

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER )  
RIGHT NO. G45422-76M BY PAUL A. )  
AND NATALIE L. HANSON, D/B/A )  
HANSON RANCH )

NOTICE OF ERRATA AND  
CORRECTION OF CLERICAL  
ERROR

\* \* \* \* \*

During preparation of the Authorization to Change Appropriation Water Right (Form 620), Hal Peck, Program Assistant in the Water Rights Bureau Processing Unit of the Department of Natural Resources and Conservation, identified a discrepancy between the total acreage of the new place of use, i.e., 60 acres, and the sum of the acreages of the separately identified parcels within the new place of use, i.e., 70 acres. The discrepancy was brought to the attention of the Hearing Examiner in this matter by Hal Peck in a memorandum on December 9, 1991. Upon full review of the Department's file in this matter, the Hearing Examiner determined this discrepancy appears throughout. It originated on the application itself (Form 600) completed by the Applicant; then it was carried onto the published and individual public notices, the Notice of Hearing, the Proposal for Decision, and the Final Order.

The discrepancy is clearly a clerical error. The area of the old place of use was consistently and correctly identified in

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total and in the sum of the separate parcels as 60 acres. The record shows the change in place of use to be an equivalent transfer of acreage under irrigation from the old place of use to the new place of use. Furthermore, using a planimeter, Hal Peck measured the area of the new place of use identified on the map Applicant submitted with the application form to be 60 acres.

Using Applicant's map, Hal Peck measured the separate parcels comprising the new place of use and found them to be:

- 23 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 23, T14N, R20W
- 3 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 23, T14N, R20W
- 15 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 23, T14N, R20W
- 15 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 23, T14N, R20W
- 4 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 26, T14N, R20W

Therefore, the clerical error that appears on page eight of the November 14, 1990, Final Order is hereby corrected accordingly, and the Authorization to Change shall be issued with the area of the separate parcels of the new place of use as listed above, and with the area of the entire new place of use being a total of 60 acres.

Dated this 12 day of December, 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 Notice of Errata and Correction of Clerical Error was duly served upon all parties of record, at their address or addresses this 13<sup>th</sup> day of December, 1991, as follows:

Paul A. Hanson and  
Natalie L. Hanson  
Hanson Ranch  
8255 Butler Creek  
Missoula, MT 59802

Dexter L. Delaney  
Mulroney, Delaney & Scott  
P.O. Box 8228  
University Plaza Building  
Missoula, MT 59802-8228

Charles M. Deschamps  
8150 Mullan Road  
Missoula, MT 59802

Jack Tuholske  
Attorney at Law  
P.O. Box 7458  
Missoula, MT 59807

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59801

  
\_\_\_\_\_  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION )	ADDENDUM TO
WATER RIGHT NO. G45422-76M BY )	FINAL ORDER
PAUL A. AND NATALIE L. HANSON )	
DBA HANSON RANCH )	

\* \* \* \* \*

Applicants appealed the Department's Final Order to the Montana Fourth Judicial District. On June 26, 1991 the Court issued its Opinion and Order. The Court suggested that the Department determine a flow level for Butler Creek above which Applicants could divert water continuously without adversely affecting Objector's junior rights. The Court instructed the Department to make further Findings of Fact concerning the "adverse effect" conclusion. The Department was further instructed to inform the parties, if necessary, of its reasons for rejecting the suggested condition. This addendum addresses the Court's concerns and supplements the Department's Findings of Fact and Conclusions of Law.

The Water Use Act does not allow the Department to condition the permit as suggested by the Court. The Department cannot condition a change of use permit to allow continuous use of a stream where the underlying right was for alternate weeks. Change proceedings can be used to initiate "a change in the place of

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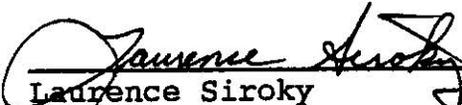
permit was conditioned prior and after July 1 for different reasons. The distinction will be emphasized here to clarify the Department's adverse effect conclusion as instructed by the Court.

The permit was conditioned prior to July 1 to conform the changed use to the historic pattern of use of the underlying right. See Conclusions of Law Nos. 11 & 12. The permit was conditioned after July 1 to prevent adverse effects to Objector's junior rights. See Conclusion of Law No. 8 and associated discussion in Final Order.

After July 1, a condition other than alternate weekly use might prevent adverse effects to Objector. However, Applicants did not submit sufficient information on flow rates and return flows for the Department to make that determination. Prior to July 1, alternate weekly use is required as a matter of law.

The discussion in this Addendum is hereby adopted as an integral part of the Final Order.

Dated this 28 day of August, 1991.

  
\_\_\_\_\_  
Laurence Siroky  
Assistant Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 E. Sixth Avenue  
Helena, Montana 59601

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 RIGHT NO. G45422-76M BY ) FINAL ORDER  
PAUL A. AND NATALIE L. HANSON )  
DBA HANSON RANCH )

\* \* \* \* \*

The Hearing Examiner's Proposal for Decision was entered on May 11, 1990. The Proposed Order would grant a conditioned Authorization for Change to the Applicant, Hanson Ranch. Both Applicant and Objector, Charles Deschamps, filed timely exceptions to the Proposal for Decision. Objector also filed Objector's Reply to Applicants' Exceptions. Oral argument was not requested.

The Proposal for Decision ("Proposal") would grant Applicant's request to change the point of diversion and place of use of their water right on Butler Creek but would limit time of use to alternate weeks. The condition on time of use is the principle object of Applicant's Exceptions. Objector's Exceptions, on the other hand, agree with the Proposed Order, but take exception to certain portions of the Proposal's findings and conclusions which support the Order.

For this review, the Department must accept the Proposal's findings if the findings were based upon competent substantial evidence and the proceedings on which the findings were based

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complied with essential requirements of law. Mont. Code Ann. § 2-4-621(3)(1989) and ARM 36.12.229. Applicant's Exceptions attack the condition in the Proposed Order as resulting from findings determined through improper proceedings. Applicant does not make any specific argument that the findings are not supported by the record. Consequently, this review will consider whether the underlying proceedings were according to law.

Applicant argues that the Department lacks jurisdiction to condition its water right. The Department has authority under Mont. Code Ann. § 85-2-402(7)(1989) to impose conditions to Authorizations to Change so that existing water rights will not be adversely affected. Moreover, the Department has no authority to issue Authorizations to Change where other water rights would be adversely affected. Mont. Code Ann. § 85-2-402(2)(1989). Here Findings of Fact 19-24, which are supported by competent substantial evidence, establish that Objector would be adversely affected if the Applicant changes its pattern of use as proposed. Therefore, the Department has the authority to restrict Applicant's water use to its historic pattern. In fact, the Department lacks authority to issue the authorization without the restriction.

The Applicant also contends that Objector's water rights in Butler Creek have been abandoned, and therefore Objector should not have been allowed to intervene in these proceedings. The Department agrees with the Applicant and the Hearing Examiner that Objector's existing irrigation rights to Butler Creek have

been abandoned under Mont. Code Ann. § 85-2-226 (1989).

However, as the Hearing Examiner correctly found, the Objector has Beneficial Water Use Permit No. 66808-76M to appropriate certain waters of Butler Creek by means of a dam and reservoir for stock watering and irrigation purposes and an exempt instream stock water right under Mont. Code Ann. § 85-2-222(1989).

Objector alleged adverse effect to these rights as required by Mont. Code Ann. § 85-2-308(1989). Consequently, the Objection is valid, and the Hearing Examiner correctly allowed the Objector to participate in the proceedings. See Mont. Code Ann. §§ 85-2-308 & 309(1989).

Applicant's exceptions further allege that the Hearing Examiner has, by conditioning the authorization, improperly given effect to a 1903 private contract related to Objector's abandoned water rights. Applicant argues that since the Objector's water rights have been abandoned the contract concerning those rights is without effect. However, the 1903 contract is evidence of the historic pattern of use of Applicant's water right whether or not the contract is still in effect. The Department believes the Hearing Examiner properly considered the 1903 contract in finding that Applicant had historically refrained from using water from Butler Creek on alternating weeks. See Proposed Finding of Fact No. 21. Moreover, even if the contract were excluded from the record, there is sufficient testimony from witnesses called by both parties to support the finding. Indeed, there is no evidence in the record to support a different finding.

Applicant's Exceptions reassert the argument made to the Hearing Examiner as part of Applicant's Combined Motions that the Objector "ratified" and accepted the Applicant's new method of irrigation. Mont. Code Ann. § 85-2-402(1989) provides the criteria which the Department must consider when acting on applications for changes in appropriation rights. The equitable issues raised by the Applicant in this regard are beyond the scope of this criteria and therefore cannot be considered by the Department. The Hearing Examiner properly disposed of this issue in the Preliminary Matters portion of the Proposal.

Applicant further argues that its existing water is not restricted to alternating weeks in the Water Court's temporary preliminary decree, and that the Department cannot alter a previously decreed right. However, a temporary preliminary decree is neither a final decree nor a final immutable statement of a water right. See Mont. Code Ann. § 85-2-231 et seq.(1989) and McDonald v. State, 220 Mont. 519, 722 P.2d. 598 (1986). Therefore, in change of use proceedings, a temporary preliminary decree may provide evidence of existing rights but does not dictate the Department's decision. Here the record clearly establishes that Applicant has an existing water right in Butler Creek that has been used historically only during alternate weeks. Consequently, the Department is able to grant Applicant's change of use for alternate weekly use. The Department is not convinced, however, that Applicant has a right to use water outside of the historic pattern. If through the water rights

adjudication process, Applicant establishes a right to uninterrupted use of the underlying right, the Department upon further application by the Applicant can modify this authorization to include the remaining weeks. See condition 2 of the Final Order.

Additionally, Applicant excepts that by restricting the use of its water right to alternating weeks, the Department will unfairly expand Objector's water right at Applicant's expense. The Department can find no merit in this argument. The Proposed Order would not extend Objector's water rights nor decrease Applicant's existing rights. The Proposed Order would merely restrict Applicant's use of the right to its historic pattern which is all the right Applicant has anyway. If more water becomes available in Butler Creek because of Applicant's more efficient use, the Proposed Order would not give any rights in the water to the Objector. See Proposed Order.

Finally, Applicants argue in their Exception D that restricting the use to alternating weeks throughout the entire irrigation season is contrary to the evidence that Applicants used the entirety of Butler Creek after approximately July 1 of each year as the flow of Butler Creek seasonally declined such that its flows did not exit the Hanson Ranch. While the record does show that Applicants' historic use after approximately July 1 did not follow the pattern of alternating weeks, the record and Findings of Fact show that Applicants' new system would consume almost all water diverted such that return flows would be

virtually eliminated. Even though eliminating return flows by converting from flood to sprinkler may not be an adverse effect in and of itself, an appropriator does not have the right to consume, to the injury of subsequent appropriators, amounts formerly returned to the source. Conclusion of Law 8 fails to address this aspect of return flows, and therefore will be modified as follows:

8. Department approval is not required for a change in method of irrigation. See §§ 85-2-102(5) and 402, MCA. A water right holder has the right to change the flow of waste waters, e.g., return flows, so long as it is without malice or negligence. See Newton v. Weiler, 87 Mont. 164, 179; 286 P. 133 (1930). Accordingly, the holder of an existing water right who has historically flood irrigated may legally convert to sprinkler irrigation whether or not the change reduces return flows. See In re Applications Nos. V111165-76H by Worf and V151753-76H by Brown. However, in operating under a changed system of irrigation, an appropriator does not have the right to consume, to the injury of subsequent appropriators, amounts formerly returned to the source. See Featherman v. Hennessey, 43 Mont. 310, 115 P. 983 (1911). Applicants' diversion structure and sprinkler system would be capable of diverting the entire flow of Butler Creek as it seasonally declines below 3.5 cfs, resulting in no return flows to Butler Creek and therefore increasing the consumptivity of the appropriation over the past practices. See Findings of Fact 14, 15, and 16.

Conditioning the change to hold to the pattern of alternating weeks throughout the irrigation season is the only reasonable condition that will ensure there is no increased burden on the source of supply either in reduced recharge to the subsurface flows or reduced surface flows to the point that the Objectors may be adversely effected. Condition 1 will not be modified.

The Objector has also filed Exceptions to the Proposal. However, Objector's Exceptions state that the Hearing Examiner's recommendation to authorize the change subject to the condition that use be restricted to alternate weekly use is consistent with the law and would alleviate adverse impacts to the Objector. The Department is not required to consider exceptions from parties that are not adversely affected by a proposal for decision. ARM 36.12.229(1). Because the Department will be adopting the Proposal for Decision as written, Objector will not be adversely affected and the Exceptions are moot.

WHEREFORE, based upon the record herein, the Department adopts without modification the findings and conclusions of the Proposal for Decision and issues the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Claimed Water Right No.G(W)45422-76M by Paul A. and Natalie L. Hanson, dba Hanson Ranch is hereby granted to Change Appropriation Water Right No. 76M-W-45422-00 in accordance with Application No. G45422-76M (filed March 22, 1988). Specifically, the Applicants may change: (1) the point of diversion located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 24, Township 14 North, Range 20 West, Missoula County, by moving it to a point approximately 75 feet upstream on the channel of Butler Creek, which would not alter the legal land description of the point of diversion; (2) the place of use of said water right to no longer use the right on 60 acres

specifically described as 5 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 18 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and 20 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 14 North, Range 20 West, Missoula County, and to begin using the right on 60 acres specifically described as 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ , 5 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , and 17 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, and 6 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26, all in Township 14 North, Range 20 West, Missoula, County.

This change is subject to the following conditions:

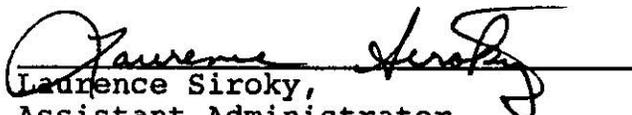
(1) Commencing with the first Monday in April during each and every year, the owner of Claimed Water Right No. 76M-W-45422-00 may exercise said right to divert waters from Butler Creek for the space of one week, and may exercise said right during each and every alternate week thereafter during the whole of each and every irrigating year hereafter; and that, commencing with the second Monday in April during each and every year, the owner of said right must refrain from exercising said right for the space of one week, and shall refrain from exercising said right during each and every alternate week thereafter during the whole of each and every irrigating year hereafter.

(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.

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 14 day of November, 1990.

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

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 14<sup>th</sup> day of November, 1990, as follows:

Paul A. Hanson and  
Natalie L. Hanson  
Hanson Ranch  
8255 Butler Creek  
Missoula, MT 59802

Dexter L. Delaney  
Mulroney, Delaney & Scott  
P.O. Box 8228  
University Plaza Building  
Missoula, MT 59802-8228

Charles M. Deschamps  
8150 Mullan Road  
Missoula, MT 59802

Jack Tuholske  
Attorney at Law  
P.O. Box 7458  
Missoula, MT 59807

Mike McLane, Field Manager  
Missoula Water Resources  
Field Office  
P.O. Box 5004  
Missoula, MT 59801

  
Cindy G. Campbell  
Hearings Unit Secretary

**CASE # 45422**

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER )  
RIGHT NO. G45422-76M BY PAUL A. ) PROPOSAL FOR DECISION  
AND NATALIE L. HANSON, D/B/A )  
HANSON RANCH )

\* \* \* \* \*

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on March 9, 1990, at 9:00 a.m. in Missoula, Montana, to determine whether the above Application should be granted to Paul A. and Natalie L. Hanson under the criteria in § 85-2-402(2), MCA.

Applicants Paul A. Hanson and Natalie L. Hanson appeared at the hearing in person and through Dexter L. Delaney, attorney. Paul A. Hanson, son of Paul A. and Natalie L. Hanson, appeared as witness for the Applicants. (For clarity and brevity, the younger Paul A. Hanson will be referred to as "Paul Hanson, Jr.") Joe Wang, technician with the Soil Conservation Service, appeared as witness for the Applicants. Walter Dodd, resident of Butler Creek drainage, appeared as witness for the Applicants.

Objector Charles M. Deschamps appeared at the hearing in person and through Jack Tuholske, attorney. Arthur Deschamps, Jr., former resident of the Deschamps ranch, appeared as witness for the Objector. Betty Deschamps, mother of the Objector and former resident of the Deschamps ranch, appeared as witness for

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the Objector. Barry Dutton, consultant, appeared as witness for the Objector.

Lee Yelin, Water Rights Specialist with the Department of Natural Resources and Conservation (Department), was called as a witness for the Objector. Applicants objected on grounds that Mr. Yelin was not identified on the List of Witnesses as required by a November 22, 1989, Order from the former Hearing Examiner. Objector responded that a Supplemental List of Witnesses had been hand-delivered to Applicants' attorney on March 8, 1990. The Hearing Examiner ruled in favor of the objection noting that the discovery period in this case was long and well defined, and had even been extended. On March 29, 1990, Objector filed a Motion to Allow Rebuttal Testimony to permit Lee Yelin to testify by deposition to rebut the testimony of Mike McLane on the general issue of whether or not Objector waived, ratified, acquiesced, or in any way approved of the Applicants' proposed change. Motion was denied by order of the Hearing Examiner issued April 11, 1990. (This Order is discussed further in Preliminary Matters, below.)

Mike McLane, Manager of the Missoula Water Rights Bureau Field Office, appeared as staff witness for the Department.

#### EXHIBITS

Applicants' Exhibit 1. An aerial photograph dated July 1, 1980, of the Hanson Ranch property and immediate surroundings.

Applicants' Exhibit 2. Copy of an October 1, 1955, Warranty Deed between Roy King and Inez King, parties of the first part,

and Paul A. Hanson, Natalie L. Hanson and Ruth L. Hanson, parties of the second part.

Applicants' Exhibit 3. Copy of an October 1, 1955, agreement by and between Paul A. Hanson, Natalie L. Hanson and Ruth L. Hanson, parties of the first part, and Roy King and Inez King, parties of the second part.

Applicants' Exhibit 4. Abstract of Water Right, No. 76M-W-045422-00, from the Temporary Preliminary Decree on the Clark Fork River between the Blackfoot River and the Flathead River.

Applicants' Exhibit 5. Copy of Board's Decision on application No. MS-1-88 (Hanson Ranch Partnership, applicant) under the State of Montana Natural Streambed and Land Preservation Act.

Applicants' Exhibit 6. Copy of Floodplain Development Permit No. 88-003, issued March 8, 1988, to Hanson Ranch.

Applicants' Exhibit 7. Copies of two Easements granted by the Missoula County Board of County Commissioners to Paul A. Hanson, Natalie L. Hanson and Paul Allen Hanson; one on January 5, 1988, the other on February 9, 1988.

Applicants' Exhibit 8. Copy of the Irrigation Water Management Plan for Hanson Ranch Partnership prepared by Joe Wang, Soil Conservation Service, Missoula, Montana.

Applicants' Exhibit 9. A bound volume containing 66 pages which form the Soil Conservation Service Agricultural Conservation Program Agreement and Conservation Plan for Hanson Ranch Partnership.

Applicants' Exhibit 10. Copies of 26 invoices from various suppliers for equipment and services provided to Hanson Ranch, plus one adding machine tape showing the total reached by adding together all of the separate invoice amounts.

Applicants' Exhibits 11 through 17. Seven photographs purported to be of the Butler Creek stream bed between Applicant's and Objector's properties.

Applicants' Exhibit 18. Copy of Waive Notice Checklist from the Department's file on the instant application.

Applicants' Exhibit 19. Copy of Waive Notice Fact Sheet from the Department's file on the instant application.

Applicants' Exhibit 20. Copy of Application for Beneficial Water Use Permit, No. 71324-s76M, filed June 1, 1989, by Charles M. Deschamps.

Applicants' exhibits were accepted into the record without objection.

Objector's Exhibit 1. Copies of two maps, from the Department's file, both indicating the existing and proposed places of use for irrigation under Applicants' Butler Creek water right.

Objector's Exhibit 2. Copy of Public Notice: Notice to Water Users for Application No. G45422-s76M.

Objector's Exhibit 3. An aerial photograph (dated July 7, 1964) of the Deschamps property and immediate surroundings.

Objector's Exhibit 4. Copy of Addendum to Water Right Transfer Certificate for Water Rights Exempt from Adjudication

Proceedings, No. 76M-E-061109, filed in the names of Charles M. Deschamps and Nancy A. Deschamps.

Objector's Exhibit 5. Copy of Addendum to Water Right Transfer Certificate for Water Rights Exempt from Adjudication Proceedings, No. 76M-E-061108, filed in the names of Charles M. Deschamps and Nancy A. Deschamps.

Objector's Exhibit 6. Copy of Permit to Appropriate Water, No. 66808-S76M, issued to Charles M. Deschamps.

Objector's Exhibit 7. Photograph purported to be of the dry bed of a reservoir on Deschamps property.

Objector's Exhibit 8. Photograph of a spring purported to be in the Butler Creek drainage on the Deschamps property.

Objector's Exhibit 9. Photograph of a spring purported to be in the Butler Creek drainage on the Deschamps property.

Objector's Exhibit 10. USGS 7.5 Minute Series Topographic Quadrangle Map: Northwest Missoula, Mont.

Objector's Exhibit 11. Copy of a graph developed by Barry Dutton entitled Streamflow at Highest Recording Station Along Butler Creek - 1985 Snowbowl Study.

Objector's Exhibits 12A and 12B. Copies of two US Department of Commerce Local Climatological Data Annual Summaries with Comparative Data for Missoula, Montana. 12A is from 1988; 12B is from 1967.

Objector's Exhibits were entered into the record without objection.

The Hearing Examiner takes official notice of the Department's file of this application. Applicant requested the Hearing Examiner take judicial notice of the Department's file on pending Application for Beneficial Water Use Permit No. 71324-s76M filed June 1, 1989, by Charles M. Deschamps. No objection to this request has been expressed. Since a Department file is not the kind of fact capable of judicial notice under Rule 201 of the Montana Rules of Evidence, the request was treated as a request to take official notice under ARM 36.12.221(4). The Hearing Examiner takes official notice of the materials in this file and reviewed them during the course of reaching and writing his decision.

#### PRELIMINARY MATTERS

On March 7, 1990, Applicants' attorney filed Applicants' Combined Motions containing four distinct Motions. The Hearing Examiner reserved ruling on the motions to allow Objector opportunity for response. A briefing schedule was established for an Applicants' support brief, Objector's response, and Applicants' reply. All briefs were filed in compliance with the established schedule. Furthermore, with the agreement at the hearing of both parties, the record was left open in this matter through March 30, 1990, to allow both parties to file written closing arguments, if they so chose. Closing arguments were filed by both parties prior to the close of the record. The record in this matter closed March 30, 1990.

Objector's Motion to Allow Rebuttal Testimony (filed March 29, 1990) and Applicants' Motion to Dismiss Deschamps' Objections by Reason of Prior Approval, Ratification, and Acceptance (the fourth of Applicants' Combined Motions) were both denied by the Hearing Examiner in an Order issued April 11, 1990. Reasons given by the Hearing Examiner for denying the motions were as follows. Since the adoption of the Montana Water Use Act, the only way a water right may be changed is in accordance with Title 85, Chapter 2, MCA. This cannot be circumvented either as to obtaining authorization for a change (see § 85-2-402, MCA) or as to the right to have a hearing before the Department on a properly filed objection (see § 85-2-309, MCA). Arguments and evidence outside the facts and issues bearing on the statutory process are not relevant to this administrative proceeding and cannot be considered in reaching a decision. Therefore, in the process of reaching a decision in this case, the Hearing Examiner gave no weight to such materials that were entered into the case record.

The three other of Applicants' Combined Motions are addressed as follows:

1. The first of Applicants' Combined Motions moves to dismiss all aspects of objections based on any claim to water or water rights or property rights allegedly owned by Objector emanating from Butler Creek. Motion is DENIED.

Objector asserts use of the waters of certain springs along Butler Creek since 1947 for livestock. Objector alleges said

springs are affected by surface water availability in the Butler Creek drainage. See Item 1 of Objector's Statement of Objection. Section 85-2-222, MCA, specifically exempts such existing rights for livestock from the filing requirements of § 85-2-221, MCA.

Objector, at Item 2 of his Statement of Objections, alleges adverse effect to his permitted water right No. 66808-s76M, which was issued by the Department on August 8, 1988 for use of Butler Creek waters for irrigation and stock watering with a priority date of February 9, 1988 at 4:00 p.m.

By virtue of alleged adverse affect to his "exempt rights" and permit, Objector has standing to prosecute his objections to Applicants' application. See §§ 85-2-308(2) and 85-2-309(1).

However, the Statement of Claim to a historical irrigation right to waters from Butler Creek filed by Objector on September 30, 1985, was not in accordance with § 85-2-221, MCA. Under the provisions of § 85-2-226, MCA, and as later held by the Montana Water Courts in Case No. 43B-LC-1, water rights not claimed in accordance with § 85-2-221, MCA, are conclusively presumed to be abandoned. Without a specific determination by a court of competent jurisdiction establishing the validity of Deschamps' late claim, the Department cannot consider it as an interest which may be adversely affected by a proposed change in appropriation water right. Therefore, Objector's objection based on allegations of adverse affect on a historical water right to the use of Butler Creek waters for irrigation purposes (as

refiled in 1985) is DISMISSED. See Item 5 of Objector's Statement of Objections filed August 2, 1989.

2. The second of Applicants' Combined Motions moves dismissal of Deschamps' objections based on the allegation that "other interests", namely, an alleged contractual obligation between Applicant and Objector, would be adversely affected.

Motion is GRANTED. Objector's objection based on allegations of adverse affect to "other interests" in that it interferes with a contractual obligation between Applicant and Objector is hereby DISMISSED. See Item 4 in Objector's Statement of Objections.

The Department does not have jurisdiction to consider adverse effects to private contracts when making its determination whether to authorize a change in appropriation water right. Although § 85-2-308, MCA, allows for filing of objections based on adverse effect on property, water rights, or interests of the objector, the Legislature made the final pronouncement as to whether adverse effects other than to water rights could be considered by the Department in making its determination in 1983 when the criterion in § 85-2-402, MCA, was amended. That year, the requirement that applicant prove "the rights of a prior appropriator will not be adversely affected" was replaced by the requirement that the applicant prove "the water rights of a prior appropriator will not be adversely affected". See 1983 Mont. Laws, Chapter 448, § 15. Thus, there is no criterion which can be construed to authorize denial of an application for change in

appropriation right if an applicant fails to prove no adverse effect to an objector's interests other than his water rights. See In Re Application No. 57448-s40R by Sheridan County/Plentywood. See also In Re Application No. 138005 by Delbert Kunneman. While the facts in the cited cases are different from those in the present case, the underlying principle is correlative to the facts in the present case.

3. The third of Applicants' Combined Motions moves in limine to prevent the introduction of any evidence by Objector incident to his putative claim of water rights which have been conclusively determined to be abandoned, matters involving alleged contractual rights, or contract construction and interpretation involving possible agreements incident to irrigation water rights, but not stock water rights.

Motion is DENIED. This motion was effectively denied at the hearing. Applicant made appropriate objections to evidence offered. The Hearing Examiner overruled the objections accepting the objected-to evidence as relative to the historic pattern of beneficial use of the water right Applicant has applied for authorization to change, and considered it in making his decision solely for that purpose.

#### FINDINGS OF FACT

1. The above Application was filed with the Missoula Field Office of the Department on March 22, 1988, in the names of Hanson Ranch, and Paul A. and Natalie L. Hanson. (Department's file.)

2. The pertinent facts of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on July 26, 1989. (Department's file.)

3. Applicants are requesting authorization to change a point of diversion and a portion of the place of use of claimed water right No. 76M-W-045422-00, which is a right to irrigation use of the waters of Butler Creek, a tributary of the Clark Fork River. The purpose of the right will remain the same, i.e., irrigation. (Department's file.)

4. Applicants have claimed a right to the use of the waters of Butler Creek for irrigation and have put that claimed right to beneficial use. The claimed right appears in the Temporary Preliminary Decree on the Clark Fork River between the Blackfoot River and the Flathead River, which is based on Statement of Claim for Existing Water Rights, No. 76M-W-045422-00, filed October 7, 1981, by the Applicants. (Testimony of Paul Hanson, Jr., Paul Hanson, and Applicants' Exhibit 4.)

5. The proposed change to the points of diversion of the right is to move one of the two diversions, the one located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 24, Township 14 North, Range 20 West, approximately 75 feet upstream on the channel of Butler Creek. The change would not alter the legal land description of the point of diversion. (Department's file and Testimony of Paul Hanson, Jr.)

6. The proposed change in the place of use of the right is to no longer use the right on 60 acres specifically described as

5 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 18 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and 20 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 14 North, Range 20 West, and to begin using the right on 60 acres specifically described as 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ , 5 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , and 17 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, and 6 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26, all in Township 14 North, Range 20 West. The new place of use is approximately one mile up Butler Creek from the former place of use. Both places of use are within the boundaries of the Hanson Ranch property. (Department's file, Applicants' Exhibit 1 and 2, and Objector's Exhibit 1.)

7. The method of distribution of the water on the proposed new place of use is to be a sprinkler system, whereas the method of distribution of the water on the historic place of use was a ditched flood system. (Testimony of Paul A. Hanson and Joe Wang, and Applicant's Exhibits 8, 9, and 10.)

8. Applicants' diversion works and sprinkler irrigation system were professionally designed and were installed in 1988. They are considered by the U.S. Soil Conservation Service to be a good system, and were operated effectively by Applicants in 1988 and 1989. Furthermore, the diversion design was reviewed and approved by the Missoula County Board of County Commissioners with regard to easements, by the Floodplain Administrator with regard to impacts on Butler Creek flood hazards, and by Missoula County Conservation District with regard to effects on the

streambed of Butler Creek. (Testimony of Paul Hanson, Jr. and Joe Wang, and Applicants' Exhibits 5, 6, 7, 8, 9, and 10.)

9. As it flows through the Applicants' property, Butler Creek is a losing stream in that it flows over a gravelly bed that allows infiltration of the water into the ground. In the stream reach between Applicants' point of diversion and where it flows under the lane that leads to Applicants' home and ranch buildings (approximately 1.25 miles of stream channel), Butler Creek has been measured to lose 30 to 50% of its flow to infiltration. This groundwater continues to flow through shallow subterranean gravels that rest on top of an impermeable clay layer, and flows in the same direction as the surface flows of Butler Creek. This subterranean flow rises to the surface as springs by intersection of the subterranean strata with the land's surface, or by being forced to the surface by layers of impermeable materials. (Testimony of Barry Dutton and Department's file.)

10. Two springs exist on Objector's property in the Butler Creek drainageway. These springs are the surfacing of the shallow groundwater system below Butler Creek. The springs derive their water from Butler Creek surface flows that have infiltrated into and through the shallow groundwater aquifer beneath Butler Creek, and fluctuate in relation to the surface flows of Butler Creek. (Testimony of Barry Dutton and Art Deschamps.)

11. Objector and his predecessors have used said springs for watering livestock since 1947, at the latest. The practice of using these springs to water stock began before the passage of the 1961 groundwater codes and the 1973 Montana Water Use Act. (Testimony of Charles Deschamps and Department's file.)

12. Other springs arise on the Deschamps property which have been used for watering stock and which may be related to the volume of water the in Butler Creek drainage. (Testimony of Art Deschamps, Charles Deschamps, and Barry Dutton.)

13. In 1988 and 1989, these springs went dry and were unavailable for watering livestock. Objector alleges the springs went dry because Applicants' new irrigation system, operated by the claimant in 1988 and 1989, appropriated more water than the former flood system due to reduced return flows and change in pattern of use from alternating weeks to continuous. (Testimony of Charles Deschamps and Department's file.)

14. A change in method of irrigation from flood to sprinkler will reduce return flows, possibly to zero. Such a change, however, will not of itself cause a decrease in the volume of water available to the Objector because the reduced return flows are compensated by reduced diversion at the intake on the source. The increased application efficiency of a sprinkler system eliminates the need to apply the water which formerly became return flows, thus eliminating the need to divert such water. (Testimony of Joe Wang, and generally recognized technical fact. See § 2-4-612(6), MCA.)

15. Applicants' sprinkler irrigation system is at least 35% more efficient than the prior flood system, which means that a 35% lower volume of water need be appropriated by Applicant by means of the sprinkler irrigation than was appropriated by means of the flood system to accomplish the same beneficial use. The result will be a 35% increase in the volume of water in Butler Creek that will flow past the Applicants' point of diversion and on down the natural course of the waters of Butler Creek. The U.S. Soil Conservation Service and U.S. Agricultural Stabilization and Conservation Service actively encourage such increases in efficiency because it increases the water available in the stream for other uses such as recreation or additional agriculture. The cooperative project between these agencies and Applicant accomplishes this general goal. (Testimony of Joe Wang.)

16. Applicants' flood irrigation system was capable of diverting 15 cubic feet per second (cfs) and the system was used by the Applicants to divert all available waters of Butler Creek. The sprinkler system is capable of diverting 3.5 cfs. When operating, the sprinkler system diverts substantially less flow from Butler Creek than the former flood system, resulting in more of the flow of Butler Creek being allowed to run past the Applicants' point of diversion and continue downstream. (Testimony of Joe Wang and Paul Hanson, Jr., and Applicants' Exhibit 9.)

17. Uncontradicted testimony of several witnesses called by either party established the principal source of the water in the Butler Creek drainage to be snow pack in the headwaters area

upstream from both the Objector's and Applicant's property. Nothing in the record identifies what snowpack levels or snowpack water content were in the Butler Creek headwaters area for the years of 1987, 1988, and 1989, or for the years immediately prior to that, relative to the averages for the area.

18. There was substantially and notably less water, both surface water and groundwater, in the Butler Creek drainage system in 1987, 1988, and 1989 than average. Amounts of water in the drainage in those years were lower than all but a few memorable years. (Testimony of Walter Dodd, Paul Hanson, Natalie Hanson, and Charles Deschamps.)

19. Users of surface water and groundwater throughout the Butler Creek drainage system experienced water availability problems in 1988. (Testimony of Paul Hanson, Walter Dodd, and Charles Deschamps.)

20. Objector has a reservoir on Butler Creek which is operated under Permit to Appropriate Water No. 66808-s76M, issued by the Department on August 8, 1988 for use of Butler Creek waters for irrigation and stock watering with a priority date of February 9, 1988 at 4:00 p.m. Objector alleges that Applicants' change from an alternating week pattern of diversion under the former flood system to continuous diversion under the sprinkler system has adversely affected this water right. (Department file and Testimony of Charles Deschamps.)

21. Testimony by many witnesses called by either party established that Applicants had always, until the spring and

summer of 1988, followed a pattern of alternating weeks as described in a 1903 written arrangement between Gaspar Deschamps and John R. Lattimer, predecessors in interest to the Applicant and Objector, when diverting Butler Creek water for irrigation. The record contains no evidence of a different pattern, prior to 1988, of diversion and use of Butler Creek water for irrigation under water right No. 76M-W-045422-00.

22. Objector's reservoir historically received a "recharge" adequate to supply water for livestock during the weeks that Applicants' were not diverting from Butler Creek under the historic alternating weeks pattern of use. This "recharge" did not occur in 1988 and 1989. (Testimony of Charles Deschamps.)

23. The distance Butler Creek surface water travels down its natural stream channel is in direct proportion to the amount of flow, i.e., cubic feet per second. The losing character of Butler Creek as it crosses Applicants property (see Finding of Fact 9) means that as the flow decreases the total infiltration of the flow into the ground occurs in a shorter distance. The lower the flow, the more the downstream bed is dry. (Testimony of Natalie Hanson and Walter Dodd.)

24. Continuous diversion from Butler Creek eliminates up to 3.5 cfs of stream flow that naturally continued downstream during weeks Applicant regularly refrained from diverting under the historic pattern of alternating weeks of use. This substantially reduces the cubic feet per second available to cross the

losing reach of the Butler Creek streambed as it traverses Applicants'. (Objector's Exhibit 11.)

25. No reservations of water have been granted on the drainage containing Butler Creek. (Department records.)

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Sections 85-2-402 and 85-2-309, MCA.

2. The Department gave proper notice of the Application and the matter is properly before the Hearing Examiner. Finding of Fact 2. See also Preliminary Matters, supra.

3. Through the offering of probative evidence, the Applicant has met the burden of production as to the existence of the underlying water right for which the application for change has been made. Finding of Fact 3. See In re Application No. 26720-c76LJ by Meadow Lake Country Club Estates. See also In Re Applications Nos. G120401-41H and G120403-41H by Estate of Lena Ryen, Interlocutory Order, March 13, 1985.

4. Applicants' means of diversion, construction, and operation of the appropriation works are adequate. Finding of Fact 7.

5. Applicants' use of the water under the applied-for change, i.e., irrigation, is a beneficial use. Section 85-2-102(2)(a), MCA.

6. Applicants' have possessory interest in the property where the water is to be put to beneficial use. Finding of Fact 9.

7. Applicants' change in point of diversion will not adversely affect Objector's water rights. Objector produced no evidence showing an adverse effect resulting from the changed location of the Applicants' diversion structure. The Applicant has shown that the distance involved in the change in location of the diversion structure is small, and has shown that the physical design of the new structure has been reviewed by the proper authorities as to its impact on the stream channel. Findings of Fact 4 and 7.

8. Reduction of return flow by a conversion from flood irrigation to sprinkler irrigation is not an adverse affect. A water right holder has the right to change the flow of waste waters, e.g., return flows, so long as it is without malice or negligence. See Newton v. Weiler, 87 Mont. 164, 179; 286 P. 133 (1930). Accordingly, the holder of an existing water right who has historically flood irrigated may legally convert to sprinkler irrigation whether or not the change reduces return flows. See In re Applications Nos. V1111165-76H by Worf and V151753-76H by Brown. Furthermore, Department approval is not required for a change in method of irrigation. See §§ 85-2-102(5) and 402, MCA.

9. The change of place of use will not adversely affect Objector's water rights. Since groundwater recharge and return flows from the former flood system have been compensated by the

presence of more water in the natural creek drainage system, the groundwater system that surfaces at the springs to which Objector has water rights and surface flows in Butler Creek that supply the reservoir to which Objector has a water right are unaffected by Applicants' changing the area on which the water is to be used. Findings of Fact 8, 9, 13, 14, and 15. See also In re Applications Nos. V111165-76H by Worf and V151753-76H by Brown.

10. The decreased flow of Objectors' springs in 1988 and 1989 are consistent with the basinwide scarcity of water in those years, and therefore cannot be positively attributed to the operation of Applicants' sprinkler system. Findings of Fact 10, 13, 17, 18, and 19.

11. Objector's allegation that Applicants' proposed change in the historic pattern of use will adversely affect the stream conditions necessary to exercise his water right, conditions without which Objector's right could not have been perfected, forms a valid objection because a downstream junior appropriator has a vested interest in stream conditions implicit in the ability to exercise his water right. See § 85-2-401, MCA. See also Brennan v. Jones, 101 Mont. 550 at 553, 55 P.2d 697 (1936); In re Ryen, supra; and Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974). In order to give effect to a junior appropriator's vested rights to maintenance of conditions necessary to exercise his water right, attention must be paid to disruptions in patterns of historic use; if not, the substantive protection intended is eroded and frustrated by uncertainty. Therefore, of

necessity, an applicant must "fill in" the general outline of the right to be changed with further delineations, even if the water right was previously delineated in a court decree. See Cate v. Hargrave, 41 Mont. 310, 115 P. 983 (1911). The description of a water right in a decree such as the Water Court decree on the Clark Fork River cannot expand a water right beyond the beneficial uses proved or remove a well-established limitation of the appropriator's right to waters as actually taken and beneficially applied. See Quigley v. McIntosh, 110 Mont. 495 at 509, 103 P.2d 1067 (1940).

An applicant for change is not entitled 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 re Ryen, supra. Applicants' intent to change their pattern of diversion from alternating weeks to continual would result in a differential expansion<sup>1</sup> of Applicants' water right, thereby adversely affecting Objectors' water right for appropriation of Butler Creek surface flows by means of a reservoir. Findings of Fact 20, 21, 22, 23, and 24.

12. To prevent adverse affect to Objector's right to appropriate Butler Creek water by means of a reservoir, Applicants' diversion of Butler Creek water under the proposed new system must be limited to the well-established pattern of historical

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<sup>1</sup>Differential expansion is an increased demand on the source during one increment of time within a period of use, with an attendant reduction in demand during another increment within the period.

use, i.e., alternating weeks as described in the 1903 written arrangement between Gaspar Deschamps and John R. Lattimer, predecessors in interest to the Applicant and Objector. Finding of Fact 21. See generally Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909); and Quigley v. McIntosh, supra. Expressing this limitation as a condition of the use of Applicants' water right under a change is not an adjudication of the right, and the limitations established herein are subject to possible modification by a court of competent jurisdiction. See In re Applications Nos. 20736-s41H and 20737-s41H by City of Bozeman, and In re Application No. 12016-s41G by Don Brown.

13. The proposed change will not adversely affect other planned uses or developments for which water has been reserved. Finding of Fact 25.

#### PROPOSED ORDER

Subject to the terms, conditions, and restrictions specified below, authorization is hereby GRANTED to Paul A. Hanson and Natalie L. Hanson, d/b/a Hanson Ranch, to Change Appropriation Water Right No. 76M-W-45422-00 in accordance with Application No. G45422-76M (filed March 22, 1988). Specifically, the Applicants may change: (1) the point of diversion located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 24, Township 14 North, Range 20 West, Missoula County, by moving it to a point approximately 75 feet upstream on the channel of Butler Creek, which would not alter the legal land description of the point of diversion; (2) the

place of use of said water right to no longer use the right on 60 acres specifically described as 5 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 18 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and 20 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 14 North, Range 20 West, Missoula County, and to begin using the right on 60 acres specifically described as 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ , 5 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 17 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , and 17 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, and 6 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26, all in Township 14 North, Range 20 West, Missoula, County.

This change is subject to the following conditions:

(1) Commencing with the first Monday in April during each and every year, the owner of water right No. 76M-W-45422-00 may exercise said right to divert waters from Butler Creek for the space of one week, and may exercise said right during each and every alternate week thereafter during the whole of each and every irrigating year hereafter; and that, commencing with the second Monday in April during each and every year, the owner of said right must refrain from exercising said right for the space of one week, and shall refrain from exercising said right during each and every alternate week thereafter during the whole of each and every irrigating year hereafter.

(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.

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, due consideration of timely exceptions, responses, and briefs.

Dated this 11<sup>th</sup> day of May, 1990.



John E. Stults, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, at their address or addresses this 11<sup>th</sup> day of May, 1990, as follows:

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Irene LaBare  
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