nothing in the record of the present matter indicates the proposed change will alter the carriage water needs of the remaining Burke Ditch first water right appropriators.

20. Any surface runoff or subsurface seepage from irrigating the place of use in Section 28 (the present place of use) does not return to Sheafman Creek. It flows into the Cow Creek drainage. Therefore, the entire volume of water diverted into Heckathorn Ditch is lost from the Sheafman Creek hydrologic system and is not contributing to other water rights in the Sheafman Creek drainage. (Allred record, Pinesdale Exhibit A, and Pinesdale Exhibit B)

21. Much of the proposed place of use is within the Sheafman Creek drainage basin. While generally municipal use is more consumptive than irrigation alone, some aspects of municipal use do result in minor amounts of waste water and seepage which may contribute to water sources in the drainage relied upon by other appropriators. For example, lawn and garden irrigation will be an element of the municipal use of this water. (Pinesdale Exhibit A, Pinesdale Exhibit B, Department's file, and testimony of Jess Nuttall and Mike McLane)

22. In uncontradicted statements on the notarized application form, Applicant affirmed it has possessory interest or written consent of the person with possessory interest in the lands on which the proposed appropriation would be put to use. No other specific evidence was provided with the application form or at the hearing to further substantiate this affidavit. There is, however, a documented history of close, almost indistinguishable, association between these two apparently separate entities. (Allred record, Pinesdale record, Department's file and records)

23. The boundaries of the City of Pinesdale encompass the proposed place of use. The city's water distribution system extends into areas within the city boundaries which have not yet been developed. The municipal water system has been extended into those areas and it is likely the undeveloped areas will be developed. Furthermore, there are fire hydrants in the undeveloped area, and fire protection is generally recognized as an aspect of municipal water use. (Department's file and testimony of Jess Nuttall and Mike McLane)

24. Pinesdale has been under a "boil order" for many years on the use of Sheafman Creek water for consumption. The boil order is still in effect. The water that would be diverted under these three rights if the change were to be authorized would also be subject to the boil order and would be boiled. There is no evidence in the record of further restrictions on the use of Sheafman Creek water for human consumption. (Testimony of Jess Nuttall)

25. There are no intervening water rights between the present point of diversion at the Heckathorn Ditch and the proposed point of diversion at the catch basin. (Department's file)

26. Department's water rights records show no planned uses or developments for which a permit has been issued for water from Sheafman Creek. Neither do they show any reservations of Sheafman Creek water, or of water in the mainstem sources of the major drainage basin to which the proposed sources are tributary.

Applications for appropriations of water in the Sheafman Creek drainage have been filed since Applicant filed the present Applications. A March 27, 1992, Proposal for Decision proposes to deny Robert and Marlene Takle's Applications for Beneficial Water Use Permits. Even if the Proposal is reversed and the permits were issued prior to final action in the present case, the Takle permits would have priority dates of November 3 and 13, 1990, which are later in time and hence "junior" to the filing dates of the present Applications. (See Finding of Fact 1.)

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. § 85-2-309 and 402 (1989).

2. 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, 2, 3, 4, and 5.

3. The Department must approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the criteria in effect at the time of the application for change, being in regard to this Application § 85-2-402(2) (1989), MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) 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.

4. Montana law allows a change of the purpose of use of a water right. Mont. Code Ann. § 85-2-102(5) (1989). Nothing in the statutes prohibits changing the purpose of use of a previously decreed water right. See generally In re Royston 48 St. Rep. 747 (1991); Castillo v. Kunneman, 197 Mont. 190, 642 P. 2d 1019 (1982). In fact many irrigation water rights have been changed to municipal use, including previously decreed water rights. E.g. In re Applications 20736-s41H by City of Bozeman and 20737-c41H by Lichtenberg.

5. The total combined flow rate of all three water rights is 149.2925 gpm. The total combined volume of all three water rights is 85.0214 AF per year. See Allred, supra; see also Findings of Fact 15, 16, 17, 18, and 19. The period of use of each water right being changed is limited to the period of use of the historic purpose. See In re Application 20736-s41H by City of Bozeman and Application 20737-c41H by Lichtenberg; see also Finding of Fact 5.

6. The proposed use of water, municipal, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a) (1989). Applicant has provided substantial credible evidence that use of the water will benefit the City of Pinesdale. The flow rate and volume amounts are within the guidelines identified by regulating agencies, are

within the identified needs of the proposed use, and, therefore, are not wasteful. The full flow rate and volume will be put to use immediately upon completion of the change. See Conclusion of Law 5; Findings of Fact 12, 13, and 14. The water in Sheafman Creek has been used and will continue to be usable for human consumption, albeit only when boiled. See Findings of Fact 6, 11, and 24. Therefore, the criterion in § 85-2-402(c), MCA, has been met.

7. Applicant has provided substantial credible evidence they have possessory interest or the written consent of the person with possessory interest in the property where the water is to be put to beneficial use. The evidence provided is so minimal it is barely substantial or credible, except when taken in context of the series of recent applications, and the water rights records of the Department. See Findings of Fact 22, and 23. It is, given this context, sufficient to conclude that the criterion in § 85-2-402(2)(d), MCA, has been met.

8. The place of use can extend to the entire area within the boundaries of the City of Pinesdale. The City of Pinesdale has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use of its city or inhabitants. Mont. Code Ann. Title 7 Chapter 13 (1989). There is municipal use throughout the proposed place of use, although in the undeveloped area it is limited to fire protection. See Finding of Fact 23. The entire service area, including the undeveloped portions, can be accepted as the place of use

because a municipal water service system area is the type of project that is designed for gradual development. See Mont. Code Ann. §85-2-312(2) (1989); In re Applications 31587-g41F and 33294-g41F by Yellowstone Village. Furthermore, even though actual use of the water has not taken place in all areas of the place of use, there is a physical manifestation of announced intent. See Finding of Fact 23. Manifested intent can serve as the definition of the extent of the beneficial use; in this case the extent of the place of use. See Wheat v Cameron, 64 Mont. 494, 210 P. 761 (1922); In re Applications 31587-g41F and 33294-g41F by Yellowstone Village; In re Application 54172-s430 by Lockwood Water Users Association; see also Bailey v. Tintinger, 45 Mont. 152, 122 P. 575 (1912); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). It is fundamentally important to remember, however, that the maximum flow rate and volume of the subject water rights are fixed. Therefore, if the undeveloped area is developed in a manner that requires more water, such as through increased domestic and lawn and garden needs, additional water rights may be needed. See Mont. Code Ann. §§ 85-2-301(1) and 302(1) (1991).

9. Applicant has provided sufficient substantial credible evidence to prove the proposed diversion works will be adequate. See Findings of Fact 6, 7, 8, 9, 10, and 11. Therefore, the criterion in § 85-2-402(b), MCA, has been met.

It must be noted and remembered by anyone who operates this system and anyone who administers the allocation of first right

water that the gap between the end of the two two-inch pipes and the infiltration gallery collection pipe causes a ten percent loss of water. The measuring device on the infiltration gallery can only be used to determine whether the proper portion of first right water is being diverted if it is done in conjunction with the plant intake flume and the ten percent loss is factored in. The measuring device on the infiltration gallery must never indicate that more than 90 percent of the flow rate and volume of these rights (134.36 gpm up to 76.52 AF per year) is being conveyed into the municipal water distribution system. Therefore, a condition must be added to the change authorization establishing this inherent limitation of the system. See Mont. Code Ann. § 85-2-310(2) (1989).

To ensure that the limits of Applicant's water rights, including the water rights being changed, are not exceeded, all water diverted must be measured. Furthermore, in order for the water commissioner to regulate diversions through this system, the system must measure all water diverted. See Findings of Fact 9 and 10. The existing bypass lines around the gallery system measuring devices allow for unmeasured appropriation. See Finding of Fact 9. The change authorization must be conditioned to prohibit a system that allows for unmeasured diversion of water. See Mont. Code Ann. § 85-2-310(2) (1989). This can be accomplished by adding meters to the pipes that convey water from the catch basin to the infiltration galleries or by eliminating

the bypasses around the gallery measuring devices, or returning the bypass water to the source rather than allowing it to go into the distribution system for use. See Finding of Fact 9.

10. Other owners of rights to water in Sheafman Creek will not be adversely affected by the impact the proposed change will have on the activities and charges of the water commissioner, because the impact will be minimal. See Finding of Fact 10. Even if the impact were greater, or somehow becomes greater, an increase in the expense of employing a water commissioner does not constitute adverse effect. See McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

11. There is substantial credible evidence proving that other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved will not be adversely affected by the proposed changes. See Findings of Fact 20, 21, 25, and 26. Therefore, the criterion in § 85-2-402(a), MCA, has been met.

#### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change Appropriation Water Right G(W)015930-76H is granted to Unified Industries to change the purpose of use, point of diversion, and place of use of: 0.0625 gallons per minute up to 0.1014 acre-feet per year of Sheafman Creek water from January 1 through December 31 of each year pursuant to water right 76H-W015930-00 as documented by the Statement of Claim to Existing Water Right, Authorization to

Change Existing Water Right issued February 22, 1990, and In re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990; and, <sup>13.3</sup> 149.23 gallons per minute up to 84.92 acre-feet per year of Sheafman Creek water from April 1 through October 31 of each year pursuant to claimed water rights 76H-W017858-00 and 76H-W019709-00 as documented by the Statement of Claim to Existing Water Right, Authorization to Change Existing Water Right issued February 22, 1990, and In re Application G15928-76H by Samuel T. and Virginia Allred, Final Order, February 5, 1990. The purpose of use of W015930 may be changed from stock watering to municipal. The purpose of use of W017858 and W019709 may be changed from irrigation to municipal. The point of diversion of all three water rights may be changed from the Heckathorn Ditch in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28 to a headgate and catch basin in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of use of all three rights may be changed from 35 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 28 and 5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 7 North, Range 21 West, to the city limits of the City of Pinesdale which includes parts of Sections 19, 20, 27, 28, 33, and 34, Township 7 North, Range 21 West, Ravalli County, Montana.

A. This authorization is subject to all prior existing water rights in the source of supply. Further, this authorization is subject to any final determination of existing water rights, as provided by Montana law.

B. Appropriator shall authorize and allow the remaining first water right appropriators, who remove water from the Burke Ditch at a point below the divider box therein, to divert the 6.7 miner's inches of first right water, claimed under Statements of Claim 76H-W017858-00 and 76H-W019709-00, but for which no authorization to change has been granted, at the original point of diversion for continued use by said appropriators as carriage water for their water rights.

C. The water right changed by this authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

D. This authorization is subject to the condition that the Appropriator shall install and maintain adequate continuously reading flow measuring device in order to allow the flow rate and volume of all water diverted pursuant to water rights W015930, W017858, and W19709 to be recorded. The devices must be placed so that water cannot be diverted without being measured and recorded. Bypass or pressure relief lines, if necessary, must convey water through an alternative measuring mechanism or to the source. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of

time, and shall submit said records on demand and by November 30 of each year to the Missoula Water Resources Regional Office.

E. As long as the diversion and conveyance system continues to employ the open release of water into the infiltration medium, no more than 134.36 gpm up to 76.52 AF per year of water can be conveyed by the infiltration gallery collection pipe into the municipal distribution system under water rights W015930, W017858, and W019709 as measured by the infiltration gallery measuring device(s).

F. If, at any time after this authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show cause why the authorization should not be modified or revoked. The Department may then modify or revoke the authorization to protect existing water rights or allow the authorization to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

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

liability for damage caused by the Appropriator's exercise of this authorization.

H. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues.

Any 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 23<sup>rd</sup> day of April, 1992.



John E. Stults, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

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 23<sup>rd</sup> day of April, 1992, as follows:

Unified Industries  
c/o Jess Nuttall  
P.O. Box 73  
Pinesdale, MT 59841

John O'Mailia  
Catherine O'Mailia  
369 Sheafman Creek Road  
Victor, MT 59875

Dan Browning  
Lorraine Browning  
544 Bourne Lane  
Victor, MT 59875

Charles K. Wheat  
Shirley A. Wheat  
447 Sheafman Creek Road  
Hamilton, MT 59840

Charles Prausa  
411 Sheafman Creek Road  
Hamilton, MT 59840

Chuck Gividen  
Ronda Gividen  
449 Knapweed Lane  
Victor, MT 59875

USA Fish Wildlife Service  
Wilber Ladd  
P.O. Box 25486 Denver Federal  
Center  
Denver, CO 80225

Miles S. Knutson  
1219 Creek View Lane  
Victor, MT 59875

John Bertolero  
Donna Bertolero  
688 Sheafman Creek Road  
Hamilton, MT 59840

Les Golden  
Agnes Golden  
1220 Creek View Lane  
Victor, MT 59875

Ray Gramza  
Darlene Gramza  
1187 Creek View Lane  
Victor, MT 59875

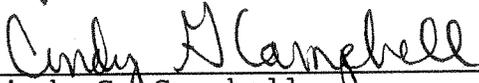
Henry M. Winters  
Jeannette E. Winters  
399 Sheafman Creek Road  
Hamilton, MT 59840

John Lee Ryan, Sr.  
Marjorie G. Ryan  
2814 27th Ave. West  
Seattle, WA 98199

Ted J. Doney  
Doney, Crowley & Shontz  
P.O. Box 1185  
Helena, MT 59624-1185

John Lee Ryan, Jr.  
Roger Whitney Ryan  
Barbara Jean Ryan  
708 Sheafman Creek Road  
Hamilton, MT 59840

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806

  
Cindy G. Campbell  
Hearings Unit Legal Secretary