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

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| IN THE MATTER OF THE APPLICATION<br>FOR CHANGE OF APPROPRIATION WATER<br>RIGHT NO. W19282-s41E AND W19284-s41E<br>BY ED MURPHY RANCHES, INC. | )<br>)<br>)<br>) | FINAL ORDER |

* * * * * * * *

The period for filing exceptions, objections, or comments to the Corrected and Amended Proposal for Decision of October 17, 1988 (hereafter, "Proposal") in this matter has expired. Timely submissions were received from Objector Paul T. Smith and Objector Emmett J. and Margy McCauley.

I. Both Objector Smith and Objector McCauley excepted to the Examiner's Conclusion of Law No. 8 wherein it was held that, as no historic pattern of use within the claimed period of use (May 1 through September 30, each year) had been demonstrated, the proposed change in the captioned water rights, which would alter the timing of application of water for irrigation purposes from that used since Applicant acquired the water rights, did not constitute a differential expansion of the right, i.e., would not create a greater demand on the source during a given interval within the claimed period of use than could be attributed to that interval historically. Objector Smith asserts that this holding is contrary to Department precedent as set forth in <u>In the Matter of Application for Change of Appropriation Water Right Nos. G120401-41H and G120403-41H by the Estate of Lena Ryen</u>, Interlocutory Order, March 13, 1985. I find that the Examiner's

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holding is not contrary to Ryen, but is the result of a logical modification of the rule set forth therein, and hereby sustain the Examiner's holding.

Ryen stands for the proposition that, where there is an historic pattern of use, the applicant for change must show that the proposed change will not alter the historic pattern thereby creating a greater demand on the source, at any given time, than existed as a consequence of his previous usage of water. Thus, the primary issue under Ryen is whether there is an historic pattern of use within the claimed period of use.

Ryen states that "the Applicant must . . . show the extent and pattern of the past use of the water". Ryen, pp. 20-21. However, Ryen concerned proposed changes in water rights which had historically been used for industrial purposes, i.e., to operate mills, where there is presumably a definable pattern of use, whereas the instant case concerns the agricultural use of water. The Examiner held that where water is used for irrigation, there is a rebuttable presumption that there is no fixed pattern of use within the claimed period of use, basing this presumption on the realities of irrigation practice, e.g., the variability of climatic conditions from year to year, stream conditions, normal crop rotation, etc. Proposal, p. 11.

The reasoning for effecting this presumption is sound. To require each irrigator who wishes to change the place of use, place of storage, purpose of use, or point of diversion of a water right to show the pattern of past use, when a pattern of



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use in irrigation is highly unusual, is unduly burdensome. The irrigator would be placed in the difficult position of having to prove a negative, i.e., that, as in most irrigation uses, there has been no set pattern of use.

Objectors presented no evidence regarding historic irrigation practices. The question thus became whether Applicant's witnesses themselves rebutted this presumption. The Examiner held that Richardson's statement that Applicant had irrigated only in May and June since it bought the place of use, standing alone, was insufficient to rebut the presumption. (The duration of Applicant's ownership was not of record; however, it was clear that it was not the original appropriator. There was no evidence of record regarding the irrigation practices of previous owners.)

I agree. Absent sufficient evidence to establish the existence of an historic pattern of use, the presumption remains in force. The statement made by the Applicant regarding his use of the rights, and only his use, when he was not the original appropriator, did not establish the existence of an historic pattern of use, and thus was insufficient to rebut the presumption.

II. Objector Smith contends that two more measuring devices (in addition to the two required under the Proposal) are necessary. He does not specifically say why the additional devices are necessary except to allege that they "would verify



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the amount of water being taken as well as that which could be attributed to ditch loss."

I see no reason to impose the suggested additional burden on the Applicant of measuring the amount of water in the McCauley-Murphy-Smith Ditch both above his first ditch take-off and below the second. The devices required under the Proposal will allow measurement of the flow and volume diverted both into and out of the McCauley-Murphy-Smith Ditch under the rights herein changed. Once ditch loss had been determined (from the headgate to the take-off for the rights herein changed), measurements taken as required under the proposal and simple arithmetic will allow verification of whether Applicant is diverting into and out of the Ditch within the parameters of the Authorization. Thus, I conclude that additional devices are unnecessary, and accordingly hereby deny Objector Smith's request.

III. Smith is correct in his third allegation of error. Although Richardson did testify that Applicant "had a water right for 250 inches of water and [sic] that we're presently pumping out of there [the McCauley-Murphy-Smith Ditch] onto another forty acres of ground out of that existing right", in response to the next question put to him, i.e., "Do you know how much you're pumping?", he answered, "We're pumping about 300 gallons per minute." Accordingly Finding of Fact 19 is hereby modified to reflect that the Murphy pump therein referred to



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"takes 300 gallons per minute out of the ditch below the culvert", not 250 miner's inches as stated in the Proposal.

IV. Objector McCauley excepts to Conclusion of Law 10 in the Proposal on two grounds.

First, Objector apparently disagrees with the Department's interpretation of § 85-2-402, MCA - specifically, that subsection (1)(b) is met if the appropriation works are proven to be physically adequate - asserting that the Department must also determine "legal adequacy". By legal adequacy, Objector apparently means that the Applicant presently has the legal right to use the Ditch for the purpose herein proposed. The Department has heretofore determined that an applicant for a Permit to Appropriate need not prove "legal adequacy" as above defined. In the Matter of Application for Beneficial Water Use Permit No. 55390-76H by Heather J. Grayson, Proposal for Decision, January 24, 1986, pp. 13-16. The reasoning in said decision holds equally in a Change proceeding. Thus, the Examiner's statement of the law stands. However, as in Grayson, it must here be emphasized that issuance of a Permit or Change Authorization by the Department in no way grants a legal right to use the means of appropriation. Issuance is merely recognition of the physical adequacy of the appropriation works which the Applicant proposes to utilize; any legal right to use such works must be acquired separately. The issuance of a Permit or Change Authorization does not grant or imply authority to convert the property of others.



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Second, Objector McCauley alleges that the Examiner erred in making Finding of Fact 17 as "the examiner cannot find a 2400 M.I. capacity with no velocity." The Examiner's finding was evidently made on the basis of the testimony of Lyle Ward, an experienced technician with the SCS, who stated that the capacity of the first 100 feet of the Ditch was 2400 M.I. (it was established on cross-examination that he had only actually seen the first 100 feet of the Ditch); of Lloyd Richardson, who has "worked with water for a number years" and who stated that he didn't think Ward's estimate of 2400 M.I. was "out of line"; and of Keith Evans, who said there were no constrictions in the Ditch except in one spot where it is slow and wide because the McCauley culvert is set too low. The Examiner, believing the testimony of these witnesses, apparently reasoned that, since the Ditch clearly had a 2400 M.I. capacity for the first 100 feet, and because it was not constricted and did not slow further downditch (except at the culvert), "the MMS Ditch <u>itself</u>" ("itself" here meaning "except for where it is constricted by the culvert") had about a 2400 M.I. capacity. Thus, although admittedly based on less than optimum evidence, it cannot be said that the Finding is arbitrary or capricious. Neither can it be said that the Finding is clearly erroneous, for the record does not show patent witness unreliability, and because the Examiner's reasoning, although not immediately apparent from the text of the Finding, is sound. If a ditch starts out with a 2400 M.I. capacity, is the same size to its end, and does not slow, the inference that



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it has a 2400 M.I. capacity to its end is justified. True, the Finding could have been better expressed, e.g., but for the slow spot created by the constriction due to the McCauley culvert, the Ditch has a 2400 M.I. capacity; however, the substance of the Finding remains the same either way. Therefore, Finding of Fact 17 stands.

WHEREFORE, the Findings of Fact and Conclusions of Law set forth in the Proposal for Decision are hereby adopted and incorporated in this Order by reference, except that Finding of Fact 19 is modified as set forth above, and based on these Findings and Conclusions, and the complete record herein, the Department of Natural Resources and Conservation makes the following:

## ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc., is granted to change Water Right No. W19282-s41E as follows: to change the point of diversion of 450 gpm up to 130 acre-feet per annum of water from the SE¼SE¼NW¼ of Section 33, Township 5 North, Range 3 West, to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 35.5 acres located in Section 33, Township 5 North, Range 3 West, to 35.5 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West; and to change Water Right No. W19284-s41E as follows: to change



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the point of diversion of 450 gpm up to 130 acre-feet per annum of water from the NE¼SW¼NE¼ of Section 33, Township 5 North, Range 3 West to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 10 acres located in Section 33, Township 5 North, Range 3 West to 10 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West. These water rights are to be used in conjunction for a total flow under both rights of no more than 450 gpm, and a total volume of no more than 130 acre-feet per annum, as measured at the headgate of the MMS Ditch. Water use under these changes will be supplemental to Water Right Claim No. W19285-s41E. This Authorization is further subject to the following express terms, conditions, and restrictions:

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination as provided by Montana law. Nothing herein shall be construed to authorize the diversion of water to the detriment of any other appropriator.

B. Authorizee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purpose provided for herein.

C. An adequate device for taking accurate measurement of water diverted shall be installed and maintained both at the point of diversion authorized herein (McCauley-Murphy-Smith headgate), as well as at the Ditch take-off (pump site). Authorizee shall keep written records of the flow rate and volume



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diverted herein at said point of diversion, and of the flow rate and volume diverted at the ditch take-off, including the date and duration of diversion. Authorizee shall submit such records fo the Department on demand.

D. If the McCauley-Murphy-Smith Ditch system is not of sufficient capacity to convey water hereunder in addition to waters presently conveyed thereby, Authorizee shall cause any improvements necessary to convey the additional water to be made prior to diverting water hereunder.

E. Authorizee's right to divert hereunder pursuant to Statement of Claim of Existing Water Right No. W19284-s41E is expressly subordinated to the water right of any junior appropriator with a point of diversion on the Boulder River lying between the new point of diversion hereunder (the headgate of the McCauley-Murphy-Smith Ditch located in the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West) and the confluence of the Boulder River and Mike Quinn Slough.

F. Authorizee may divert hereunder pursuant to Statement of Claim of Existing Water Right No. 19284-s41E only to the extent that the flow diverted under said right is simultaneously present at the original point of diversion on Mike Quinn Slough.

G. Prior to using water hereunder, Authorizee must determine the amount of ditch loss occurring between the new point of diversion and the pump site to be used, subject to Department verification. Authorizee may not pump more than the



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difference between the amount (flow and volume) diverted and the amount (flow and volume) of ditch loss.

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 22 day of March, 1989.

Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

I concur.

Robert H. Scott, Hearing Examiner
Department of Natural and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625



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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 22nd day of March, 1989, as follows:

Ed Murphy Ranches, Inc.
P.O. Box 7
Boulder, MT 59632

John Jardine
P.O. Box 488
Whitehall, MT 59759

Paul T. Smith
Lazy T Ranch
P.O. Box 565
Boulder, MT 59632

T.J. Reynolds
Helena Field Manager
1520 East 6th Avenue
Helena, MT 59620

Emmett J. and Margy McCauley
P.O. Box 25
Boulder, MT 59632

Estate of Eve and
William Twohy
c/o Robert T. Cummins
Attorney at Law
One Last Chance Gulch
Helena, MT 59601

Irene V. LaBare

Irene V. LaBare
Legal Secretary



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BB.

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

* * * * * * * * * *

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION FOR )<br>CHANGE OF APPROPRIATION WATER RIGHTS )<br>NOS. W19282-s41E AND W19284-S41E )<br>BY ED MURPHY RANCHES, INC. ) | CORRECTIONS<br>AND AMENDMENT TO<br>PROPOSAL FOR DECISION |

* * * * * * * * * *

PLEASE TAKE NOTICE that an error in calculation was made and reflected in Finding of Fact of Fact 6 on page 7 of the Proposal for Decision. In said Finding, 450 gallons per minute was erroneously equated with 11.25 miner's inches. In fact, 450 gallons per minute equals 40.1 m.i. Therefore, the first sentence of Finding of Fact 6 is hereby corrected to read as follows:

"6. By the Application, Applicant requests that the department authorize changes in the above-said rights so that 450 gpm (40.1 miner's inches) up to 130 acre-feet per annum of water can be diverted from the Boulder River under either right or both rights conjunctively in the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West, by means of the McCauley-Murphy-Smith headgate and ditch (hereafter, "MMS Ditch") for supplemental irrigation use on 51 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West."

Said erroneous equivalence was perpetuated and carried forward in Conclusion of Law 10, Conclusion of Law 11 and

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the proposed Order. Said Conclusions* are hereby corrected to read in their entirety as follows (the text of Footnote 4 is not reproduced, but remains as set forth in the Proposal):

"10. The remaining allegations of adverse effect are admixed with objections regarding the adequacy of the proposed means of diversion, construction and operation of the appropriation works; specifically, Objectors question the adequacy of the MMS headgate and Ditch to convey water in addition to that which it already carries, worrying that they will be adversely affected because waters might not be correctly apportioned once commingled in the Ditch. The question of ditch ownership and who will pay for improvements thereto, if necessary, is not within department jurisdiction and will not be decided in this forum. The department is only concerned here with the physical adequacy of the appropriation works, and that there be no adverse effect to the water rights of the other parties.[4]

Regarding the adequacy of the appropriation works, the issue raised concerns whether the headgate and Ditch are of sufficient capacity and design to convey 40.1 miner's inches in addition to the full complement of waters already conveyed therein. The

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*The Examiner is aware that the percentage increases expressed in Conclusion of Law 10 as corrected are larger than those based on the erroneous equivalence. However, despite the increases, it remains his opinion that the percentage increases are minimal. Therefore, the substance of Conclusion of Law 10 remains unchanged.



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headgate is placed sufficiently low in the Boulder River to accommodate diversion of 850 miner's inches (the total appropriations for the conveyance of which the ditch is presently utilized) during low flows with the current wing dam in place. Improvement of the wing dam would increase this figure. The capacity of the MMS headgate and Ditch to the McCauley Culvert is roughly 2400 miner's inches. Thus, it is hereby concluded that, with little alteration of the appropriation works, the amount presently carried to the culvert could be increased by a de minimis 4.7% (40.1 miner's inches = 4.7% of 850 miner's inches). The same is true below the culvert.

The one possible limiting factor in the Ditch is said culvert, the maximum capacity of which cannot be determined based on the record. Thus, whether it can carry 40.1 miner's inches in addition to the water it already carries (more than 500 miner's inches) cannot be determined based on the record. Although it seems likely that the culvert would pass the small addition of 40.1 inches (this is only an 8% increase in the flow presently carried assuming only 500 miner's inches presently passes through the culvert), if the culvert capacity is only adequate to convey sufficient water to supply the existing rights on the Ditch, the culvert would have to be replaced.

Utilizing a pump for ditch take-off, and water application by pipeline and sprinkler, is a reasonable and customary method of operation.



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Based on the above, the Examiner concludes that the means of diversion, construction and operation of the appropriation works is adequate, providing the Authorization is conditioned so that Applicant must replace the culvert if it is not of sufficient size to carry 40.1 miner's inches in addition to the water presently carried thereby.

11. Providing that the amount of water Applicant diverts hereunder is measured at the headgate, and further providing that the amount diverted at the ditch take off is no more than the amount diverted at the headgate less ditch loss, the proposed change will not adversely affect the water rights of other appropriators.

Appropriators with points of diversion at points on the Boulder River other than the proposed point of diversion will be adequately protected providing Applicant diverts only as authorized. See Conclusion of Law 9. However, proper administration requires that an adequate measuring device be installed at the headgate of the proposed point of diversion, and that Applicant keep records of when and how much water it diverts under the water right here changed.

As for other appropriators on the MMS Ditch, the only change from the status quo will be the diversion of an additional 40.1 miner's inches at the headgate. Because of the required measuring device, it will be evident when Applicant is diverting under the changed water rights. There will be no effect to users above Applicant's ditch take-off, for those users have first



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access to the ditch as well as senior water rights. Further, providing Applicant allows the correct amount for ditch loss, there will be no effect on the senior user down ditch from Applicant's ditch take-off. Accordingly, the Authorization will be expressly conditioned to require Applicant to determine and deduct the percentage ditch loss from the amount it diverts at the headgate, and to set and operate its pump so that no more than 40.1 miner's inches up to 130 acre-feet per year <u>reduced by the percentage ditch loss</u> (as verified by the department) is diverted at the ditch take-off (pump site).

12. The change will not adversely affect other planned uses for which a permit has been issued or water reserved. (Finding of Fact 22.)"

Further, because the condition proposed in Conclusion of Law 9 for the protection of junior users upstream of the confluence of Mike Quinn Slough and the Boulder River was underinclusive, the Examiner hereby amends the Proposal for Decision by deleting the first full paragraph on page 15 of the Proposal and inserting the following paragraph:

"Such adverse effect can be eliminated by conditioning the Authorization so that Applicant's right to divert under claimed Water Right Right No. 19284-s41E is subordinated to the right to divert of Objector Smith and any other junior appropriator whose point of diversion is located above the point where Mike Quinn Slough enters the Boulder River. In other words, although



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claimed Water Right No. W19284-s41E has an earlier priority than the rights of such junior appropriators, Applicant may not assert his priority date over their legitimate use of Boulder River water."

Pursuant to the above described corrections and amendment, the Examiner hereby corrects, and amends Condition E of, the proposed Order as follows:

"Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Rights Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc., be granted to change Water Right No. W19282-s41E as follows: to change the point of diversion of 450 gallons per minute (40.1 miner's inches) up to 130 acre-feet per annum of water from the SE¼SE¼NW¼ of Section 33, Township 5 North, Range 3 West, to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 35.5 acres located in the Section 33, Township 5 North, Range 3 West to 35.5 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West; and to change Water Right No. W19284-s41E as follows: to change the point of diversion of 450 gpm (40.1 miner's inches) up to 130 acre-feet per annum of water from the NE¼SW¼NE¼ of Section 33, Township 5 North, Range 3 West to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 10 acres located in Section 33, Township 5



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North, Range 3 West to 10 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West. These water rights are to be used in conjunction for a total flow under both rights of no more than 450 gallons per minute and a total volume of no more than 130 acre-feet per annum, as measured at the headgate of the MMS Ditch. Water use under these changes will be supplemental to Water Right Claim No. W19285-s41E. This authorization is further subject to the following express terms, conditions and restrictions:

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination as provided by Montana Law. Nothing herein shall be construed to authorize the diversion of water to the detriment of any other appropriator.

B. Authorizee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purpose provided for herein.

C. An adequate device for taking accurate measurement of water diverted shall be installed and maintained both at the point of diversion authorized herein (McCauley-Murphy-Smith headgate), as well as at the ditch take-off (pump site). Authorizee shall keep written records of the flow rate and volume diverted at the ditch take-off, including the date and duration of diversion. Authorizee shall submit such records to the department on demand.



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D. If the McCauley-Murphy-Smith ditch system is not of sufficient capacity to convey water hereunder in addition to waters presently conveyed thereby, Authorizee shall cause any improvements necessary to convey the additional water to be made prior to diverting water hereunder.

E. Authorizee's right to divert hereunder pursuant to Statement of Claim of Existing Water Right No. W19284-s41E is expressly subordinated to the water right of any junior appropriator with a point of diversion on the Boulder River lying above the confluence of the Boulder River and Mike Quinn Slough.

F. Authorizee may divert hereunder pursuant to Statement of Claim of Existing Water Right No. 19284-s41E only to the extent that the flow diverted under said right is simultaneously present at the original point of diversion on Mike Quinn Slough.

G. Prior to using water hereunder, Authorizee must determine the amount of ditch loss occurring between the new point of diversion and the pump site to be used, subject to department verification. Authorizee may not pump more than the difference between the amount (flow and volume) diverted and the amount (flow and volume) of ditch loss."

NOTICE

The parties are notified that the period in which they may file exceptions or request oral argument in this matter (as explained in the Notice portion of the September 21, 1988



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Proposal for Decision) is hereof extended. Such exceptions and requests must be filed within 20 days after service of this document upon the party.

DATED this 17 day of October, 1988.

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th. Avenue
Helena, Montana 59620-2301
(406) 444 - 6625



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing NOTICE OF CORRECTION was served by mail upon all parties of record at their address or addresses this 17th day of October, 1988, as follows:

Ed Murphy Ranches, Inc.
Box 7
Boulder, MT 59632

John Jardine
Box 488
Whitehall, MT 59759

Paul T. Smith
Lazy T Ranch
PO Box 565
Boulder, MT 59632

Emmett J & Margy McCauley
Box 25
Boulder, MT 59632

Estate of Eve & William Twohy
One North Last Chance Gulch
Helena, MT 59601

T.J. Reynolds
Helena Field Manager
1520 East 6th Ave.
Helena, MT 59620-2301

Sally Martinez
Secretary

CASE #

BB

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

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| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. W19282-S41E AND W19284-S41E BY ED MURPHY RANCHES, INC. | ) ) ) ) | 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 matter on March 24, 1988.

Applicant, Ed Murphy Ranches, Inc., appeared by and through John Jardine, attorney at law. Lloyd Richardson, ranch manager for Applicant, appeared as witness for Applicant. Lyle Ward, a technician with the Soil Conservation Service, also appeared as witness for Applicant.

Objector Paul T. Smith Ranches, Inc., appeared by and through Paul T. Smith, attorney at law. Keith Evans, an area rancher, appeared as witness for Objector Paul T. Smith Ranches, Inc.

Objector Estates of Eve Twohy and William A. Twohy (hereafter, "Twohy Estates"), appeared by and through Robert Cummins, attorney at law.

Objector Emmett J. and Margy B. McCauley were represented by Ed McCauley, son of Emmett J. McCauley. Emmett J. McCauley appeared as witness on behalf of Objector Emmett J. and Margy B. McCauley.

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James Beck, agricultural specialist with the Department of Natural Resources and Conservation (hereafter, "department" or DNRC") Water Rights Bureau Helena Field Office, appeared as DNRC staff witness.

At the end of the hearing it was moved and ordered that the record be left open for receipt of closing briefs. The record closed on April 12, 1988.

Exhibits

The Applicant offered two exhibits for inclusion in the record.

Applicant's Exhibit 1, a photocopy of a two-page letter to Lloyd Richardson from Lyle Ward, dated March 25, 1987, was admitted without objection after it was stipulated that the exhibit purported to show only the capacity of the McCauley-Murphy-Smith Ditch in the reach examined by Mr. Ward, and that it did not purport to show how much water the ditch has actually carried.

Applicant's Exhibit 2, a photocopy of an aerial photograph (No. 30043 479-150, dated August 29, 1979), was admitted without objection.

Objector Paul T. Smith Ranches, Inc. offered one exhibit for inclusion in the record.

Objector Smith Exhibit 1, a photocopy of an aerial photograph (No. 30043 479-128; dated August 29, 1979), was admitted without objection.

Neither Objector McCauley nor Objector Twohy offered exhibits.

The department offered one exhibit for inclusion in the record.



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Department Exhibit 1, 7 photographs and 4 photographic panoramas, taken by Jim Beck on September 26, 1987, was admitted without objection.

There was no objection to any of the contents of the department file.

## Findings of Fact

1. MCA §85-2-402 provides that "[a]n appropriator may not make a change in an appropriation right except as permitted under this Section and with the approval of the department. . . ."

2. This Application was duly filed on October 17, 1984.

3. By this Application, Applicant seeks to change the point of diversion and place of use for a portion of each of claimed Water Rights Nos. W19282-s41E and W19284-s41E.

4. Statement of Claim for Existing Water Right No. W19282-S41E, as filed on June 9, 1981, claims 100 miner's inches up to 750 acre-feet per annum of Boulder River water, diverted in the SE¼SE¼NW¼ of Section 33, Township 5 North, Range 3 West between May 1 and September 30 each year, for flood irrigation of 35 acres located in Section 33, Township 5 North, Range 3 West, priority date May 1, 1928. On May 7, 1985, said Statement of Claim was amended to claim a place of use of 35.5 acres in Section 33, Township 5 North, Range 3 West.

5. Statement of Claim for Existing Water Right No. W19284-s41E, filed June 9, 1981, claims 40 miner's inches up to 300 acre-feet per annum of water from Mike Quinn Slough, a tributary of the Boulder



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River[1], diverted in the NE¼SW¼NE¼ of Section 33, Township 5 North, Range 3 West between May 1 and September 30 each year, for flood irrigation of 10 acres located in Section 33, Township 5 North, Range 3 West, priority date May 1, 1928.

6. By the Application, Applicant requests that the department authorize changes in the above-said rights so that 450 gpm (11.25 miner's inches) up to 130 acre-feet per annum of water can be diverted from the Boulder River under either right or both rights conjunctively in the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West, by means of the McCauley-Murphy-Smith headgate and Ditch (hereafter, "MMS Ditch") for supplemental irrigation use on 51 acres located in the NE¼SW¼ AND NW¼SE¼ of Section 21, Township 5 North, Range 3 West. The use of any water under said rights as claimed was discontinued in 1981 due to flood damage, and Applicants do not intend to resume use of any water at the original places of use. Water use under these changes will be supplemental to water right Claim No. W19285-S41E.

7. The pertinent facts of the Application were published in the Boulder Monitor, as newspaper of general circulation in the area of the source, on May 30 and June 6, 1985.

8. The Application received four timely objections.

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[1]The claim states that Mike Quinn Slough is a tributary of the Boulder River, while maps in the department file indicate that Mike Quinn Slough "originates" in the Boulder. Because the claim states tributary, and because a slough can not, by definition, be a free-flowing channel of a river, for purposes of analysis the Slough will be treated as a tributary of the Boulder, i.e., as a source of water the flow of which will not be affected by transient changes in the flow of the Boulder.



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a. From Emmett and Margy McCauley, alleging that the MMS Ditch and headgate do not have the capability to divert or convey the additional water;

b. From the Estates of Eve Twohy and William A. Twohy, alleging that the "withdrawal of this requested quantity and for the period involved will adversely affect the flow of the Boulder River to the detriment of prior rights used on lands and diverted below the intended permittee's point of diversion."

c. From Paul T. Smith Ranches, Inc., alleging the MMS Ditch cannot convey additional water, that the present means of diversion is inadequate to divert additional waters under the MMS Ditch when Boulder River flow is low, that Smith's water rights would be interfered with as there is no way to measure the flow Applicant would be taking out of the ditch, and that Smiths' water right would be otherwise adversely affected by commingling.

d. From Montana Power Company (hereafter, "MPC") alleging adverse affect due to expansion of acreage to be irrigated under both claims.

9. By letter of May 29, 1986, MPC agreed to withdraw its objection hereto if Applicant agreed to reduce the proposed place of use from 51 acres to a total area of 45.5 acres. (Department file.) On June 7, 1986 Applicant agreed to such reduction (department file, testimony of Jim Beck), and formally amended its Application at the hearing.



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10. Objector Emmett and Margy McCauley claim the right to divert 350 miner's inches through the MMS Ditch under two different rights, one with an 1888 priority date, the other with a 1903 priority date.

11. Objector Smith claims Water Right No. W110739-s41E, priority date June 1, 1950, to divert 100 miner's inches from the Boulder River at a point of diversion which is upstream of Applicants' present point of diversion under Water Right No. W19282-s41E but downstream from the proposed point of diversion, and which is upstream from the confluence of Mike Quinn Slough and the Boulder River.

12. Objector Twohy Estates claim various water rights out of the Boulder River with points of diversion downstream from Applicants' proposed point of diversion.

13. Applicant and Objector Smith together claim Water Right No. W110740-s41E to divert 500 miner's inches through the MMS Ditch, priority date 1866.

14. The capacity of the headgate, and upper 100 feet of the MMS Ditch, is 2400 miner's inches.

15. The floor of the headgate is higher than the bottom of the Boulder River; therefore, a wing dam must be maintained in the Boulder River during periods of low water in order to divert water into the MMS Ditch. This wing dam can be sealed and extended to divert more water than is presently divertable. (Testimony of Jim Beck.)

16. Providing there is sufficient water in the Boulder River to allow exercise of the water rights presently on the MMS Ditch, the



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present wing dam, headgate and ditch are physically adequate to convey the waters (850 miner's inches) appropriated under those rights.

17. The MMS Ditch varies from wider and shallower to deeper and narrower along its length (testimony of Emmett McCauley); however, it is, at a minimum, wide enough to accomodate a backhoe all the way to its end. (Testimony of Keith Evans.) Therefore, the Examiner finds that the MMS Ditch itself has roughly a 2400-miner's-inch capacity. See Finding of Fact 14.

18. During periods of high water, the MMS Ditch may overflow its banks in certain places; however, the flow of water which constitutes high water vis-a-vis ditch overflow was not defined on the record.

19. There is a structure in the MMS Ditch which constricts it. Below the Ditch takeoff for part of McCauley's water right, there is a culvert which carries the water for 16 feet. Regarding the capacity of the culvert, no measurements were taken. However, McCauley estimated that it could carry about 500 miner's inches. Richardson testified that normally 300-350 miner's inches go by the Murphy pump which takes 250 miner's inches out of the Ditch below the culvert. If Richardson's observation is accurate, the culvert would have to convey at least 600 miner's inches (for there to be 600 miner's inches of water at the pump site) plus the amount which McCauley takes out below the culvert, but above the pump. Further, Richardson testified the culvert could easily take 50 miner's inches in addition to what it presently carries.



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The culvert clearly limits the amount of water which can be carried by the Ditch below it; however, the maximum amount of water the culvert can convey can not be ascertained from this record.

20. McCauley's take-offs are uppermost on the MMS Ditch, Murphy is next, Smith is last. This order would not be altered under this change.

21. During its ownership thereof, Applicant has utilized the captioned water rights in May and June only. After the change, Applicant will use water pursuant to these rights primarily after July 1. There is no evidence in the record regarding use of these water rights prior to Applicant's ownership, except that a period of use is stated in each of Applicant's claims. See Findings of Fact 4 and 5.

22. The record contains no evidence of planned uses or developments for which a permit has been issued, or water reserved.

## Proposed Conclusions of Law

1. The department has jurisdiction over the subject matter herein, and the parties hereto.

2. The department gave proper notice of the hearing, and all relevant substantive and procedural requirements having been fulfilled, the matter is properly before the Hearing Examiner.

3. Section 85-2-402 MCA directs that the department approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the following criteria are met:



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(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. Objector Twohy Estates' motion, in which Objector Smith joined, to certify the issue of the existence and extent of Applicant's claimed existing water rights No. W19282-s41E and W19284-s41E is hereby denied. See discussion re: when the department will certify, In the Matter of Application for Change of Appropriation Water Right No. G41585-41E by William L. and Charlotte Dunks, Proposal for Decision, July 14, 1988, pp 15-16.

5. For the purposes of this contested case, Applicant is presumed to possess the water rights it has claimed, and the parameters of said rights are presumed to be as described in its Statements of Claim. MCA §85-2-227. However, any Authorization issued pursuant hereto will be made subject to the final determination of claimed rights pursuant to MCA §85-2-211 et seq. (1987).

6. At the hearing, Applicant moved to amend its application so that the proposed place of use would be reduced from the 51 acres specified in the original application to 45.5 acres. Objector Twohy Estates objected to any amendment to the application. However, Objector did not allege any specific harm.

Because the amendment results in a reduction of the requested place of use, but does not change the legal description set forth in the public notice, the Examiner can find no prejudice to anyone, party or non-party, arising therefrom. (Those persons, who received notice of the change as originally proposed but did not object thereto, would not alter their position due to the amendment; nor does there appear to be undue surprise to the Objectors of record.) Therefore, the objection is overruled, and the amendment is hereby accepted.

Objector MPC previously withdrew its objection hereto based on the representation that such amendment would be made. Objector MPC's withdrawal is hereby acknowledged. (See Finding of Fact 9.)

7. Irrigation is a beneficial use of water. MCA §85-2-102(2)(a).

8. The objection of Twohy Estates asserts that "withdrawal of this requested quantity and for the period involved will adversely affect the flow of the Boulder River to the detriment of prior rights used on lands and diverted below the intended permittee's point of diversion." The tenor of the allegation suggests that Objector believes the requested change will result in a new use of water. However, for purposes of this contested case, Applicant is presumed presently entitled to divert the "requested quantity." See Conclusions of Law 4 and 5 supra. Therefore, the implication that Applicant does not possess the right to divert the amount of water it has claimed is not an issue in this proceeding.

Objector also alleges that "withdrawal . . . for the period involved will adversely affect the flow of the Boulder River. . . ."



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Though Applicant does not propose to alter the claimed period of use, the Applicant does (and this was made clear at the hearing) intend to change the timing of its recent use within the claimed period of use; i.e., Applicant, which has utilized the rights exclusively before July 1, now intends to utilize the rights primarily after July 1. Thus, the issue of whether one appropriator is entitled to the continuation of a certain timing of use in another's appropriation is raised. (The Examiner notes that Objector Smith, though he did not object to the alleged change in timing of use initially, argues this issue in his closing brief.) Put another way, the issue is, does MCA §85-2-401 et seq. require the department to deny the change application if the requested change would alter the timing of use of the underlying water rights?

The department has previously held that an appropriator is not entitled, through a change, to create a greater demand on the source of supply, at any given time, than existed as a consequence of his previous usage of water. See In the Matter of the Application for Change of Appropriation Water Right Nos. G120401-41H and G120403-41H by Estate of Lena Ryen, Interlocutory Order, March 13, 1985, p. 22. However, because existing (historic) demand on a source during any particular segment (day, week, or month) of a period of use may of necessity vary from year to year (e.g., timing of agricultural use depends on several factors: irrigation method, amount and timing of rainfall, stream conditions, crop grown, etc.), a senior user's right is not as a rule exercised (timed) in the same manner each year, i.e., exercised in an historic pattern, nor can it reasonably be expected that it would be when timing of use depends on several



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variable factors. Nonetheless, an historic pattern of use is sometimes established if timing is controlled by a constant and supersedent factor which annually recurs on approximately the same date.

Whether the rule expressed in Lena Ryen means that the department has no jurisdiction to authorize differential expansion[2] of a water right which would occur as a result of alteration of an historic pattern of use, or if it simply prevents such expansion of a water right if the expansion is shown to adversely affect the rights of juniors (by changing stream conditions so that juniors can not make full use of the appropriations) is not clear. However, it is clear that the rule can not be applied at all unless there is an historic pattern of use.[3]

In the instant case, the only evidence of record pertaining to timing of use is the statement of Applicant's witness, Lloyd Richardson, that Applicant had exercised the water right in question

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[2]By differential expansion, the Examiner means an increase in the demand on the source during one increment of time within a period of use, with an attendant reduction in demand on the source during another increment within the period, so that the total appropriation during the overall period of use remains constant.

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[3]Because a claim does not describe any certain pattern of use (as the final decree presumably will not), the department is not adjudicating the underlying water right if it determines what the historic pattern of use, if any, of the right is.



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only in May and June since Applicant bought "the Flood place." There was no testimony regarding how Flood or his predecessors utilized the rights; however, use after July 1 has been claimed. (See Findings of Fact 4 and 5.) Thus, whether or not Applicant's recent timing of use in fact reflects an historic pattern of use remains an open question. (The assertion that Applicant abandoned part of the water right by failing to use water during the period after July 1, or that the claimed period of use is erroneous, will not be decided in this forum. See Conclusion of Law 5.)

Absent information of record which establishes that the Applicant's water rights have historically been utilized according to a certain pattern within a claimed period of use, the department must presume that, for any given increment of the period of use, demand on the source due to the exercise these agricultural rights fluctuates widely from year to year due to usual and customary variations in water application, i.e., that there is no historic pattern of use within the period of use. Accordingly, it is here concluded that any variation in the timing of demand on the source (within the claimed period of use) which may result from the proposed change will not, as a matter of law, result in a greater demand on the source of supply at any given time than has existed as a consequence of previous usage, because such variation is presumed to have occurred in the past due to usual and customary variations in timing of diversion.

9. Objector Smith raised the issue of whether moving points of diversion, which were formerly downstream from the point of diversion of an existing junior right, to a point of diversion



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upstream therefrom constitutes adverse effect. Such a move does not constitute adverse effect per se; rather, a finding of adverse effect depends on the facts of the case.

In this case, one of Applicant's points of diversion is on the Boulder River, downstream from Objector Smith's point of diversion for his junior right. The other point of diversion is on a tributary of the Boulder River, which tributary enters the Boulder below the Smiths' point of diversion. (Finding of Fact 11.) Regarding the first aforementioned point of diversion, moving same upstream of Smith's point of diversion, will not affect Smith's right or ability to take water to which he is entitled, providing that Applicant only diverts water which it could formerly have obtained by call. (Of course, Applicant will no longer have to call the junior when it needs water, it will simply take the water to which it is entitled; however, that effect on Smith is not adverse.) There is no evidence indicating that under the change Applicant would be diverting water which he formerly could not have obtained by call. Therefore, the Examiner concludes that the proposed move of point of diversion for claimed Water Right No. 19282-41E will not adversely affect Objector Smith.

Regarding the proposed move of point of diversion for claimed Water Right No. W19284-s41E, because the original point of diversion is on a downstream tributary of the Boulder rather than the river itself, the resultant effect on Smith would not, as above, be a simple conversion from deprivation of water by call (by a downstream senior) to automatic deprivation (by an upstream senior). Rather, Applicant would be able to divert water it could not have formerly



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obtained. (Historically, when the tributary contained little or no water, Applicant could not have obtained Boulder River water by call--see Footnote 1, supra; however, after the change, Applicant could obtain Boulder River water under the aegis of his senior right.) Such diversion would amount to an expansion of Applicant's water right to the detriment of Objector Smith.

Such adverse effect can be eliminated by conditioning the Authorization so that Applicant's right to divert under claimed Water Right No. W19284-s41E is subordinated to the right to divert of Objector Smith and any other Objector hereto whose point of diversion lies between the proposed point of diversion and the point where Mike Quinn Slough enters the Boulder River. In other words, although claimed Water Right No. W19284-s41E may have an earlier priority than the rights of these Objectors, in order to preclude adverse effect to their rights, Applicant would have to cease diversion under claimed Water Right No. W19284-s41E when called by said Objectors.

Appropriators with points of diversion downstream from the confluence of Mike Quinn Slough and the Boulder (Twohy) will not be adversely affected so long as Applicant takes no more water at the new point of diverion than is being provided to the Boulder River by Mike Quinn Slough due to cessation of Applicant's diversion on the Slough. Accordingly, the Permit will be conditioned so that Applicant can divert under claimed Water Right No. W19284-s41E only to the extent that water is present at the old point of diversion on Mike Quinn Slough.



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10. The remaining allegations of adverse effect are admixed with objections regarding the adequacy of the proposed means of diversion, construction and operation of the appropriation works; specifically, Objectors question the adequacy of the MMS Headgate and Ditch to convey water in addition to that which it already carries, worrying that they will be adversely affected because waters might not be correctly apportioned once commingled in the Ditch. The question of ditch ownership and who will pay for improvements thereto, if necessary, is not within department jurisdiction and will not be decided in the forum. The department is only concerned here with the physical adequacy of the appropriation works, and that there be no adverse effect to the water rights of the other parties.[4]

Regarding the adequacy of the appropriation works, the issue raised concerns whether the headgate and Ditch are of sufficient capacity and design to convey 11.25 miner's inches in addition to the full complement of waters already conveyed therein. The headgate is placed sufficiently low in the Boulder River to accommodate diversion of 850 miner's inches (the total appropriations for the conveyance of which the Ditch is presently utilized) during low flows with the current wing dam in place. Improvement of the wing dam would increase this figure. The capacity of the MMS Headgate and Ditch to the McCauley Culvert is

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[4]Cost apportionment involves questions of ditch rights, not water rights, and as such is outside the scope of department jurisdiction.

roughly 2400 miner's inches. Thus, it is hereby concluded that with little alteration of the appropriation works the amount presently carried to the culvert could be increased by a de minimus 11.25 miner's inches (11.25 miner's inches = 1.3% of 850 miner's inches). The same is true below the culvert.

The one possibly limiting factor in the Ditch is said culvert, the maximum capacity of which can not be determined based on the record. Thus, whether it can carry 11.25 miner's inches in addition to the water it already carries (more than 500 miner's inches) can not be determined based on the record. Although it seems likely that the culvert would pass the small addition of 11.25 inches (this is only a 2.25% increase in the flow presently carried assuming only 500 miner's inches presently passes through the culvert), if the culvert capacity is only adequate to convey sufficient water to supply the existing rights on the Ditch, the culvert would have to be replaced.

Utilizing a pump for ditch take-off, and water application by pipeline and sprinkler, is a reasonable and customary method of operation.

Based on the above, the Examiner concludes that the means of diversion, construction and operation of the appropriation works is adequate, providing the Authorization is conditioned so that Applicant must replace the culvert if it is not of sufficient size to carry 11.25 miner's inches in addition to the water presently carried thereby.



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11. Providing that the amount of water Applicant diverts hereunder is measured at the headgate, and further providing that the amount diverted at the ditch take off is no more than the amount diverted at the headgate less ditch loss, the proposed change will not adversely affect the water rights of other appropriators.

Appropriators with points of diversion at points on the Boulder River other than the proposed point of diversion will be adequately protected providing Applicant diverts only as authorized. See Conclusion of Law 9. Proper administration requires that an adequate measuring device be installed at the headgate of the proposed point of diversion, and that Applicant keep records of when and how much water it diverts under the water right here changed.

As for other appropriators on the MMS Ditch, the only change from the status quo will be the diversion of an additional 11.25 miner's inches at the headgate. Because of the required measuring device, it will be evident when Applicant is diverting under the changed water rights. There will be no effect to users above Applicant's ditch take-off, for the users have first access to the ditch as well as senior water rights. Further, providing Applicant allows the correct amount for ditch loss, there will be no effect on the senior user down ditch from Applicant's ditch take-off. Accordingly, the Authorization will be expressly conditioned to require Applicant to determine and deduct the percentage ditch loss from the amount it diverts at the headgate, and to set and operate its pump so that no more than 11.25 miner's inches up to 130 acre-feet per year reduced by the percentage ditch loss (as verified by the department) is diverted at the ditch take-off (pump site).



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12. The change will not adversely affect other planned uses for which a permit has been issued or water reserved. (Finding of Fact 22.)

WHEREFORE, based on the foregoing proposed Findings of Fact and Conclusions of Law, the Examiner proposes the following:

ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc., be granted to change Water Right No. W19282-s41E as follows: to change the point of diversion of 11.25 miner's inches up to 130 acre-feet per annum of water from the SE¼SE¼NW¼ of Section 33, Township 5 North, Range 3 West, to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 35.5 acres located in Section 33, Township 5 North, Range 3 West, to 35.5 acres located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West; and to change Water Right No. W19284-s41E as follows: to change the point of diversion of 11.25 miner's inches up to 130 acre-feet per annum of water from the NE¼SW¼NE¼ of Section 33, Township 5 North, Range 3 West to the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West; and to change the place of use of said amount from 10 acres located in Section 33, Township 5 North, Range 3 West to 10 acres



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located in the NE¼SW¼ and NW¼SE¼ of Section 21, Township 5 North, Range 3 West. These water rights are to be used in conjunction for a total flow under both rights of no more than 11.25 miner's inches, and a total volume of no more than 130 acre-feet per annum, as measured at the headgate of the MMS Ditch. Water use under these changes will be supplemental to Water Right Claim No. W19285-s41E. This authorization is further subject to the following express terms, conditions and restrictions:

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination as provided by Montana Law. Nothing herein shall be construed to authorize the diversion of water to the detriment of any other appropriator.

B. Authorizee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purpose provided for herein.

C. An adequate device for taking accurate measurement of water diverted shall be installed and maintained both at the point of diversion authorized herein (McCauley-Murphy-Smith headgate), as well as at the Ditch take-off (pump site). Authorizee shall keep written records of the flow rate and volume diverted herein at said point of diversion, and of the flow rate and volume diverted at the ditch take-off, including the date and duration of diversion. Authorizee shall submit such records to the department on demand.

D. If the McCauley-Murphy-Smith Ditch system is not of sufficient capacity to convey water hereunder in addition to waters presently conveyed thereby, Authorizee shall cause any improvements necessary to convey the additional water to be made prior to diverting water hereunder.



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E. Authorizee's right to divert hereunder pursuant to Statement of Claim of Existing Water Right No. W19284-s41E is expressly subordinated to the water right of any junior appropriator with a point of diversion on the Boulder River lying between the new point of diversion hereunder (the headgate of the McCauley-Murphy-Smith Ditch located in the SE¼NE¼NW¼ of Section 19, Township 5 North, Range 3 West) and the confluence of the Boulder River and Mike Quinn Slough.

F. Authorizee may divert hereunder pursuant to Statement of Claim of Existing Water Right No. 19284-s41E only to the extent that the flow diverted under said right is simultaneously present at the original point of diversion on Mike Quinn Slough.

G. Prior to using water hereunder, Authorizee must determine the amount of ditch loss occurring between the new point of diversion and the pump site to be used, subject to department verification. Authorizee may not pump more than the difference between the amount (flow and volume) diverted and the amount (flow and volume) of ditch loss.

## NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto



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with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record.



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

DONE this 21 day of September, 1988.

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address this 22nd day of September, 1988, as follows:

Ed Murphy Ranches, Inc.
Box 7
Boulder, MT 59632

John Jardine
Box 488
Whitehall, MT 59759

Paul T. Smith
Lazy T Ranch
P O Box 565
Boulder, MT 59632

Emmett J and Margy McCauley
Box 25
Boulder, MT 59632

Estate of Eve & William Twohy
One North Last Chance Gulch
Helena, MT 59601

T. J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT 59620-2301

Susan Howard
Hearing Reporter



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