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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 73697-43B AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(W)193768-43B BY THE CITY OF LIVINGSTON	))))))	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 13, 1990, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G(W)193768-43B is hereby granted to change the point of diversion to the NE¼NW¼SW¼ of Section 24, Township 2 South, Range 9 East, Lot 1-B, Block 5 of Werner Addition and Application for Beneficial Water Use Permit No. 73697-43B is hereby granted to appropriate 213.4 gallons per minute up to 0 acre-feet of water per year for municipal purposes in the City of Livingston at a point in the NE¼NW¼SW¼ of Section

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24, Township 2 South, Range 9 East, Lot 1-B, Block 5 of Werner Addition, all in Park County, Montana.

The Authorization to Change Appropriation Water Right No. G(W)193768-43B and Permit No. 73697-43B are subject to the following:

A. The Permit and Authorization are subject to all prior water rights in the source of supply. Further, these water rights are subject to any final determination of existing water rights, as provided by Montana law.

B. This well shall be constructed so it will not allow water to be wasted, or contaminate other water supplies or sources. The final completion of the well must include an access port of at least .50 inch so the static water level may be measured.

C. Permit No. 73697-43B is used in conjunction with Authorization to Change No. G(W)193768-43B. The combined appropriation as granted shall not exceed a total of 725 gallons per minute up to 821 acre-feet of water per year.

D. These water rights are subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records no later than November 30 of each year to the Bozeman Water Resources Field Office.

E. If at any time after these water rights are issued, a

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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 applicant to show cause why the Permit and Authorization should not be modified or revoked. The Department may then modify or revoke the permit and authorization to protect existing rights or allow the water rights to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

F. Issuance of the Permit and Authorization by the Department shall not reduce the City of Livingston's liability for damages caused by the exercise of these water rights, nor does the Department acknowledge any liability for damages caused by exercise of the permit and authorization, even if such damage is a necessary and unavoidable consequence of the same.

G. The approval of Authorization to Change No. G(W)193768-43B is not to be construed as recognition by the Department of the water right involved. This right is subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

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

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the Final Order.

Dated this 10 day of October, 1990.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 10th day of October, 1990 as follows:

City of Livingston
Robert Jovick, Attorney
414 East Callender
Livingston, MT 59047

Tommy Ray Jerde
701 South 13
Livingston, MT 59047

Gerald D. & Gwen Norskog
527 N. 7th E.
Livingston, MT 59047

Elmer A. Hogstad
630 So. 13th St.
Livingston, MT 59047

Park Road Trailer Court
c/o Harold R. Crowell
Rt. 62, Box 3061
Livingston, MT 59047

David G. Colmey
Box 521
Livingston, MT 59047

Warren W. Harper, Sr.
Gayle J. Harper
Rt. 62 Box 3020
Livingston, MT 59047

Fabian & Martha Schnablegger
Box 553
Livingston, MT 59047

J & L Country Store Exxon
Rt. 62, Box 3201
Livingston, MT 59047

Philip C. Young
708 South 13th St.
Livingston,MT 59047

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Neil L. & Jessie L. Harmon
711 South 13th
Livingston, MT 59047

Scott Compton, Field Manager
Bozeman Water Resources
Field Office
111 N. Tracy
Bozeman, MT 59715

Cindy G. Campbell
Hearings Unit Secretary

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 73697-43B AND THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(W)193768-43B BY THE CITY OF LIVINGSTON	))))))	PROPOSAL FOR DECISION

* * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matters on August 14, 1990, in Livingston, Montana.

Applicant City of Livingston, hereafter City or Applicant, appeared at the hearing by and through its attorney, Robert Jovick.

Roger Miller, Consulting Hydrogeologist, appeared as a witness for the Applicant.

David Mosser, Professional Engineer with Morrison-Maierle/CSSA, Inc., appeared as a witness for the Applicant.

John Orndorff, City Manager, appeared as a witness for the Applicant.

Clint Tinsley, Water Systems Foreman, appeared as a witness for the Applicant.

Objector Fabian Schnablegger appeared pro se.

Objector Elmer Hogstad appeared pro se.

Objector Philip Young appeared pro se.

Objectors Neil L. and Jessie L. Harmon appeared pro se.

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Objectors David G. Colmey, Tommy Ray Jerde, Warren W.(Sr.) and Gayle J. Harper, Gerald D. and Gwen Norskog, J & L Country Store Exxon, and Park Road Trailer Court did not appear at the hearing, therefore their objections are dismissed.

Jan Mack, Water Right Specialist III with the Bozeman Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter, Department, appeared at the hearing.

EXHIBITS

The Applicant introduced 11 exhibits for inclusion in the record.

Applicant's Exhibit 1 is a 12 page document entitled Document 00300, Bid Form, Bid for Water Well Improvements - 1990 for City of Livingston, Montana.

Applicant's Exhibit 2 is a well design report prepared by Morrison-Maierle/CSSA, Inc.

Applicant's Exhibit 3 is a well log report for the City's test well.

Applicant's Exhibit 4 is a graph showing drawdown during pumping for periods of 1,000, 2,000, and 4,000 minutes at 750 gallons per minute (gpm).

Applicant's Exhibit 5 consists of three pages. The first page is the title page of a report prepared by Envirocon, Inc., to remedy the petroleum contamination resulting from spills at the Livingston Rail Yard. Pages 13-9 and 13-10 from that report which contain a discussion of the hydrogeologic characteristics of the area are the remaining two pages.

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Applicant's Exhibit 6 is a diagram showing the drawdown in Observation Well No. 3 located 326 feet from the test well which was being pumped at a rate of 750 gpm.

Applicant's Exhibit 7 is a diagram showing drawdown in Observation Well No. 1 located 10.5 feet from the test well which was being pumped at a rate of 750 gpm.

Applicant's Exhibit 8 is a diagram showing drawdown in Elmer Hogstad's well which is located 123 feet from the test well. The test well was being pumped at a rate of 750 gpm.

Applicant's Exhibit 9 is a copy of a letter from Philip C. Young to Scott Compton, Field Manager of the Bozeman Water Resources Field Office, stating that an agreement had been reached and he no longer objected to the well at the Livingston Clinic Site.

Applicant's Exhibit 10 is a copy of the agreement between Philip C. Young and the City.

Applicant's Exhibit 11 is a copy of an agreement between Neil, Jessie, Jerrold, and Cheri Harmon and the City.

All Exhibits were received into the record without objection.

All parties examined the Department files which were received into the record in their entirety without objection.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion,

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impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions do not apply in the present matter.

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

2. The Application for Change of Appropriation Water Right was duly filed with the Department on January 11, 1990, at 10:15 a.m. The Application for Beneficial Water Use Permit was duly filed with the Department on February 22, 1990, at 10:40 a.m.

3. The pertinent portions of these Applications were published in The Livingston Enterprise on April 4, 1990.

4. The Applicant seeks to change the point of diversion for Water Right No. W193768-43B. Application No. 73697-43B is to withdraw water at an increased rate of 213 gallons per minute. These Applications will be combined for one well. The volume of water appropriated will not be increased. The total withdrawal of the proposed well will be 725 gpm up to 821 acre-feet per year. The proposed places of use are: the W½ of Section 7 and the W½ of Section 18, both in Township 2 South, Range 10 East; the S½ of Section 12; all of Section 13; the S½ of Section 14; the E½ of Section 23; and all of Section 24; all in Township 2 South, Range 9 East in Park County. The proposed places of use

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are within the City's public right of way and jurisdiction. (Department file and testimony of David Mosser.)

5. Water Right No. W193768-43B is for a well originally located in the SW¼SE¼NW¼ of Section 18, Township 2 South, Range 10 East, in Park County. The claimed priority date of this water right is February of 1955. This well is referred to as the "L Street well" throughout the hearing. (Department file.)

6. The "L" Street well was 41 feet deep and produced 511.65 gpm up to 821 acre-feet per year. This well has been abandoned due to contamination by petroleum chemical spills at the Livingston Rail Yard. The proposed well will be located in the same aquifer as the "L" Street well. The possibility of the new well becoming polluted from the same source of pollution is remote even though the new well is in the same aquifer because the new well is up-gradient from the pollutant source. (Testimony of David Mosser and Roger Miller.)

7. The proposed new point of diversion would be located in Lot 1-B, Block 5, Werner Addition; NE¼NW¼SW¼ of Section 24, Township 2 South, Range 9 East in Park County. (Department file.)

8. A pump test and well monitoring have been performed to determine the zone of influence of the proposed well. The test well, 44 feet deep and 10 inches in diameter, was completed with a 12 foot, 10 inch screen. Observation Well No. 1 is located 10.5 feet from the test well. Observation Well No. 2 is located 123 feet from the test well. Observation Well No. 3 is located

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326 feet from the test well. The drawdown in Observation Well 2, after 4,000 minutes of pumping at 750 gpm, was 3.24 feet. At 3,000 minutes the drawdown curve for Observation Well No. 2 became flatter indicating the establishment of steady-state, equilibrium conditions in which the cone of depression simply expanded until it intercepted sufficient groundwater flow to sustain the well discharge. The final drawdown in the observation wells after 4,100 minutes of well discharge were: 7.25 feet in Observation Well No. 1; 3.24 feet in Observation Well No. 2; and 1.39 feet in Observation Well No. 3. The cone of depression expanded to 650 feet from the test well after 4,000 minutes of pumping at 740 gpm. Outside the 650 feet edge of the cone of depression, the drawdown is zero. (Department file, Applicant's Exhibit 2, and testimony of Roger Miller.)

9. The groundwater level in the Livingston area fluctuates as much as five feet with the seasons. When the groundwater declines in the fall and winter, the new well will most likely be pumped at a rate of 600 gpm. The period of peak water use by the City and the surrounding well owners is in the spring and summer when the groundwater level is at its highest. At no time, except in the case of fire, would the new well be operated continuously. The normal operation period is approximately 12 hours or 720 minutes at a time. (Testimony of Roger Miller and Clint Tinsley.)

10. The Department of Health and Environmental Sciences has approved the plans for the proposed well and distribution system. (Testimony of David Mosser.)

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11. The City had six wells before the contamination problem. Since the contamination, the L Street and Q Street wells have not been used. This has caused the City to ration water last summer (1989) and some this year (1990). (Testimony of David Mosser.)

12. Objector Young stated that he had monitored his well during the test period. He stated that his water level is usually 12 feet below the surface and that during the test, the water level declined three additional feet. However, upon questioning, it was determined the well had been used for regular domestic uses during the test.

13. The proposed production well will be 55 feet deep. The well will be finished in bedrock and a screen 12 feet in length installed. The pump which is five feet long will be installed above the screen. The top of the pump will be at 36 feet and the bottom at 41 feet. Shutoff probes will be installed in the well at a depth of 35 feet. If the water level in the well drops to 35 feet, the pump will automatically shut off and will not come back on until it is manually reset. (Testimony of David Mosser.)

14. The City offered remedial agreements to all the objectors in the event the new well did adversely affect their water rights. Philip Young and Neil L. and Jessie L. Harmon have signed such agreements. Jessie L. Harmon stated at the hearing that she still objected on the basis that if the City took their water and connected them with the City system as part of their agreement, she would have to buy her water back. Mrs. Harmon

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stated that she would not object to paying a set rate for water, but she did not feel they should be charged the regular City rates. (Testimony of John Orndorff and Jessie Harmon.)

15. Objector Schnablegger stated he did not sign an agreement because he was concerned about the length of time between the possible loss of water and the City's response to such loss. He also voiced a concern about possible pollution of the surrounding wells from an active septic tank up-gradient from the proposed City well. Roger Miller stated they had considered the possibility of pollution by septic tanks and had concluded there were no active septic tanks in the area not knowing there was one that if installed incorrectly could cause a problem. David Mosser stated that they had sampled the water after three consecutive days of pumping and had it tested for pollutants, including those caused by septic tanks. No pollutants of that nature were found.

16. Objector Young stated his well is 38.5 feet deep and the pump is approximately 12 feet higher or about 26.5 feet deep. He stated that his pump had been lower but lightning struck the well disabling the pump. The well caved in causing a sanding problem and the new pump had to be raised approximately 12 feet. Objector Schnablegger stated his well is approximately 40 feet deep with the check valve located at approximately 34 feet. Objector Hogstad stated his well is approximately 37.5 feet deep and the pumping level is approximately three feet above the bottom which would be 34.5 feet. Objectors Harmon stated their

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well is approximately 45 feet deep. Mrs. Harmon said that when they received their last listing, it said the well was 54 feet deep but she thought perhaps they had reversed the numbers. The Harmons' check valve is three feet above the bottom of the well which would be 42 feet.

17. The aquifer in the subject area is 42 feet thick. The top of the aquifer is approximately 15 feet below ground surface and the bottom of the aquifer is approximately 57 feet below the surface. (Department file.)

18. There are no planned uses or developments for which a permit has been issued or for which a reservation has been granted which the proposed project may interfere with unreasonably. (Department records.)

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 a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

(a) there are unappropriated waters in

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the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence the following criteria set forth in § 85-2-402 (2), MCA, 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.

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(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 us to be put to beneficial use.

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

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 10 and 13.

7. The Applicant does not have possessory interest in the proposed places of use, however, as part of its governmental duties, it is required to supply water to the residents of the City. See Finding of Fact 4.

8. There are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to beneficial use, in the amount the City seeks to appropriate, and during the period the City seeks to appropriate.

The new well will be in the same aquifer as the "L" Street well. The volume of water appropriated will be the same. Although the rate of withdrawal will be increased, test pumping indicates the water is available at the increased rate. See Findings of Fact 6, 8, 9, 11, 16, and 17.

9. The water rights of prior appropriators will not be adversely affected. There was no alleged adverse effect to other well owners during the pumping test which was conducted over a

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period of 4,000 minutes or almost three days, much longer than the production well will be pumped ordinarily. Objector Young was the only objector to mention any effect to his well during the test, but he did not allege adverse effect; he merely stated that the water level declined three feet. Objector Young has the least pumping depth of all the objectors who appeared at the hearing. Even with the additional three feet of drawdown in Objector Young's well, there was still 23.5 feet of water in the well and 11.5 feet of water above his pump. Furthermore, some of the drawdown experienced by Objector Young was likely to have been the effect of domestic use while the test was in progress. See Findings of Fact 8, 9, 12, and 16.

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 18.

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, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G(W)193768-43B is hereby granted to change the point of diversion to the NE¼NW¼SW¼ of Section 24, Township 2 South, Range 9 East, Lot 1-B, Block 5 of Werner Addition and Application for Beneficial Water Use Permit No. 73697-43B is hereby granted to appropriate 213.4 gallons per

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minute up to 0 acre-feet of water per year for municipal purposes in the City of Livingston at a point in the NE¼NW¼SW¼ of Section 24, Township 2 South, Range 9 East, Lot 1-B, Block 5 of Werner Addition, all in Park County, Montana.

The Authorization to Change Appropriation Water Right No. G(W)193768-43B and Permit No. 73697-43B are subject to the following:

A. The Permit and Authorization are subject to all prior water rights in the source of supply. Further, these water rights are subject to any final determination of existing water rights, as provided by Montana law.

B. This well shall be constructed so it will not allow water to be wasted, or contaminate other water supplies or sources. The final completion of the well must include an access port of at least .50 inch so the static water level may be measured.

C. Permit No. 73697-43B is used in conjunction with Authorization to Change No. G(W)193768-43B. The combined appropriation as granted shall not exceed a total of 725 gallons per minute up to 821 acre-feet of water per year.

D. These water rights are subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of

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time and shall submit said records no later than November 30 of each year to the Bozeman Water Resources Field Office.

E. If at any time after these water rights are 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 applicant to show cause why the Permit and Authorization should not be modified or revoked. The Department may then modify or revoke the permit and authorization to protect existing rights or allow the water rights to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

F. Issuance of the Permit and Authorization by the Department shall not reduce the City of Livingston's liability for damages caused by the exercise of these water rights, nor does the Department acknowledge any liability for damages caused by exercise of the permit and authorization, even if such damage is a necessary and unavoidable consequence of the same.

G. The approval of Authorization to Change No. G(W)193768-43B is not to be construed as recognition by the Department of the water right involved. This right is subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

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NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of September, 1990.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposed Order was duly served upon all parties of record at their addresses this 13th day of September, 1990, as follows:

City of Livingston
Robert Jovick, Attorney
414 East Callender
Livingston, MT 59047

David G. Colmey
Box 521
Livingston, MT 59047

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Tommy Ray Jerde
701 South 13
Livingston, MT 59047

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