

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. G(W)31227-01-41F BY )  
SHINING MOUNTAINS OWNERS )  
ASSOCIATION )

\* \* \* \* \*

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 21, 1990 Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, and limitations specified below, Application for Change of Appropriation Water Right No. G(W)31227-01-41F hereby is granted to the Shining Mountains Owners Association, to make the following changes:

Authorization is granted to add an additional point of diversion in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, Township 07 South, Range 01 West, Madison County, Montana. Authorization also is granted to change the place of use for 30 gallons of water per minute up to 2.25 acre-feet of water per year from the SW $\frac{1}{4}$  of Section 19 to

**CASE #** 31227-01

the S½NW¼NW¼ of Section 19 (Lot 43, Shining Mountains Subdivision Unit II), Township 07 South, Range 01 West, Madison County, Montana. The water will be diverted by means of a pump and pipeline for new sprinkler irrigation between April 1 and September 30, inclusive, of each year.

The Change Authorization in this matter is issued 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 the appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the 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.

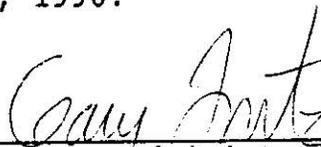
C. The Appropriator must cease diverting 30 gpm of its full claimed flow rate of 6.25 cfs at its claimed historic points of diversion at such times water is being diverted at the new point of diversion pursuant to this Change Authorization. The Appropriator shall in no event withdraw more water from the source of supply than reasonably is required for the purpose authorized herein.

D. The Appropriator shall ensure that the diversion system installed pursuant to this Authorization shall be so designed and operated that it does not divert more than the authorized flow rate and volume, and shall require the operator of the diversion system to keep written records of the dates on which water is diverted, and the rate and duration of diversion on each such date. The Appropriator shall provide such records to the Department upon request.

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 9 day of ~~September~~ <sup>October</sup>, 1990.



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

CERTIFICATE OF SERVICE

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

**CASE #** 31227-01

Shining Mountains Owners  
Association  
P.O. Box 452  
Ennis, MT 59729

John Allen Padilla  
520 South 5th St  
Miles City, MT 59301

Estate of Joseph Robbie  
513 Varney Road  
Ennis, MT 59729

James H. Morrow  
Morrow, Sedivy and Bennett  
P.O. Box 1168  
Bozeman, MT 59771-1168

James A. Daems  
678 Varney Road  
P.O. Box 170  
Ennis, MT 59729

Peggy Elting,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59601

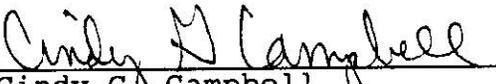
Helen Joy Daems  
c/o Jim Daems  
26 Gravely Range Road  
Ennis, MT 59729

William Russell McElyea  
Moore, O'Connell, Refling  
and Moon  
P.O. Box 1288  
Bozeman, MT 59771-1288

Don P. Mellon  
14 Fish Hatchery Road South #1  
Ennis, MT 59729

Matt Williams  
Attorney at Law  
506 E. Babcock  
Bozeman, MT 59715

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

  
Cindy G. Campbell  
Hearings Unit Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. G(W)31227-01-41F BY )  
SHINING MOUNTAINS OWNERS )  
ASSOCIATION )

\* \* \* \* \*

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 30, 1990 in Bozeman, Montana.

Applicant Shining Mountains Owners Association appeared at the hearing by and through counsel Perry J. Moore and Russell McElyea.

Tom Orcutt, a resident of Shining Mountains Subdivision and on the Shining Mountains Owners Association (hereafter, "SMOA") Board of Directors, appeared as a witness for the Applicant.

Objector Don P. Mellon appeared at the hearing pro se.

Objector John Padilla appeared at the hearing pro se.

Untimely Objectors James A. Daems and Helen Joy Daems, represented by counsel Matthew W. Williams, appeared at the hearing for the limited purpose of withdrawing their objections. (See Preliminary Matters.)

The Estate of Joseph Robbie was represented as an interested party at the hearing by counsel James Morrow.

EXHIBITS

The Applicant offered four exhibits for inclusion in the

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record in this matter:

Applicant's Exhibit 1 consists of a partial plat map of Shining Mountains Subdivision Unit II, marked with a green line to show the historic diversion ditch, with an orange dot to show the property of John W. Smidansky, and with blue dots to show the lots owned by Objector Don Mellon. The exhibit was marked at the hearing with a green rectangle to show the proposed place of use, a purple dot to indicate the lot owned by Objector John Padilla, and a red line which indicates the ground (a road easement) the Applicant proposes removing from production.

Applicant's Exhibit 2 is a photocopy of a letter from John W. Smidansky to Tom Orcutt, giving SMOA permission to act on Mr. Smidansky's behalf in the matter of the present change Application. In response to the Hearing Examiner's request that the Applicant furnish an original document or other authentication, a notarized letter signed by Mr. Smidansky was submitted subsequent to the hearing, along with a photocopy of the warranty deed for Mr. Smidansky's property. Both items have been incorporated into Applicant's Exhibit 2 for the record.

Applicant's Exhibits 1 and 2 were accepted for the record without objection.

Applicant's Exhibit 3 is a notarized letter written by George Alger, a resident in the area, stating his observations concerning irrigation along the south edge of the SMOA bench. Objector Mellon objected to the exhibit on the basis that it is hearsay. However, the objection goes to the weight rather than

the admissibility of the exhibit; therefore, the objection was overruled and the exhibit was accepted for the record.

Applicant's Exhibit 4 is a copy of the minutes of the SMOA annual meeting, dated July 5, 1986. Objector Mellon objected to the exhibit on the basis of lack of foundation. Tom Orcutt testified that he had been present at the meeting and had prepared the minutes, and that they accurately represent the business transacted at the meeting. The Hearing Examiner hereby overrules Mr. Mellon's objection and accepts the exhibit for the limited purpose of supporting Mr. Orcutt's testimony that the proposed water right changes have been applied for with the approval of SMOA's Board of Directors.

The Applicant stipulated that the two exhibits offered by Objector Mellon at the hearing In the Matter of the Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company would be incorporated in the record in the present matter:

Mellon Exhibit 1 (T-L) is a map created by overlapping several plat maps showing the Shining Mountains Subdivision. Objector Mellon marked the main canal running north to south through the subdivision in green on the map, and marked three possible water take-out points.

Mellon Exhibit 2 (T-L) consists of photocopies of the Department of Natural Resource and Conservation's verification abstracts for Statement of Claim for Existing Water Right No. 31227-41F (cover sheet plus 11 pages).

Objector Mellon offered one additional exhibit for inclusion in the record in this matter:

Mellon Exhibit 4 is a letter signed by the County Appraiser for Madison County, stating that the county tax records do not show SMOA as owning any real property. The Applicant objected to this exhibit as being irrelevant. The Hearing Examiner withheld ruling on the exhibit at the hearing, pending a chance to review the offered document, but now sustains the Applicant's objection. Since the Applicant has the written consent of the owner of the property where the water is to be put to beneficial use (see §85-2-402(2)(d), and Finding of Fact 7 infra), the exhibit does not appear to have any relevance to the issues in this matter. Therefore, Objector Mellon's proposed Exhibit 4 has not been accepted for the record.

The Department did not offer any exhibits for inclusion in the record. The Department file in this matter was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The record in this matter closed at the end of the March 30, 1990 hearing.

#### PRELIMINARY MATTERS

The Application for Change in this matter involves changes to the same claimed water right as does the Application for Change filed by T-L Irrigation Company. Claimed Water Right No. 31227-41F has been divided, and portions thereof transferred to

T-L Irrigation Company and Combs Cattle Company, with a portion of the remaining right being made available for the present change application by Shining Mountains Owners Association on behalf of J.W. Smidansky. Hearings on these Applications, numbered G(W)31227-41F, G(W)31227-02-41F, and G(W)31227-01-41F respectively, were held back to back, since they involve the same underlying water right, the same issues, and for the most part the same parties. Since the Applications are so closely related, certain evidence is relevant to the records in all of the Applications.

The parties in this matter stipulated that the exhibits offered by Objector Mellon at the hearing on Application No. G(W)31227-41F by T-L Irrigation Company will be deemed admitted for purposes of the record in the present matter as well. The parties in this matter also incorporated many of their procedural motions and objections in the record of the present Application by reference to the arguments made on the record in the T-L Irrigation hearing.

Due to the duplication of parties and issues in the T-L Irrigation application and the present application by SMOA, and to avoid undue repetition, the Hearing Examiner also has incorporated portions of the discussion set forth in the T-L Irrigation Proposal for Decision by reference in the present Proposal for Decision.

I. The Applicant in the present matter moved to dismiss the objection of Don Mellon, alleging that Mr. Mellon has no

recognized interest in the matter which would give him standing.

The Hearing Examiner denied the Applicant's motion and allowed Don Mellon to participate as an objector at the hearing, while limiting the scope of his argument on the issue of ownership of the water right to be changed to an offer of proof on the issue. The Applicant renewed its Motion to Dismiss.

The Hearing Examiner hereby reiterates her position that the statutory language of §85-2-308, MCA is broad enough to allow Mr. Mellon status as an objector and the right to participate in the hearing process. For a full discussion of this issue, see Preliminary Matters in the Proposal for Decision, Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company (hereafter, "T-L Irrigation Proposal for Decision").

II. Untimely Objectors James A. Daems and Helen Joy Daems withdrew their objection in the present matter on the record at the hearing, and did not participate in the hearing. The Objectors specified, however, that the withdrawal of objection in this matter may not be viewed as a retreat from their position that the water right in this matter has been abandoned in whole or in part, nor may it be construed as a bar to their arguments on this issue in future administrative or judicial actions involving the water right.

For a full discussion of the Objectors' abandonment argument, see the Daems post-hearing brief and reply brief filed in T-L Irrigation, and Preliminary Matters in the T-L Irrigation

Proposal for Decision.

III. Objector Mellon challenged the Applicant's right to apply for the proposed changes in this matter, alleging that the Applicant does not own the underlying water right. The Hearing Examiner reiterates her position that the Department cannot accept jurisdiction on the ownership issue, and denies Objector Mellon's Motion to Certify on the basis that certification of the water right ownership issue would not be appropriate in this matter. For a full discussion of these decisions, see Preliminary Matters, T-L Irrigation Proposal for Decision.

IV. Objectors Mellon and Padilla and the Applicant spent a large amount of time at the hearing in the present matter addressing the issue of whether the Shining Mountains Subdivision lots owned by Objectors Mellon and Padilla were part of the original place of use for claimed Water Right No. 31227-41F. (See, e.g., Applicant's Exhibit 3.) Presumably the parties are attempting to develop a record in case the ownership issue is determined to be relevant in an appeal in this matter. However, based upon the Hearing Examiner's determination that the Department does not have jurisdiction to decide the issue of ownership of the water right, the evidence on this issue will not be reviewed in this Proposal.

V. Objector Mellon argued at the hearing in the present matter that he was prejudiced by the Hearing Examiner's decision to hold the hearing on this Application prior to holding the hearing on the Combs Cattle Company application, when the present

matter had been scheduled to be held last. (See Department file.) The Objector made an objection to the scheduling on the record. However, subsequent to the hearing, Objector Mellon filed a Motion to Strike, requesting that his motion on the issue of scheduling be stricken from the record, and affirming that said scheduling was not prejudicial to his case. (See Department file, April 4, 1990 Motion to Strike.) The Hearing Examiner, upon review of the record in this matter and in absence of opposition to the motion by any party to this matter, hereby grants the Objector's Motion to Strike.

VI. Objector Mellon alleges that the administrative process in this matter is flawed by inadequate notice: he claims that the individual landowners who reside in Shining Mountains Subdivision are the owners of the underlying water right and, as such, were entitled to individual notice of the Application pursuant to §85-2-307, MCA. However, the Hearing Examiner reiterates her position that a review of the record indicates that notice in this matter was adequate. For a full discussion of this decision, see Preliminary Matters, T-L Irrigation Proposal for Decision.

VII. Objector Mellon alleges that the public notice in this matter was inaccurate, and/or that the change in place of use the Applicant proposes does not comport with the public notice, because the public notice in this matter specifies that the Applicant intends to remove three-quarters of an acre of land from historically irrigated acreage in Section 19, Township 07

South, Range 01 West and Section 24, Township 07 South, Range 02 West, while testimony and evidence presented by the Applicant shows that the three-quarters of an acre to be removed actually is located wholly in Section 19. (See Applicant's Exhibit 1; testimony of Tom Orcutt.)

Objector Mellon is correct in his allegation that the three-quarters of an acre in question is located entirely in Section 19, Township 07 South, Range 01 West. (See Finding of Fact 7.) However, a review of the record does not indicate that any interests may have been prejudiced by the discrepancy. Although the public notice was inaccurate in the sense of being overinclusive, it did include the correct legal, and the actual physical discrepancy is a matter of the acreage to be removed being located a couple of hundred feet from the section line. (See Applicant's Exhibit 1.) Objector Mellon did not argue that his case was prejudiced by the discrepancy, nor is it likely that any additional or different objections would have resulted if the public notice had listed only Section 19 as the past place of use. The public notice accurately reflects the Applicant's intent to remove from the past place of use land rendered nonirrigable by the construction of roadways, and lists the proximate area of this acreage. The Hearing Examiner finds no basis for a determination that the public notice was misleading.

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, 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."

2. Application for Change of Appropriation Water Right No. G(W)31227-01-41F was duly filed with the Department of Natural Resources and Conservation on April 6, 1989 at 2:36 p.m.

3. The pertinent portions of the Application were published in the Madisonian, a newspaper of general circulation in the area of the source, on May 4, 1989.

4. The source of water for claimed Water Right No. 31227-41F is Blaine Spring Creek (also known as Warm Springs Creek), a tributary of the Madison River.

5. Statement of Claim for Existing Water Rights for Irrigation No. 31227-41F was filed by Shining Mountains Owners Association on September 8, 1981, claiming 250 miner's inches up to 1000 acre-feet of water per year for irrigation of 490 acres of land. The 490 acres listed as the place of use was reduced to 279 acres in the Water Court verification process. This acreage includes the entire bench where Shining Mountains Subdivision presently is located (the "SMOA bench") as well as acreage to the west of the diversion ditch. (See Applicant's Exhibits 1 and 5; Department file.)

The historic place of use as verified includes 75 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ , 60 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ , 10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 35 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ , and 20 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, Township 07 South, Range 01 West, as well as 10 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ , 20 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , 20 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , 25 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and 4 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 24, Township 07 South, Range 02 West, all legals located in Madison County, Montana (see Department file).

The priority date for the claim is September 19, 1880. The claimed period of appropriation for the right is April 1 through September 30 of each year.

6. Shining Mountains Owners Association is a non-profit corporation organized under Title 35, Chapter 2 of Montana Code Annotated (1981) to provide maintenance, preservation, and control of the Shining Mountains Subdivision and to administer all matters regarding surface water rights, among other duties and obligations. (See paragraph III of the Restated Articles of Incorporation of Shining Mountains Owners Association, part of the Applicant's response to the filed objections in this matter, as contained in the Department File.) The corporation's members are composed of owners of parcels within the subdivision described in paragraph IV of the Restated Articles, including owners of lots 1 to 226 of Shining Mountains Unit II.

James W. Smidansky, as owner of Lot 43 in Shining Mountains Unit II, is a member of SMOA. SMOA, as the owner of record of the water right in this matter (see Statement of Claim of

Existing Water Rights for Irrigation No. 31227-41F), intends to allow Mr. Smidansky to utilize a portion of the water right on his Shining Mountains property, but there is no evidence that it intends to transfer the specified portion of the water right to Mr. Smidansky. See Applicant's Exhibit 4.

7. J.W. Smidansky has given written consent to Shining Mountains Owners Association to represent him in the Change Application in this matter. See Applicant's Exhibit 2.

8. SMOA, as the owner of record of claimed Water Right No. 31227-41F, has applied to add a point of diversion and change the place of use for 30 gallons per minute ("gpm") up to 2.25 acre-feet of water per year, so that the water may be used by Shining Mountains Subdivision property owner John W. Smidansky on his subdivision lot. The Applicant, which has claimed diversion points in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 13 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 07 South, Range 02 West, proposes to add a third point of diversion located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, Township 07 South, Range 01 West, all legals in Madison County, Montana. The Applicant also seeks to change the place of use from three-quarters of an acre of land located in the claimed historic place of use in Section 19 to three-quarters of an acre located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19 (Lot 43, Shining Mountains Unit II), both legals in Township 07 South, Range 01 West. Water would be used on the proposed new place of use for new sprinkler irrigation.

9. Tom Orcutt testified on behalf of the Applicant that

the lands SMOA proposes to take out of production to compensate for the new lands to be irrigated consist of the 30-foot road easement at the south edge of subdivision lots 21 and 22, plus the western 254 feet of road easement at the south edge of lot 23. This continuous section of roadway is located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, Township 07 South, Range 01 West. (See Applicant's Exhibit 1.) Mr. Orcutt stated that the acreage was computed by choosing a relatively straight stretch of road, then computing the length of 30-foot easement needed to yield three-quarters of an acre of land. (See also Item 8 on the Application in this matter.) Mr. Orcutt testified that the specified section of easement is a part of the historic place of use which has been rendered nonirrigable by the construction of subdivision roads.

10. J.W. Smidansky proposes to irrigate the new place of use by pumping water directly from Blaine Spring Creek by means of a 5 horsepower "non-self-priming pump" (Supplement to Application, Section II) up a 130-foot vertical rise to the Smidansky lot, which borders Blaine Spring Creek. The Application Supplement in this matter specifies that the 86 pounds of pressure developed at the pump is more than sufficient to deliver enough water to the proposed place of use, and at adequate pressure, to run four lawn sprinklers at a water application rate of five gallons per minute per sprinkler. The water would be conveyed from the pump to the lot through a plastic pipe with an outside diameter of 1 3/4". The Supplement further specifies that the technical information has been

discussed in detail with the Aquatech Company of Belgrade, Montana. (See Department file, Supplement to Application for Change of Appropriation Water Right No. G(W)31227-01-41F.) Tom Orcutt testified that Mr. Smidansky also will install a holding tank on his property, if necessary.

Mr. Smidansky intends to use the water to irrigate his lawn and garden, a total area of three-quarters of an acre. (Testimony of Orcutt; Application Supplement.) The proposed period of diversion remains April 1 through September 30 of each year, as claimed for the underlying water right.

11. Objector Mellon alleged that there will not be any return flows from the proposed place of use, thereby adversely affecting other appropriators on the source. Objector Padilla stated that he is concerned about the potential cumulative effects of this and other applications for changes in the underlying water right, since he has future plans (such as a potential hydropower project) which require water to be available. Objectors Mellon and Padilla both expressed concern that the value of their property will be affected if water rights which historically have been appurtenant to the property are transferred to other places of use. (See Preliminary Matters.)

12. A review of the record in this matter does not indicate any planned uses or developments for which a permit has been issued or for which water has been reserved.

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 has jurisdiction over the subject matter herein and the parties hereto. Title 85, Chapter 2, Part 4, MCA.

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

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in §85-2-402, MCA, 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) Except for a lease authorization pursuant to (§85-2-436) that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

5. The Applicant has the written consent of the person with possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 6 and 7.

6. The Applicant has provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 10.

7. The Applicant has provided substantial credible

evidence that the proposed use will not adversely affect the water rights of other persons or other planned uses for which a permit has been issued or for which water has been reserved.

An applicant's initial burden of production on this criterion is met if the applicant provides substantial credible evidence that the proposed change(s) will not increase the burden on the water source. In the absence of objections or other contrary evidence, a correct and complete application usually is sufficient to meet the burden, if it sets forth the kind and character of the proposed change(s). Objectors then have the burden of producing information about the utilization of their own water rights and offering a plausible argument that the proposed changes would cause adverse effects to their rights. (See Conclusion of Law 7, T-L Irrigation Proposal for Decision, for citations.) Once these initial burdens have been met, the Applicant has the final burden of proof (the burden of persuasion) on all issues set forth in §85-2-402, MCA.

In the present matter, the Applicant discharged its initial burden of production by providing the Application, Statement of Claim for the underlying water right, and the testimony of witnesses. The Objectors failed to offer a plausible argument as to how the proposed changes could cause adverse effect to their rights, however. Objector Padilla's concerns about his own future use of water are not relevant in the present matter, since he has not been granted a water permit, reservation, or change authorization which might be affected. The Objectors' concerns

about the effect on their property value also are not relevant, since they involve adverse effects to real property interests rather than to water rights. See §85-2-402 (2)(a), MCA.

Objector Mellon alleged that the water rights of other Blaine Spring Creek appropriators would be adversely affected because utilizing the water on the proposed place of use will not yield any return flows, but he failed to provide any evidence or argument to support his theory. Considering the fact that the Applicant only intends to divert about 1% of the claimed flow rate (see Finding of Fact 10), the effect of losing the historic return flow probably would be de minimus. However, the record does not suggest that use of the water on James Smidansky's lot will yield less return flow than use of the water on the historic place of use.

To the contrary, the proposed place of use borders directly on Blaine Spring Creek, while the historically irrigated acreage to be removed from production lies approximately three-quarters of the width of the SMOA bench away from Blaine Spring Creek. See Applicant's Exhibit 1. Therefore, even taking into account the greater efficiency (and therefore more limited return flow) of sprinkler irrigation systems, it appears that runoff is more likely to return to the source from the proposed place of use than from the historic place of use which is to be removed from production. Furthermore, a comparison of the proposed diversion rate and volume with the historic rate and volume indicates that the Applicant will not be diverting for a longer period of time

than historically was the case. On these bases, and in the absence of any contradictory evidence, the Applicant has provided substantial credible evidence on the issue of adverse effect.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, and limitations specified below, Application for Change of Appropriation Water Right No. G(W)31227-01-41F hereby is granted to the Shining Mountains Owners Association, to make the following changes:

Authorization is granted to add an additional point of diversion in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, Township 07 South, Range 01 West, Madison County, Montana. Authorization also is granted to change the place of use for 30 gallons of water per minute up to 2.25 acre-feet of water per year from the SW $\frac{1}{4}$  of Section 19 to the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19 (Lot 43, Shining Mountains Subdivision Unit II), Township 07 South, Range 01 West, Madison County, Montana. The water will be diverted by means of a pump and pipeline for new sprinkler irrigation between April 1 and September 30, inclusive, of each year.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

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C. The Appropriator must cease diverting 30 gpm of its full claimed flow rate of 6.25 cfs at its claimed historic points of diversion at such times water is being diverted at the new point of diversion pursuant to this Change Authorization. The Appropriator shall in no event withdraw more water from the source of supply than reasonably is required for the purposed authorized herein.

D. The Appropriator shall ensure that the diversion system installed pursuant to this Authorization shall be so designed and operated that it does not divert more than the authorized flow rate and volume, and shall require the operator of the diversion system to keep written records of the dates on which water is diverted, and the rate and duration of diversion on each such date. The Appropriator shall provide such records to the Department upon request.

NOTICE

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

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

Dated this 21<sup>st</sup> of August, 1990.

*Peggy A. Elting*

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Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301  
(406)444-6834

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 21<sup>st</sup> day of August, 1990, as follows:

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