

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. G(P)3049-01-s76D BY MONTANA )  
DEPARTMENT OF FISH, WILDLIFE AND )  
PARKS )

AMENDED  
FINAL  
ORDER

\* \* \* \* \*

The Final Order in this matter was issued October 23, 1991. Chuck Brasen, Manager of the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation, during a subsequent review of the Order, discovered a discrepancy in the volume limitation of the change authorization. The discussion, reasoning, and conclusions in the Final Order clearly hold that the volume limitation of the change should be 249.65 acre-feet per annum. Section IV at page 8 states:

Thus the amount of volume necessary to irrigate the changed place of use is 249.65 acre-feet per annum, i.e., (156.25 acres/175.25 acres) x 280 acre-feet. Conclusion of Law 9 must contain a sentence stating this limitation.

Conclusion of Law 9 has been altered to read:

9. The need for full irrigation water supply is supported by the transfer of a undivided interest in the full flow rate to DFWP. Since the transfer does not mention a change in water use or irrigation management, the same water use practices are assumed to continue. The water use is proportional to the area irrigated. (See Finding of Fact 15.) The area irrigated will be 156.25 acres. Based on the record in this matter, the volume needed to irrigate the new place of use will be 249.65 acre-feet per annum, i.e., (156.25 acres/175.25 acres) x 280 acre-feet. Therefore, the extent of the changed right must be limited to 249.65 acre-feet per annum. [Emphasis added.]

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Section VI at page 9 states:

The maximum volume authorized must be modified to 249.65 acre-feet per annum.

The Order, however, states the authorization is granted for 1716 gallons per minute up to 101.64 acre-feet per annum. Final Order at page 11.

The Final Decision-maker has reviewed the entire Final Order and has determined that the figure in the Order itself, i.e., 101.64 acre-feet per annum, is a clerical error. The volume figure should be 249.65 acre-feet per annum throughout, including in the Order itself. Therefore the Order in the above entitled matter is hereby

AMENDED to read:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change of Appropriation Water Right No. G(P)3049-01-s76D by the Montana Department of Fish, Wildlife and Parks is hereby granted to change Permit No. 3049-s76D as follows: to change the point of diversion of 1716 gallons per minute up to 249.65 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, Lincoln County; and to change the place of use of irrigation on 29.55 acres in the NW $\frac{1}{4}$  of Section 7, Township 37 North, Range 26 West, Lincoln County to irrigation on 13.00 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7 and 16.55 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 37 North, Range 26 West, Lincoln County.

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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 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

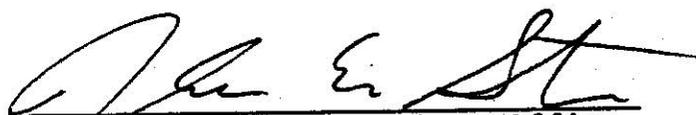
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<sup>1</sup> See In re Application No. G(P)3049-00-s76D by Glen P. and Rose J. Wood, Final Order, October 23, 1991, at page 15.

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.

Dated this 5<sup>th</sup> day of November, 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 Amended Final Order was duly served upon all parties of record at their address or addresses this 5<sup>th</sup> day of November, 1991, as follows:

Glen and Rose Wood  
3476 Hwy 287  
Sheridan, MT 59749

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860

Curtis E. Larsen,  
Agency Legal Counsel  
Montana Department of Fish,  
Wildlife & Parks  
1420 East 6th Avenue  
Helena, MT 59620

  
Cindy G. Campbell  
Hearings Unit Legal Secretary



by Glen P. and Rose J. Wood. 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 the Glen P. and Rose J. Wood.

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

I. DFWP except to Finding of Fact 10 as incomplete in that the third sentence identifies only the transfer from Woods to the U.S.A.; it does not also mention the ownership transfer to DFWP. This omission in one sentence is not an omission of the fact from the decision. It is not even an omission of the item from this Finding of Fact. The transfer of ownership to DFWP is noted in the first paragraph. In their exception, DFWP have not explained whether or how the omission has any bearing on the decision, and none is apparent. Finding of Fact 10 will not be changed.

II. DFWP take exception to Finding of Fact 14 contending that it incorrectly transposes the volume amounts allocated to Woods and DFWP in the division of Permit 3049-s76D between them in the ownership transfer they filed with the Department in June 1990. The volume amounts identified by the Hearing Examiner in Finding of Fact 14 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

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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 14 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."

DFWP further except to Finding of Fact 14 on grounds that it does not take full account of the terms of the Settlement Agreement between Woods and DFWP. The terms of the Settlement Agreement that DFWP proposes should be contained in Finding of Fact 14 involve the undivided use of the water on the changed places of use, and in language that permits the arrangement. Concluding that such an arrangement is permissible is a function of the application of the law, not simply the finding of a fact. Section 85-2-403, MCA, 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)

The Hearing Examiner must not uncritically accept the terms of the Settlement Agreement, he must determine whether they are

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within the criteria and provisions in Title 85, Chapter 2, MCA. No further changes will be made to Finding of Fact 14.

III. DFWP except to Conclusion of Law 8 on grounds that it fails to properly take into account what the Confirmation Deed and Settlement Agreement set out as to the places of use and amounts of water for Woods and DFWP. DFWP contend that Conclusion of Law 8 should recognize the amounts of water and acres of irrigation agreed upon between Woods and DFWP.

The Department is required by § 85-2-312(2), MCA, to set a time limit for a permittee to complete the permitted project and perfect their water right. The statutes allow an appropriator to extend that time, but if the time is not extended, the limit of the water right is the extent to which it was perfected within the time permitted. See Mont Code Ann. 85-2 312(3) and 315(1) (1989). Conclusion of Law 8 is the application of these provisions to determine the extent of Permit 3049-s76D.

What DFWP propose in their exceptions is not an adjustment to Conclusion of Law 8, but a reversal of it. As stated in II. above, the Department cannot accept the terms of a private contract in a transfer and change action without determining whether the law allows the terms. DFWP argue in their May 24, 1991, Brief that the terms of the Settlement Agreement do stay within the law because it is the intent of the parties to divert no additional water and that since the water is conveyed out of the drainage of the source, adverse effect is impossible. While the latter part of the argument may be correct the former part is

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not. The finding of the Hearing Examiner implicit in Conclusion of Law 9 is the parties intent could not be realized given the facts in the record, particularly Finding of Fact 15. Expanding the irrigated acreage will result in the diversion of more water than was ever diverted under Permit 3049-s76D as perfected. Diverting more water than one has perfected water rights to do requires a new water right which can only be obtained by making application under § 85-2-301, et seq., MCA. Woods place of use cannot be expanded within the process of completing the changes as proposed in Applications G(P)3049-00-s76D and G(P)3049-01-s76D. Hence, Conclusion of Law 8 is correct as written and will not be changed. (This holding is also discussed in section III. of the Final Order in Glen P. and Rose J. Wood, as it related to the same issue in that case.)

IV. DFWP except to Conclusion of Law 9 stating first the transposition of volume amounts that occurred in Finding of Fact 14 is repeated here, and second the conclusion is inconsistent in allowing DFWP use of the full flow rate but restricting their acreage. There is no inconsistency in this conclusion other than an inconsistency with DFWP's unwillingness to have their area of irrigation reduced to accommodate an expansion of the area irrigated by Woods. DFWP's unwillingness to have their area of irrigation reduced was not explicit in the record but was only implied in some of the terms of the Confirmation Deed and Settlement Agreement. The Agreement, however, could also be perceived

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as primarily trying to allow Woods the opportunity to develop the additional acreage.

Given the record in this matter, particularly the terms of the Settlement Agreement, 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 were expanded, additional water would not be diverted from Fallon Creek. The Hearing Examiner's proposed conditional authorization requires irrigated acres of DFWP's place of use be reduced in proportion to expansion of irrigated acres in Woods' new place of use. His proposed restriction conjoins the two severed sections of the Permit under a rotation system, in paragraph B of the Proposed Order, alternating 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

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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.

Without evidence that the Woods' 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 has been unable to authorize Woods to change the permitted appropriation such that the new place of use could be expanded beyond the bounds established at the time the appropriation was perfected. See In re Application 3049-00-s76D by Glen P. and Rose J. Wood. This being so, the need to condition the authorization and completion of DFWP's change to a reduced area of irrigation is moot. The second sentence, the following parenthetical sentence, and the last sentence of Conclusion of Law 9 were solely for establishing limits on DFWP's change to accommodate expansion of Woods' area of irrigation and, therefore, are now moot. Said three sentences are deleted.

There being no proportional reduction of DFWP's area of irrigation to accommodate an expansion of Woods' area of irrigation, the extent of the portion of Permit 3049-s76D now retained by DFWP is defined by the area of irrigation, 156.25 acres. The conclusion of the Hearing Examiner, based on the record, is the full flow rate of 1716 gallons per minute is needed. The volume needed is limited to a proportional per-acre share of the perfected use of Permit 3049-s76D, which was 280 acre-feet on 175.35

acres. Thus the amount of volume necessary to irrigate the changed place of use is 249.65 acre-feet per annum, i.e., (156.25 acres/175.25 acres) x 280 acre-feet. Conclusion of Law 9 must contain a sentence stating this limitation.

Conclusion of Law 9 has been altered to read:

9. The need for full irrigation water supply is supported by the transfer of a undivided interest in the full flow rate to DFWP. Since the transfer does not mention a change in water use or irrigation management, the same water use practices are assumed to continue. The water use is proportional to the area irrigated. (See Finding of Fact 15.) The area irrigated will be 156.25 acres. Based on the record in this matter, the volume needed to irrigate the new place of use will be 249.65 acre-feet per annum, i.e., (156.25 acres/175.25 acres) x 280 acre-feet. Therefore, the extent of the changed right must be limited to 249.65 acre-feet per annum.

V. DFWP recommend the Final Order include an additional Conclusion of Law stating that all criteria have been met and therefore their proposed change must be approved. The Hearing Examiner in Conclusions of Law 3, 5, 6, and 7 has stated, in a linear progression, the individual elements of the conclusion that DFWP would like to see added. The Proposal for Decision as written makes it clear that, with the restrictions, conditions and limitations stated in the Order, the Department rules this application has met the criteria for authorization. The additional conclusion of law recommended by DFWP will not be added.

VI. DFWP contend that the first paragraph of the Proposed Order must be modified to take into account the Confirmation Deed and Settlement Agreement. In light of the holdings above in sections II. and III. as to Finding of Fact 14 and Conclusion of

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Law 8, this contention is no longer viable. The changes to Conclusion of Law 9 in section IV. above, however, do necessitate a change to the Proposed Order. The maximum volume authorized must be modified to 249.65 acre-feet per annum.

DFWP contend that the restriction in paragraph B of the Proposed Order is unnecessary unless the Woods' area of irrigation is expanded, and even then the system of alternating use should be up to them to establish for themselves. The former part of the statement is moot. See In re Application G(P)3049-00-s76D by Glen P. and Rose J. Wood. The latter part of this statement is consistent with past rulings of the Department. See In re Application No. 58133-s410 by DeBruycker. Because the changes proposed by DFWP and Woods, and their ownership transfer of Permit 3049-s76D, indicate a 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:

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 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 of all waters conveyed onto the authorized place of use, including the period of time, and shall submit said

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records to the Kalispell Water Resources Regional Office by November 30 of each year or upon request.

DFWP contend paragraph C of the Proposed Order should be modified to allow them to irrigate the full 156.25 acres in their portion of the area irrigated under Permit 3049-s76D, to allow Woods a fixed time to expand their area of irrigation, and to provide for scheduling as needed. In light of the foregoing modifications to the first paragraph and paragraph B of the Proposed Order, both paragraph C and DFWP's recommendations are moot. Paragraph C of the Proposed Order is deleted, and lettering of the following paragraphs modified accordingly.

VII. Paragraph E 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 E of the Proposed Order is deleted, and lettering of the following paragraph modified accordingly.

Based upon a review of the full record in this matter, and for the reasons stated above, 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, Authorization to Change of Appropriation

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Water Right No. G(P)3049-01-s76D by the Montana Department of Fish, Wildlife and Parks is hereby granted to change Permit No. 3049-s76D as follows: to change the point of diversion of 1716 gallons per minute up to 101.64 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, Lincoln County; and to change the place of use of irrigation on 29.55 acres in the NW $\frac{1}{4}$  of Section 7, Township 37 North, Range 26 West, Lincoln County to irrigation on 13.00 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7 and 16.55 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 37 North, Range 26 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. 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

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<sup>1</sup> See In re Application No. G(P)3049-00-s76D by Glen P. and Rose J. Wood, Final Order, October 23, 1991, at page 15.

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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.

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.

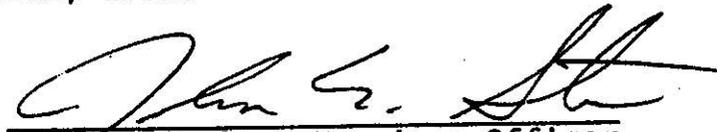
NOTICE

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.

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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

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860

Curtis E. Larsen  
Agency Legal Counsel  
Montana Department of Fish,  
Wildlife & Parks  
1420 East 6th Avenue  
Helena, MT 59620



Cindy G. Campbell  
Hearings Unit Legal Secretary

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

FILMED

JAN 4 1991

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IN THE MATTER OF THE APPLICATION FOR )  
CHANGE OF APPROPRIATION WATER RIGHT NO. ) PROPOSAL FOR DECISION  
3049-01-s76D BY THE MONTANA DEPARTMENT )  
OF FISH, WILDLIFE AND PARKS )

\*\*\*\*\*

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.

The Applicant, 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.

Glen P. and Rose J. Wood appeared in person as late objectors.

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. 3049-00-s76D by Glen P. and Rose J. Wood) were considered as part of the record in this matter and made available for review. (See Finding of Fact 7.) No party made objection to

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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. 3049-01-s76D by DFWP was duly filed with the Department of Natural Resources and Conservation on August 5, 1987 at 8:35 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 with the parties, by telephone, 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.

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5. Glen P. and Rose J. Wood appeared at the hearing as objectors even though they never objected in any formal manner. They were included in the hearing because of the potential information they could provide about the findings of the Kalispell Water Resources Division Field Office's verification of Permit No. 3049-s76D. (See Findings of Fact 6, 10, 11, and 12.)

6. 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 described point of diversion and place of use locations so that the actual development is accurately listed on Department records. The DFWP proposes to give up the right to irrigate 29.55 acres in the NW $\frac{1}{4}$  of Section 7, Township 37 North, Range 26 West which was never developed for irrigation. They want to irrigate the same amount of land in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 37 North, Range 26 West which was developed instead of the former parcel. (Public Notice for the DFWP Change and the DFWP Application for Change.)

7. A second Application for Change, No. 3049-00-s76D, by Glen P. and Rose J. Wood 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 Glen P. and Rose J. Wood 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.

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

9. The diversion consists of a ditch from Fallon Creek in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 8, Township 37 North, Range 26 West to a 36 acre-foot off-stream storage reservoir located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  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 lateral lines in the field. Both parties agreed that the present diversion and conveyance system is adequate.

10. Mr. and Mrs. Wood were the original owners of Permit No. 3049-s76D (the permit which the Applicant proposes to change). 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.)

11. The 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 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 $\frac{1}{2}$ 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 $\frac{1}{2}$ 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

\*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.

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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, they did not dispute the 19 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.

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

13. 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 which documents were required, and set December 31, 1988 as the deadline for submitting

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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, 1990. (See Orders dated March 10, 1989 and May 3, 1989.)

14. On June 14, 1989, DFWP transferred a portion of their permit share to Glen and Rose Wood. The transfer allows each party undivided interest in 1716 gpm (the full verified amount). No mention was made concerning a schedule of diversion. The volume was split 101.64 acre-feet for DFWP and 178.36 acre-feet for Mr. and Mrs. Wood. The area of use was divided 156.25 acres for DFWP and 89 acres 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.

15. 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. Mr. and Mrs. Wood were allowed to testify as late objectors because of their position as the original owners of Permit No. 3049-s76D and the land associated with the permit. Their testimony had the potential to provide facts concerning the past use of water in the area, and therefore may have provided additional information to the Department's verification of Permit No. 3049-s76D. (See Finding of Fact 5.) Their testimony did not indicate any inconsistencies with the verification. (See Findings of Fact 10 and 11 and Conclusion of Law 8.) They did provide testimony that indicated the diversion works is adequate. (See Finding of Fact 8.)

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

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

7. The change in point of diversion and place of use will not adversely affect other water users. (See Findings of Fact 6, 12, and 15.)

8. The verification of Permit No. 3049-s76D locates the diversion point and the place of 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 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 11.) 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.

9. The water use is proportional to the area irrigated. (See Finding of Fact 15.) The DFWP has a 36.3% share of the volume. (See the 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 water supply is supported by the transfer of an undivided interest in the full flow rate to DFWP.

The area that can be irrigated with 101.64 acre-feet is 63.6 acres [(101.64acre-feet/280acre-feet)x175.25acres].

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. 3049-01-s76D by the DFWP is hereby granted to change Permit No. 3049-s76D as follows: to change the point of diversion of 1716 gallons per minute up to 101.64 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, Lincoln County; and to change the place of use of irrigation on 29.55 acres in the NW $\frac{1}{4}$  of Section 7, Township 37 North, Range 26 West, Lincoln County to irrigation on 13.00 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7 and 16.55 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 37 North, Range 26 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 this right on the 1st, 2nd, 8th, 9th, 10th, 15th, 16th, 22nd, 23rd, 24th, and 31st day of each month during the period of use.

NOTE: By mutual agreement of the DFWP and Glen P. and Rose J. Wood the above schedule may be changed. The agreement shall allow the DFWP ten (10) or eleven (11) 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. The area irrigated in any season shall not exceed 63.6 acres. Each year by May 30, the holder of this portion of Permit No. 3049-s76D shall submit to the Kalispell Water Resources Division Field Office, a plan of irrigation for the season. The plan shall specify a description of the sub-parcels to be irrigated within each parcel of record. A map shall also be submitted showing the place of use for the upcoming season.

D. 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.

E. 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.

F. 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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JAY STODDARD  
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*Cindy Campbell*  
CINDY CAMPBELL, Legal Secretary  
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