

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
CHANGE OF APPROPRIATION WATER RIGHT ) FINAL  
NO. G(P)3049-00-s76D BY GLEN P. AND ) ORDER  
ROSE J. WOOD )

\* \* \* \* \*

The Proposal for Decision in this matter was issued and served on all parties on December 31, 1990. The Hearing Examiner proposed that Application for Change of Appropriation Water Right No. G(P)3049-00-s76D be granted to Glen P. and Rose J. Wood with conditions. Objector Montana Department of Fish, Wildlife and Parks (DFWP) filed Exceptions to the Proposal for Decision and Request for Oral Argument with the Department of Natural Resources and Conservation (Department) on February 7, 1991, which was within the time period allowed by the Hearing Examiner in his January 22, 1991, Notice of Extension of Time to File Exceptions. An Oral Argument hearing was held April 16, 1991 in Helena, Montana, before John E. Stults, Department Hearings Officer, who had been appointed to make the final decision in this matter. Present at the Oral Argument hearing were John Stults; Faye Bergan, Department Legal Counsel; Curtis Larsen, Agency Legal Counsel for Objector DFWP; and Liter Spence, staff member of the DFWP Fisheries Division.

This matter has been proceeding jointly with and parallel to the separate but intimately related case In the Matter of Application to Change Appropriation Water Right No. G(P)3049-01-s76D

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by Montana Department of Fish, Wildlife and Parks. The two cannot be easily understood separately; therefore any reading or analysis of the Proposal for Decision and Final Order in the above-entitled matter should include reading or analysis of the same documents in Montana Department of Fish, Wildlife and Parks.

Parties were given the opportunity to submit post-hearing briefs on specific questions by May 25, 1991. Such a brief was timely submitted by Objector DFWP.

I. DFWP take exception to Finding of Fact 5 in the Proposal for Decision contending that it incorrectly states the acreage figure Applicants wish to irrigate as being 129 acres. Finding of Fact 5 is correct. It is a statement of the acreage figure identified by Applicants on their application form, and as published in the public notices of this Application. The Proposal for Decision also correctly states, at Finding of Fact 13 and Conclusion of Law 9, the subsequent reduction in acreage made by Applicants in their water right transfer document down to 89 acres. The reduced figure was used by the Hearing Examiner in the Proposed Order. Finding of Fact 5 will not be changed.

II. DFWP take exception to Finding of Fact 13 contending that it incorrectly states the date Objector transferred a portion of the permit to Applicants, and transposes the volume amounts allocated between the parties. The Proposal for Decision states that DFWP transferred a portion of their water right to Applicants on June 14, 1989. Objector DFWP state in their exception that Woods signed the transfer document on April 12,

1989, and that it became effective on May 23, 1989, thereby implying one of these dates is the correct date. According to the Department's records, a Transfer Certificate (Form 608 R7/87) (a copy of which was in the Department's file on this Application when it was made a part of the record) was filed with the Department on June 14, 1989. It is clear that the Hearing Examiner was referring to the date the water right transfer was recorded with the Department pursuant to §§ 85-2-421 through 424 and 426, MCA. The date as given by the Hearing Examiner in Finding of Fact 13 is correct and will not be changed.

The volume amounts identified by the Hearing Examiner in Finding of Fact 13 are transposed. The Addendum to Water Right Transfer Certificate for Apportioned Water Right (Form 608A R7/87) at Item A.3. states buyers', i.e., Applicants', portion of the volume of the water right is 101.64 acre-feet (AF). At Item B.2. it states seller's, i.e., DFWP's, portion to be 178.36 AF. The figures on Form 608A are confirmed on a sheet attached to the Confirmation Deed and Settlement Agreement recorded by the Lincoln County Clerk and Recorder at the request of DFWP. Copies of these documents were in the Department's file on this Application when the file was made a part of the record. Nothing in the record indicates that the volume figures should be attributed other than they are on the Settlement Agreement. The fourth sentence of Finding of Fact 13 is hereby changed to read: "The volume was split 178.36 acre-feet for DFWP and 101.64 acre-feet for Mr. and Mrs. Wood."

III. DFWP except to Conclusion of Law 8, arguing that it is incorrect to say that in order to increase the acres to be irrigated in a new place of use, some of the irrigated acreage in the old place of use must be retired. DFWP justify their argument by saying the intent of the parties was to do otherwise. In their brief they say the parties do not propose to consume more water than has been consumed historically. They do not indicate whether evidence in the record supports this contention. They do provide case law which they believe allows for expansions in the place of use of a water right through a change as long as other appropriators are not adversely affected.

The evidence in the record, as stated by the Hearing Examiner at Finding of Fact 14, is that irrigating both the old and new places of use would use proportionately equal amounts of water acre for acre. This means that if more acres are irrigated in the new place of use than are retired in the old place of use more water will be used, intentions notwithstanding. There is nothing in the record that contradicts the Hearing Examiner's determination of this fact. A finding of fact of a hearing examiner may not be rejected or modified without a determination from a review of the complete record that it was not based on competent substantial evidence. Mont. Code Ann. § 2-4-621(3) (1979). Furthermore, a hearing examiner's finding of fact can only be reversed if it is clearly erroneous. See Billings v. Billings Firefighters Local No. 521 200 Mont. 421 (1982). Finding of Fact 14 is not clearly erroneous.

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Conclusion of Law 8 means the Hearing Examiner has interpreted the law to forbid a change of a water right if it would result in an increase in the water used. DFWP question this conclusion. DFWP argue that only adverse effects to other appropriators as a consequence of increasing the irrigated acreage in a change can prohibit such a change, and that if the water being appropriated is conveyed out of the drainage of the source, then adverse effect is impossible. This analysis may be true, but only if there is evidence in the record showing that the increase in irrigated acres will not mean an increase in the amount of water diverted from the source. This is not a mechanistic rule by which to deny changes; it is an application of §§ 85-2-301(1) and 302, MCA. DFWP has assumed that Conclusion of Law 8 is a finding of adverse effect. It is not. Conclusion of Law 8 in conjunction with Conclusion of Law 9 are a finding the parties have not provided substantial credible evidence the irrigation systems, which would exist if the change were authorized, would be operated without more water being diverted from the source.

The record in this matter provides nothing indicating how the parties intend to expand the acres irrigated under Permit 3049-s76D from 175.25 to 245.25 without using more water. Permit 3049-s76D allows up to 280 AF per year to be diverted from Fallon Creek because that is the amount of water the Department and original Permittee determined is reasonably needed to irrigate the 175.25 acres and reasonably available in Fallon Creek.

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Furthermore, the appropriation was verified to have been perfected as permitted, i.e., having diverted no more than 280 AF per year. Finding of Fact 14 determines the new place of use to require, acre for acre, the same amount of water for irrigation. Since the record contains no evidence of some means of increasing efficiencies, some means of salvaging water reasonably lost in the existing use, or some other method of making the present volume accomplish more productivity, the only conclusion that can be reached is that implied in Conclusion of Law 8, i.e., more water is going to be diverted from the source.

In the Introduction section of DFWP's May 24, 1991, Brief they state the Confirmation Deed and Settlement Agreement was an attempt to settle the issue between Applicant and DFWP without the necessity of a hearing, and all issues in this case become moot if Woods do not perfect the change in place of use by April 12, 1992, as required under the settlement agreement. And that to date the Woods are not using any of the water. This implies for Woods to live up to the terms of the agreement they should have been implementing its terms by putting the new place of use under irrigation. Under the Montana Water Use Act, however, the Woods cannot implement a change to their water right until authorized to do so by the Department in compliance with statutory procedures. See Mont. Code Ann. § 85-2-402 (1989).

This misunderstanding is carried through into the Settlement Agreement section of the Brief, where, the long held principle set down in Castillo v. Kunneman and Sherlock v. Greaves, i.e.,

that water rights are property rights which may be disposed of apart from the land, is used by DFWP to justify actions that go beyond the simple severance of a water right from the land on which it has been used. What Applicant proposes is an expansion of the amount of acreage irrigated with the severed water right. Closely following the quote in Sherlock v. Greaves cited by DFWP, the court goes on to say:

One who purchases the water right independent of the land to which it was theretofore appurtenant does not hereby enlarge or extend the right, and one who so purchases such a right is entitled to do only those things which the original owner of the right might have done.

Id. at 218.

In DFWP's Brief at page seven the statement is made that under the settlement agreement entered into by Applicants and DFWP, both parties combined would not be diverting or consuming more water than that to which the permit as verified entitles them. This statement does not comport with the findings of the Hearing Examiner. The Proposal for Decision at Finding of Fact 14 finds that acre per acre the new place of use will require the same amount of water as the old, and Conclusion of Law 8 specifically states that any increase in irrigated acreage will result in an increase in the amount of water used. There is no evidence in the record contradicting these findings. Neither DFWP nor Applicants have shown how the record in this case can support a finding that the contemplated increase in irrigated acreage would not increase the amount of water diverted from the source.

In their Brief and in their oral arguments, DFWP indicated they are opposed to any reduction in the acreage under irrigation on their place of use, i.e., the place of use as permitted under Permit 3049-s76D with the change authorized by In re Application No. 3049-01-s76D by Montana Department of Fish, Wildlife and Parks, Final Order. That being the case, the last two sentences, as well as the parenthetical sentence, in Conclusion of Law 8 cannot be implemented and are moot. Therefore, said sentences will be deleted and replaced with the following:

An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. See Mont. Code Ann. § 85-2-301 (1989); see also Featherman v. Hennessey 43 Mont. 310. 115 P. 983 (1911). Therefore, the authorization to change cannot be granted for greater than 19 acres of irrigation on the new place of use.

IV. Given the record in this matter, the Hearing Examiner attempted to develop a system of conditions and restrictions for the implementation of the change of Permit 3049-s76D which would provide a means of ensuring that if the new place of use is expanded, additional water would not be diverted from Fallon Creek. The Hearing Examiner's proposed conditional authorization requires irrigated acres of the old place of use be reduced in proportion to expansion of irrigated acres in the new place of use. His proposed restriction conjoins the two severed sections of the Permit under a rotation system to alternate use of the water between the two separate places of use.

An expansion of the acres of irrigation without increasing the amount of water diverted from the source can be accomplished,

and is most often accomplished through two techniques: 1) water, which was not unreasonable waste, has been salvaged from the former system (see In re Application No. G34573-76H by Carrie M. Grether), or 2) there is a proportional reduction in acreage of the old place of use to be irrigated under the portion of the water right remaining appurtenant to the old place of use. In this matter the parties have not provided evidence the irrigation of the places of use after the change will be somehow more efficient or operated in such a way that there will not be an increase in the amount of water diverted from the source. To the contrary, DFWP have indicated that they are opposed to any reduction in the acreage under irrigation on their place of use. DFWP also takes exception to the rotation system proposed by the Hearing Examiner. DFWP states it is the intent of the parties to develop a schedule for use of the system, but that the Department should not impose one upon them. The latter part of this statement is consistent with past rulings of the Department. See In re Application No. 58133-s410 by DeBruycker. The former part of the statement, however, is another indication that the record is without substantial credible evidence that the system will be operated to avoid appropriating more water than parties are entitled to under the respective portions of Permit 3049-s76D. Conclusion of Law 6 finds that Applicants have met the criterium for an adequately operated diversion and conveyance system. This interpretation is a narrow determination of the design adequacy of the physical structures based on Finding of Fact 9.

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Conclusion of Law 6 is a determination that Applicant has proved the system is capable of controlling the amount of water it diverts and is therefore administrable. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale.

Without evidence that the system will not divert more water than was diverted under Permit 3049-s76D, and in light of DFWP's refusal to allow a reduction of the irrigated acreage on their place of use, the Department is unable to authorize Applicant to change the permitted appropriation such that the new place of use may be expanded beyond the bounds established at the time the appropriation was perfected. The change must be limited to the 19 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 37 North, Range 27 West, Lincoln County, Montana. The place of use in paragraph one of the Proposed Order is modified accordingly.

V. In light of DeBruycker, the restriction in paragraph B of the Proposed Order will not be imposed. However, because the proposed change and the ownership transfer of Permit 3049-s76D indicate an undivided interest in use of the flow of the original appropriation rather than a proportional division of the flow, a restriction must still be placed on the change authorization to ensure that the permitted flow and volume are not exceeded.

Paragraph B is hereby changed to read:

By May 15 of each year, the respective owners of Permit to appropriate Water Nos. 3049-00-s76D and 3049-01-s76D shall jointly submit to the Kalispell Water Resources Regional Office an operating schedule for the undivided use of the 1416 gallons per minute of flow allotted as an undivided interest between them to confirm that said

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use will be within the limits of their respective Permits and Change Authorizations. Furthermore, Permittee must install and maintain an adequate flow metering device capable of allowing the flow rate and volume of water conveyed onto the authorized place of use to be recorded. Permittee shall keep a written record of the flow rate and volume of all waters conveyed onto the authorized place of use, including the period of time, and shall submit said records to the Kalispell Water Resources Regional Office by November 30 of each year or upon request.

VI. In reviewing the entire record in this matter, an inconsistency and error in the amount of flow rate to be changed has become apparent. The application form filed by Applicants states 1416 gallons per minute (gpm) will be changed to the new place of use. The public notices of the Application also state 1416 gpm is the amount of flow that would be changed. In an October 2, 1987, letter the Department asked Applicants to notify them immediately of any errors in the notices. The record contains no evidence that the figures in the notices and application form were in error.

An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would

be inherent in an amendment to increase the rate of diversion or increase the volume of water diverted. See In re Application No. 50272-g42M by Joseph F. Crisafulli. Altering the Application to increase the flow rate to be changed by 300 gpm or 21 percent, i.e., from 1416 gpm to 1716 gpm, is a significant change that may suggest an increased burden on the source. Nevertheless, the Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1989). However, in this matter, the record contains nothing from any party or the Hearing Examiner about this increase. Hence, there is nothing with which the Department can reason, and nothing upon which to base an opinion.

For these reasons, an increase in the flow rate to be changed from the 1416 gpm applied for and published to 1716 gpm cannot be allowed. The change must not be authorized for a flow rate greater than 1416 gpm. The flow rate limitation of the change in paragraph one of the Proposed Order is modified accordingly.

VII. The error discussed in II, above, is repeated and compounded in other areas of the Proposal for Decision: Conclusion of Law 9, paragraph one of the Proposed Order, and paragraph B of the terms, conditions, restrictions, and limitations. Paragraph B has been changed such that the error in the Proposed Order has been overwritten.

Because of the finding in section III, above, limiting the irrigated acreage on the new place of use to 19 acres, the volume

and acreage computations in Conclusion of Law 9 no longer apply. The underlying conclusions relating to water use and irrigation management, however, are still valid (see section III, above). Therefore, the volume limitation of the change must be computed based on these conclusions and the new acreage figure. Conclusion of Law 9 is hereby changed to read:

The water use is proportional to the area irrigated (see Finding of Fact 14). Mr. and Mrs. Wood have a 10.84% share of the area irrigated. Since the transfer does not mention a change in water use or irrigation management, the same water use practices are assumed to continue. The need for full irrigation supply is supported by an undivided interest in the flow rate to Mr. and Mrs. Wood. The area of irrigation and volume of water proposed by Mr. and Mrs. Wood are greater than the historical use (see Conclusion of Law 8). The area of irrigation under this authorization for change will be 19 acres. The total volume perfected under Permit 3049-s76D is 280 AF per annum. The proportional share of the volume is 30.36 AF per annum, i.e., 10.84% x 280 AF/annum.

The change must not be authorized for a volume greater than 30.36 AF per annum. The volume limitation in paragraph one of the Proposed Order is modified accordingly.

VIII. Paragraph D of the Proposed Order appears to be a restatement of a condition already on Permit 3049-s76D. Upon a thorough review of the full record, there appears to be no specific element of the proposed change requiring this condition. Because it appears to be duplicative of the existing condition, and because it may cause confusion in future administration of this change, paragraph D is deleted. Paragraph E of the Proposed Order is relettered so as to maintain consecutive lettering.

IX. DFWP contends that because a water right is a property right, the Department is bound to honor the intent of the owners as expressed in their change of ownership transactions and contracts. Section 85-2-403, MCA, cited by DFWP in the same context as Castillo v. Kunneman (see section III, above), also contains language limiting how ownership of a water right can be transferred. At subsection (2) it says:

Failure to comply with the provisions of 85-2-402 does not render a conveyance or reservation of a water right void, but the right may not be used until the department has approved the change. (emphasis added)

It is clear from this language that the legislature intends the protections they have enacted into law should take precedence over the intent of the parties in a transfer of ownership of a water right. It seems clear the purpose of the criteria for authorization of a change of an appropriation water right is to ensure that actions of parties to a change do not harm others not engaged in the transaction or do not in some other way progress contrary to law, such as by violating § 85-2-301, MCA.

Based upon the record herein, the Department hereby modifies the Proposal for Decision as stated above, adopts the Proposal for Decision as modified, and issues the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. G(P)3049-00-s76D by Glen P. and Rose J. Wood is hereby granted to change Permit No. 3049-s76D as follows: to change the point of diversion of 1416 gallons per minute up to

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30.36 acre-feet per annum from Fallon Creek in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West to the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West; and to change the place of use for that amount of water for irrigation of 19.00 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 37 North, Range 27 West, Lincoln County, Montana.

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

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

B. By May 15 of each year, the respective owners of Permit to Appropriate Water Nos. 3049-00-s76D and 3049-01-s76D shall jointly<sup>1</sup> submit to the Kalispell Water Resources Regional Office an operating schedule for the undivided use of the 1416 gallons per minute of flow allotted as an undivided interest between them to confirm that said use will be within the limits of their respective Permits and Change Authorizations. Furthermore, Permittee must install and maintain an adequate flow metering device capable of allowing the flow rate and volume of water conveyed onto the authorized place of use to be recorded. Permittee shall keep a written record of the flow rate and volume

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<sup>1</sup> See In re Application No. G(P)3049-01-s76D by Montana Department of Fish, Wildlife and Parks, Final Order, October 23, 1991, at page 11.

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of all waters conveyed onto the authorized place of use, including the period of time, and shall submit said records to the Kalispell Water Resources Regional Office by November 30 of each year or upon request.

C. Issuance of this Change Authorization by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Change Authorization, nor does the Department, in issuing this Change Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

D. The issuance of this Change Authorization by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest System lands to exercise this Change Authorization.

NOTICE

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

Dated this 23<sup>rd</sup> day of October, 1991.



John E. Stults, Hearings Officer  
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 Final Order was duly served upon all parties of record at their address or addresses this 24<sup>th</sup> day of October, 1991, as follows:

Glen and Rose Wood  
3476 Hwy 287  
Sheridan, MT 59749

Curtis E. Larsen  
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Cindy G. Campbell  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
CHANGE OF APPROPRIATION WATER RIGHT NO. ) PROPOSAL FOR DECISION  
3049-00-s76D BY GLEN P. AND ROSE J. WOOD )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 19, 1988 at Helena, Montana.

Applicants, Glen P. and Rose J. Wood, appeared in person.

The Objector, Montana Department of Fish, Wildlife & Parks (hereinafter referred to as DFWP) appeared by and through counsel, Robert Lane. Mr. Lane appeared in place of DFWP staff attorney Fred Robinson who had been handling this matter, but who could not attend the hearing. Liter Spence appeared as a witness for the DFWP.

The Kalispell Water Resources Division Field Office was represented by Field Manager, Charles Brasen.

EXHIBITS

There were no exhibits offered at the hearing.

The Department files were made available at the hearing for review by all parties. This file and a related Application for Change (No. 3049-01-s76D by the Department of Fish, Wildlife and Parks) were considered as part of the record in this matter and made available for review. (See Finding of Fact 6.) No party made

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objection to any part of the files. Therefore, the Department files in this matter are included in the record in their entirety.

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

#### FINDINGS OF FACT

1. 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, the legislature." The requirement of legislative approval does not apply in this matter.

2. Application for Change of Appropriation Water Right No. 3049-00-s76D by Glen P. and Rose J. Wood was duly filed with the Department of Natural Resources and Conservation on July 24, 1987 at 11:45 A.M.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on October 15, 1987.

4. The hearing in this matter was held in Helena, Montana instead of Eureka, Montana as specified in the Notice of Hearing and Appointment of Hearing Examiner. The change of hearing location was discussed, by telephone, with the parties the day prior to the hearing. Notice was not sent to any of the parties concerning the hearing location, however, all parties stated on the record that they were not prejudiced by the hearing location.

5. The Applicant proposes to change the point of diversion and place of use of Permit No. 3049-s76D. The reason for the change is to correct the point of diversion and place of use locations so that the actual development is accurately listed on Department records. Mr. and Mrs. Wood propose to give up the right to irrigate 280 acres (the full permitted area). They want to irrigate 129 acres in several parcels within the W½ of Section 13, Township 37 North, Range 27 West under Permit No. 3049-s76D. (Transfer, Public Notice for the Wood's Change, and the Wood's Application for Change.)

6. A second Application for Change, No. 3049-01-s76D, by DFWP proposes to change a portion of the same permit. The issues in the two change applications inter-relate to such an extent that the record for the DFWP hearing was deemed to also be a part of the record in this hearing. (See Order dated August 11, 1988.) The actual progression of the hearing allowed the issues for both applications to be addressed together. None of the parties objected to the order of the hearing.

7. The proposed use of the water is for irrigation of agricultural crops.

8. The diversion consists of a ditch, taking water from Fallon Creek in the SW¼SE¼NW¼ of Section 8, Township 37 North, Range 26 West. The ditch feeds an off-stream storage reservoir located in the SW¼SW¼NW¼ of Section 8, Township 37 North, Range 26 West. From the reservoir, water is conveyed through a ditch to a pipeline inlet. Gravity provides the energy and head for the water

movement through the pipeline. Valves are placed on the pipeline so that water may be controlled into sprinkler lateral lines in the field. Both parties agreed that the present diversion and conveyance system is adequate.

9. Mr. and Mrs. Wood were the original owners of Permit No. 3049-s76D. On June 6, 1978 they conveyed property to the United States of America (hereinafter referred to as USA), which included all of the place of use specified by Permit No. 3049-s76D. On March 8, 1982 the USA conveyed the property to the DFWP. The DFWP had transferred Permit No. 3049-s76D into their name on May 6, 1981. (See the permit file, TRANSFER and VERIFICATION sections.)

As of November 19, 1975 [the date which they signed the Notice of Completion (Form 617)], Mr. and Mrs. Wood had developed irrigation on 175.25 acres of the total of 280 acres permitted. Of the 175.25 acres developed by Mr. and Mrs. Wood, only 126.70 acres was within the place of use defined by the permit. The land sold to the USA contained 156.25 acres of irrigation and the remaining 19.00 acres was on property retained by Mr. and Mrs. Wood. A 29.55 acre portion of the irrigated land sold to the USA is outside the permitted place of use. None of the irrigated land retained by Mr. and Mrs. Wood is in the permitted place of use. (See the permit file, VERIFICATION section.)

10. A verification of Permit to Appropriate Water No. 3049-s76D was completed on January 20, 1986 and modified on October 19, 1988. The verification shows, in part, the following information:

- A. The maximum diversion rate is 1716 gallons per minute;

- B. The maximum yearly (seasonal) volume diverted is 280 acre-feet;
- C. A permanent drainage device condition (the condition was retained because the verification makes no mention of modifying or deleting the condition);
- D. The actual point of diversion is in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West, Lincoln County;
- E. Irrigation of 175.25 acres in the following areas:

13.00 acres in the W $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 07, Township 37 North, Range 26 West, Lincoln County  
 96.45 acres in the SE $\frac{1}{4}$  of Section 12, Township 37 North, Range 27 West, Lincoln County  
 30.25 acres in the N $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 13, Township 37 North, Range 27 West, Lincoln County  
 16.55 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 37 North, Range 26 West, Lincoln County  
 19.00 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 37 North, Range 27 West, Lincoln County.

The original verification was approved by the DFWP on April 15, 1986. (See the section entitled "TO BE COMPLETED BY PERMITTEE" on page 2 of the verification form.) Glen Wood signed the memo to Charles Brasen which led to the modification of the verification. The DFWP did not approve the verification modification, but they did indicate, at the hearing, that they did not dispute the 19.00 acres of irrigation, perfected by November 19, 1975, on the land Mr. and Mrs. Wood presently own.

Information with the verification indicated the differences between the permit and the verification findings would only be approved if an Authorization to Change was issued.

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<sup>1</sup>This place of use parcel is the modification made on October 19, 1988. The verification shows Range 26 West but the mapped place of use is in Range 27 West.

11. The DFWP did not express any concern about adverse affects of the proposed changes in place of use and point of diversion per se. Mr. Lane did say that he believed the ownership, or share of the ownership, of the Permit No. 3049-s76D had a bearing on this proceeding. He said he maintained it was not within the Department's jurisdiction to decide the ownership of the Permit.

12. The parties agreed that the ownership issue should be decided outside of the scope of the hearing. If a split of the permit was agreed upon, they would submit the appropriate documents showing that split for the Hearing Examiner's consideration. Mr. Lane, with the approval of Mr. and Mrs. Wood, agreed that a submittal deadline of December 31, 1988 would allow enough time to submit the appropriate documents for the record. The order dated October 26, 1988 specifically outlined the required documents and set December 31, 1988 as the deadline for submitting them. Pursuant to a conference telephone call on March 7, 1989, the deadline for submitting the documents was extended until April 10, 1989. Subsequently the deadline was extended until May 26, 1989. (See Orders dated March 10, 1989 and May 3, 1989.)

13. On June 14, 1989, DFWP transferred a portion of their permit share to Glen P. and Rose J. Wood. The transfer allows each party an undivided interest in 1716 gpm (the full verified flow rate). No mention was made about the diversion schedule. The volume was split 101.64 acre-feet for DFWP and 178.36 acre-feet for Mr. and Mrs. Wood. Mr. and Mrs. Wood show 89 acres of irrigation

and DFWP shows 156.25 acres, a combined 70 acre increase over the total area verified.

14. Mr. Wood stated there is not a noticeable difference in the water needs of or the water use from area to area within the proposed and permitted place of use.

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. (See Findings of Fact 3 and 4.)

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

3. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria 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) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

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

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 8.)

6. The change in point of diversion and place of use will not adversely affect other water users. (See Findings of Fact 5, 11, and 14.)

7. The verification of Permit No. 3049-s76D locates the diversion point and the location of the water use as they were when the Notice of Completion was filed for the permit. The verified data is the basis from which a change in diversion or use has to be made. The irrigated land verified in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 13, Township 37 North, Range 26 West is the only property within the verified place of use presently belonging to Mr. and Mrs. Wood. There is not a previously filed change application or a Water Right Transfer Certificate in the area indicating a diversion of the permit other than by the proportion of the irrigated land sold.

The parties agreed with the results of the verification done by the Kalispell Water Resources Division Field Office. By their agreement, the parties imply their agreement with the division of the permitted places of use and amounts of water. (See Finding of Fact 10.) Neither party chose to disagree with the verifier's findings or to request an administrative hearing. (See the section of the Verification Form entitled "TO BE COMPLETED BY PERMITTEE".) Since the parties have agreed to the verified places and areas of use, it is reasonable to base a change on those amounts and the diversion which they imply.

8. The verification specified 19.00 acres of irrigated land within the present ownership of Mr. and Mrs. Wood. Any area of use greater than 19 acres will result in an increased use of water. (See Finding of Fact 14.) The irrigated area in other locations served by this permit must be decreased to allow for an increase in irrigated area by Mr. and Mrs. Wood. (See Proposal for Decision in the Matter of the Application for Change of Appropriation Water Right No. 3049-01-s76D by the Montana Department of Fish, Wildlife and Parks.)

9. The water use is proportional to the area irrigated (see Finding of Fact 14), Mr. and Mrs. Wood have a 63.7% share of the volume. (See Transfer dated June 14, 1989.) Since the transfer does not mention a change in water use or irrigation management, the same water use practices are assumed to continue. The need for the full irrigation supply is supported by an undivided interest in the full flow rate to Mr. and Mrs. Wood. The area that can be irrigated with 178.36 acre-feet is 111.6 acres. The transfer shows only 89 acres for Mr. and Mrs. Wood's place of use. This means that the proposed volume of water use per area irrigated is greater than the historic use. A volume which was adequate for the areas that were irrigated.

The volume of water necessary for 89 acres is 142.2 acre-feet [(280 acre-feet/175.25 acres) x 89 acres].

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of

Appropriation Water Right No. 3049-00-s76D by Glen P. and Rose J. Wood is hereby granted to change Permit No. 3049-s76D as follows: to change the point of diversion of 1716 gallons per minute up to 142.2 acre-feet per annum from Fallon Creek in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West to the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West; and to change the place of use for that amount of water for irrigation of 89.00 acres; 19 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ , 20 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and 10 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , all in Section 13, Township 37 North, Range 27 West, Lincoln County.

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

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

B. Water shall be diverted by the holder of this proportionate share of Permit No. 3049-s76D on the following days of each month (all dates inclusive), 3rd through 7th, 11th through 14th, 17th through 21st, and 25th through 30th.

NOTE: By mutual agreement of the DFWP and Glen P. and Rose J. Wood the above schedule may be changed. The agreement shall allow Glen P. and Rose J. Wood nineteen (19) to twenty-one (21) days of diversion per month. Any alternative use schedule shall

be submitted to the Hearing Examiner by the deadline set to file exceptions to this proposal for decision.

C. Issuance of this Change Authorization by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Change Authorization, nor does the Department, in issuing this Change Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

D. This Change Authorization is issued subject to the permanent installation of an adequate drainage device, channel, or any other necessary means to satisfy existing water rights.

E. The issuance of this Change Authorization by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest System lands to exercise this Change Authorization.

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 on 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 31<sup>st</sup> day of December, 1990.

*James Beck*

JAMES BECK, Hearing Examiner  
Department of Natural Resources and  
Conservation  
1520 East Sixth Avenue  
Helena MT 59620-2301  
(406) 444-6695

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 31<sup>st</sup> day of December, 1990, as follows:

GLEN AND ROSE WOOD  
3476 HWY 287  
SHERIDAN MT 59749

CHUCK BRASEN  
DNRC - WATER RESOURCES DIVISION FIELD OFFICE  
PO BOX 860  
KALISPELL MT 59903  
(inter-departmental mail)

ROBERT LANE  
STATE OF MONTANA  
DEPARTMENT OF FISH, WILDLIFE & PARKS  
1420 E 6TH AVE  
HELENA MT 59620

MR. LITER SPENCE  
STATE OF MONTANA  
DEPARTMENT OF FISH, WILDLIFE & PARKS  
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*Cindy Campbell*  
CINDY CAMPBELL, Legal Secretary  
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