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 NOS. G22261-76LJ AND G22262-76LJ BY WILLIAM S. TOWN, JOSEPH W. TOWN, AND RAE BELLE HUGHEY	)	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 20, 1991, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

That subject to the terms, conditions, restrictions, and limitations set forth below, Authorization to Change Appropriation Water Right Nos. G22261-76LJ and G22262-76LJ by William S. and Joseph W. Town is hereby granted to change the points of diversion from Lot 4, Block 5, which is located in the SW¼SW¼SE¼ of Section 34, Township 24 North, Range 19 West, in Lake County to Lot 5, Block 6 which is located in the SE¼SW¼SE¼ of said Section 34.

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

2. The approval of this change is not to be construed as recognition by the Department of the Water Rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

3. This Authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes position that economic investments made in reliance upon the Authorization do not create in the Appropriator any equity or vested right against the Tribes. The Appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this Authorization is at Appropriators' risk.

Issuance of this Authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this Authorization nor does the Department, in issuing this Authorization acknowledge any liability for damages caused by exercise of this Authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may experience should they be unable to exercise

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this Authorization due to the future exercise of reserved water rights.

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 13 day of September, 1991.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 13th day of September, 1991 as follows:

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32865 St. Hwy 38
Scottsburg, OR 97473

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Wallowa, OR 97885

Ray Belle Hughey
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Columbia, MO 65201

James H. Goetz
Goetz, Madden & Dunn
35 N. Grand
Bozeman, MT 59715

John Chaffin
U.S. Department of Interior
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East Shore
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Department of Biology
California State University
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David M. Rorvik
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Hugo E. Horst
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Kalispell Water Resources Regional Office
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Kalispell, MT 59903

Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NOS. G22261-76LJ AND G22262-76LJ BY WILLIAM S. TOWN, JOSEPH W. TOWN, AND RAE BELLE HUGHEY	)	PROPOSED ORDER

* * * * * * * * * *

Pursuant to the provisions of the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was scheduled to be held on July 23, 1991 at 10:00 a.m. in the Conference Room in the Lake County Courthouse.

At approximately 9:40 a.m. Objectors Grant and Doris Buswell; Applicants Maxine and Joseph Town; Charles Brasen, Manager of the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department); and the Hearing Examiner were in the Conference Room preparing to proceed with the hearing when Mr. K. M. Bridenstine, Attorney for Objectors Hugo and Elizabeth Horst, appeared. When Mr. Bridenstine was informed that his clients no longer had an interest in the property which was the basis for their objection, Mr. Bridenstine stated that the hearing could not be held because the Department had not notified the new owners. Prior to this statement, Mr. Bridenstine had directed the Buswells to stay out of the discussion, telling them they had caused enough problems already. At this the Buswells asked if they could be excused. Since the hearing had not yet convened, the Examiner nodded.

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When it was verified through telephone calls that the Department had indeed notified the new owners, the Hearing Examiner and Mr. Brasen searched for the Buswells and upon finding them, the Hearing Examiner informed them that the hearing would be convened at 1:00 p.m. Mr. Buswell then stated that he would not attend at 1:00 p.m. At that point, the Hearing Examiner informed Mr. Buswell that he would be in default if he did not. The Hearing Examiner also attempted to contact Mr. Bridenstine but was unsuccessful. The other objectors failed to appear either at 10:00 a.m. or at 1:00 p.m. When the hearing was convened at 1:08 p.m., the Buswells did not appear.

In accordance with ARM 36.12.208, Grant W. and Doris N. Buswell; Bayard H. Brattstrom and new owner of the Brattstrom property, David M. Rorvik; Hugo E. and Elizabeth Horst and new owner of the Horst property, Sherman H. Deveas III, are in default and their objections are hereby dismissed.

Objectors Confederated Salish and Kootenai Tribes and U.S. Department of Interior stated in their objection that because their objection is one of jurisdiction, they would waive any factual hearing and requested the objection be made a part of the record. The Department of Interior stated in its objection that they would not attend any hearings on this Application; however, they do not waive the right to challenge the State's jurisdiction.

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EXHIBITS

Applicants' Exhibit 1 consists of eight pages. This exhibit contains copies of Applicants' Statements of Claim and explanations of past water use.

Applicants' Exhibit 2 consists of 11 pages containing copies of two water right filings by Mrs. Rose Donahue, a list of water right filings and the existing uses thereof, a history of land ownership, and four maps.

Applicants' Exhibit 3 consists of 18 pages. This exhibit contains a Notice of Proposed Project for a 310 permit and the granting thereof, including several maps, a Field Investigation Report, a letter from the Montana Department of Fish, Wildlife, and Parks, a letter from the Chairman of the Board of Lake County Commissioners granting an easement to place pipes across the county right-of-way, and copies of two photographs.

Applicants' Exhibit 4 consists of 34 pages containing Statements of Claim filed by Grant and Doris Buswell, Bayard Brattstrom, and Hugo and Elizabeth Horst. Also contained in this exhibit is a notice to an unknown person or persons which is signed by B. H. Brattstrom.

Applicants' Exhibit 5 consists of three pages which contain the written responses of the Applicants to the objections filed to this Application.

Applicants' Exhibit 6 is a map drawn on a poster board which depicts Lots 2, 3, 4, 5, and 6 of Block 6; Lot 1 of Block 7; Lots 2, 3, and 4 of Block 5; and Lot 1 of Block 8. This map also

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shows the location of Dee Creek, a ditch, and various buildings. The orange dot labelled #3 is the ditch through which Objectors Brattstrom (now Deveas) and Horst (now Rorvik) obtain their water. The orange dot labelled #4 is Applicants' original point of diversion. The orange dot labelled #2 is the new point of diversion. The orange dot labelled #5 is the point of diversion used by Objector Buswell for his drinking water. The orange dot labelled #6 diverted water for the orchard that was located in Lot 1 of Block 8. The orange dot labelled #7 is a double cement box that fed water to the old house that burnt in 1967 and the cabin located in Lot 1 of Block 8. The orange dot labelled #1 is the location of some activity on Tribal land that has nothing to do with this contested case hearing.

All exhibits were accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it; therefore the Department file is entered into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

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, of the legislature." The

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requirement of legislative approval does not apply in this matter.

2. On July 6, 1981, the Applicants filed an Application for Change of Appropriation Water Right to change two points of diversion. An amended Application was received by the Department on March 26, 1982.

3. Pertinent portions of the amended Application were published in the Flathead Courier on August 5, August 12 and August 19 of 1982. (Applicants' Exhibit 1.)

4. Statement of Claim of Existing Water Right No. 22261-76LJ claims 20 gallons per minute up to three acre-feet per annum of water from Dee Creek, also known as Laugh Away Creek, diverted at a point in Lot 4, Block 5, Festou Villa Subdivision[1], located in the SW¼SW¼SE¼ of Section 34, Township 24 North, Range 19 West, in Lake County, for domestic use on six acres in Lot 4, Block 5, in the SW¼SW¼SE¼ of said Section 34. The claimed period of use is from January 1 through December 31, inclusive of each year. The claimed priority date is August 22, 1916.

5. Statement of Claim of Existing Water Right No. 22262-76LJ claims 10 cubic feet per second up to 50 acre-feet per annum of water from Dee Creek, also known as Laugh Away Creek, diverted at a point in Lot 4, Block 5, located in the SW¼SW¼SE¼ of Section 34 Township 24 North, Range 19 West, in Lake County, for irrigation on 4.24 acres in Lot 1, Block 8, in the NW¼NW¼NE¼ of

[1]Unless otherwise specified, all lots and blocks mentioned in this Proposal are located in the Festou Villa Subdivision.

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Section 3, and 4.81 acres in Lot 1, Block 7, the NE¼NW¼NE¼ of said Section 3; both located in Township 23 North, Range 19 West; 4.06 acres in Lot 4, Block 5, in the SW¼SW¼SE¼ of Section 34; 2.52 acres in Lot 5, Block 6, in the SE¼SW¼SE¼ of said Section 34; 2.50 acres in Lot 6, Block 6, in the SE¼SW¼SE¼ of Section 34, located in Township 24 North, Range 19 West for a total of 18.13 acres. The claimed period of use is from May 1 through September 30, inclusive of each year. The claimed priority date is August 22, 1916. (Applicants' Exhibit 1.)

6. The basis for the Applicants' Statements of Claim is a Notice of Appropriation filed by Mrs. Rose Donahue on August 22, 1916. Mrs. Donahue stated in her Notice that the intended place of use for this appropriation was "Lot Four Block Five of Festou Villa Site, East Shore Flathead Lake, on Lot 1 B. 8 Lot 5 B 6 Lot 6 B 6 Lot 1 B 8 of Festou Villa Site" which appears to read as Lot 4, Block 5; Lot 1, Block 8; Lot 5, Block 6; Lot 6, Block 6; and Lot 1, Block 8 of Festou Villa Subdivision. There is reason to believe the last description, Lot 1, Block 8, should have been Lot 1, Block 7, since she had already cited Lot 1, Block 8, and Lot 1, Block 7, is adjacent to the other property. (Applicants' Exhibits 1 and 2 and testimony of Joseph Town.)

7. Applicants own all of Lot 1 of Block 8 east of the highway, Lot 4 of Block 5 east of the highway, and Lots 5 and 6 of Block 6, 15.1 acres of the property described in Mrs. Donahue's Notice of Appropriation filed on August 22, 1916. Objectors Brattstrom, now Rorvik, own .6 of an acre, Objectors

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Horst, now Deveas, own .11 of an acre, and Objectors Buswell own .62 of an acre. (Testimony of Joseph Town and Applicants' Exhibit 1.)

8. Applicants propose to change the points of diversion for each of the above Statements of Claim from Lot 4, Block 5, in the $SW\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ of Section 34, Township 24 North, Range 19 West, to a point in Lot 6, Block 5, in the $SE\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ of said Section 34, which is approximately 150 yards upstream from the old points of diversion. (Testimony of Joseph Town, Applicants' Exhibit 6, and Department file.)

9. The following diversions were in existence when Applicants' father, S. R. Town, purchased Lot 4 of Block 5, Lot 1 of Block 8, Lots 5 and 6 of Block 6, and Lot 1 of Block 7 in 1966:

A. a small ditch at the top of the orchard located in Lot 1 of Block 8;

B. old concrete diversion tank near upper end of orchard with water line to old house, orchard, and cabin in Lot 1 of Block 8;

C. a small ditch to the west edge of Lot 4 of Block 5 that went behind the old barn on Lot 4 of Block 5;

D. a water line from metal container near the east edge of Lot 4 of Block 5 to an old concrete diversion system which supplied water to the house that burned, the little cabin and a stand pipe in the orchard; and

E. a small ditch above Lots 5 and 6 of Block 6 that

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went around the ridge, destination unknown. (Testimony of Joseph Town and Department file.)

10. The physical aspects of this change were completed and have been in operation since 1978 without problems. The diversion consists of a sump in the stream and a pipeline to the places of use. This diversion also serves Applicants' Beneficial Water Use Permit No. 61978-76H. (Department file and testimony of Joseph Town.)

11. The use of the water is domestic and irrigation. (Department file and testimony of Joseph Town.)

12. There are no diversions between the old and new points of diversion. (Applicants' Exhibit 6 and testimony of Joseph Town.)

13. Charles Brasen conducted a field investigation of the project on June 21, 1984. In his report, Mr. Brasen states that the change does not appear to adversely affect any of the objectors' water rights. At the time of Mr. Brasen's field investigation, water was flowing into Flathead Lake from both the ditch and Dee Creek. At no time has a complaint been filed with the Department alleging an adverse effect to a prior water right.

14. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved that would be adversely affected by this Application. (Department records and testimony of Joseph Town.)

15. Rae Belle Hughey is no longer a co-owner of the property involved in this case and her name should be removed

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from this Application. (Testimony of Joseph Town.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA. As to the objections of the Confederated Salish and Kootenai Tribes, the Department has regulatory jurisdiction over new appropriations of non-reserved water by non-Indians on fee lands within the Reservation. See In re Applications No. 62935-s76LJ by Crop Hail Management; 63023-s76L by Stan and Catherine Rasmussen; 63574-s76L by Jerolene Richardson; 64965-s76LJ by Herbert Gray; 64988-g76LJ by John and Patricia Starner; 66459-s76L by Kenneth and Jorrie Ciotti and G15152-s76L by Frank Pope, Director's Order, April 30, 1990.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the criteria set forth in § 85-2-402(2), MCA, are met. The instant Application was filed on March 26, 1982; therefore, the following criteria which were in effect at that time must be satisfied.

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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. The Applicant has provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 8, 9, 10, 12, and 13.

5. The means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 10.

6. The proposed uses, domestic and irrigation, are beneficial uses of water. See § 85-2-102(2), MCA.

7. 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. See Finding of Fact 14.

8. Since Rae Belle Hughey no longer owns any part of the subject property, she is no longer a party to this proceeding; therefore, her name cannot appear on an Authorization to Change Appropriation Water Right granted in this matter. See Finding of Fact 15.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

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PROPOSED ORDER

That subject to the terms, conditions, restrictions, and limitations set forth below, Authorization to Change Appropriation Water Right Nos. G22261-76LJ and G22262-76LJ by William S. and Joseph W. Town is hereby granted to change the points of diversion from Lot 4, Block 5, which is located in the SW¼SW¼SE¼ of Section 34, Township 24 North, Range 19 West, in Lake County to Lot 5, Block 6 which is located in the SE¼SW¼SE¼ of said Section 34.

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

2. The approval of this change is not to be construed as recognition by the Department of the Water Rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

3. This Authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes position that economic investments made in reliance upon the Authorization, do not create in the Appropriator any equity or vested right against the Tribes. The Appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this Authorization is at Appropriators' risk.

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Issuance of this Authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this Authorization nor does the Department, in issuing this Authorization acknowledge any liability for damages caused by exercise of this Authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may experience should they be unable to exercise this Authorization due to the future exercise of reserved water rights.

NOTICE

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

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

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Dated this 20th day of August, 1991.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 20th day of August, 1991 as follows:

William S. Town
32865 St. Hwy 38
Scottsburg, OR 97473

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