

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

* * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR EXTENSION OF TIME TO PERFECT)
BENEFICIAL WATER USE PERMIT)
P049632-41H AND TO PERFECT CHANGED) FINAL ORDER
APPROPRIATION WATER RIGHTS)
G(W)120401-41H AND G(W)120403-41H)
GRANTED TO ESTATE OF LENA RYEN)

* * * * *

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 September 7, 1994, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Extension of Time to Perfect Beneficial Water Use Permit 49632-41H, Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120401-41H, and Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120403-41H are hereby granted to Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen. Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen shall complete the appropriation works and put the water to the beneficial use as specified in Beneficial Water Use Permit 49632-41H, complete the changes authorized by

CASE #

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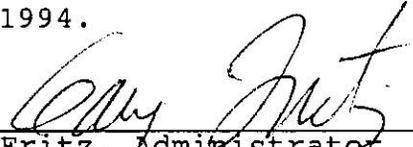
Authorization to Change Appropriation Water Right G(W)120401-41H and Authorization to Change Appropriation Water Right G(W)120403-41H on or before July 18, 1996, file a notice of completion of permitted water right development, Form 617, and notices of completion of change of appropriation water right, Form 618, respectively, on or before December 31, 1996.

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 5 day of October, 1994.



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 6th day of October, 1994 as follows:

Anna Marie Bakken
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Wayne Ryen
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Moore, O'Connell & Reffling
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Sara Zimmer
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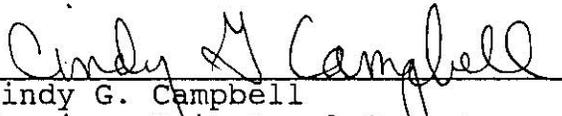
Patricia L. & Dale L. Gibson
P.O. Box 102
Willow Creek, MT 59760

Estate of Clark Ryen
% Lance Ryen, PR
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Sacramento, CA 95821

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Williams, Jent & Dockins
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
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IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME TO PERFECT)
BENEFICIAL WATER USE PERMIT)
P049632-41H AND TO PERFECT CHANGED) PROPOSAL FOR DECISION
APPROPRIATION WATER RIGHTS)
G(W)120401-41H AND G(W)120403-41H)
GRANTED TO ESTATE OF LENA RYEN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing was held in the above-entitled matter on July 19, 1994, in Bozeman, Montana, to receive evidence and hear arguments on whether Applicants, Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen,¹ have diligently pursued completion of the permitted project and authorized changes within the time stated or any previously authorized extensions and, for this reason, or other good cause shown, should be granted under the provisions in Mont. Code Ann. § 85-2-312(3) (1991), an extension of time in which to complete this project.

APPEARANCES

Applicants Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen appeared at the hearing by and through counsel, Cindy Younkin. Ms. Bakken attended the hearing but did not testify.

Matt Williams, attorney for Ross Creek Hydro, Inc., lessee of the water rights, appeared as a witness for Applicants.

¹The proper water rights transfer certificates were filed with the Department on December 10, 1993, changing the ownership of these water rights.

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Objectors Dale and Patricia Gibson appeared at the hearing in person and by and through Sarah Zimmer.

Objector Charles Howe appeared at the hearing *pro se*.

Sally Howe appeared at the hearing as an interested person but did not testify.

Jan Mack, Water Resources Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicants offered eight exhibits which were accepted into the record without objection.

Applicants' Exhibit 1 is a 40 page document entitled "Draft Power Purchase Agreement Between Ross Creek Hydro, Inc. and The Montana Power Company," dated May 26, 1994.

Applicants' Exhibit 2 is an Order Granting Extension of Time, issued June 5, 1992, to Ross Creek Hydro, Inc. by United States Of America Federal Energy Regulatory Commission (FERC) for commencing project construction.

Applicants' Exhibit 3 is a letter dated June 14, 1994, to George L. Smith of Ross Creek Hydro, Inc. from the Gallatin Conservation District granting a one year extension for construction of the concrete diversion structure in Ross Creek.

Applicants' Exhibit 4 is a letter dated March 29, 1993, to George L. Smith of Ross Creek Hydro, Inc. from the Gallatin Conservation District granting a one year extension for construction of the concrete diversion structure in Ross Creek.

Applicants' Exhibit 5 is a letter to Brent L. Smith of Ross Creek Hydro, Inc. granting approval to construct the concrete diversion structure in Ross Creek.

Applicants' Exhibit 6 is a letter dated June 2, 1994, to George Smith of Ross Creek Hydro, Inc. from the US Army Corps of Engineers (Corps) notifying Mr. Smith of the determination by the Corps that the proposed project is authorized by the Department of the Army Nationwide Permit and that an individual permit is not needed. The verification of the Nationwide Permit authorization is valid until June 2, 1996.

Applicants' Exhibit 7 is a two page letter dated May 11, 1992, to Brent L. Smith of Ross Creek Hydro, Inc. from the Corps notifying Mr. Smith of the determination by the Corps that the proposed project is authorized by the Department of the Army Nationwide Permit and that an individual permit is not needed. The verification of the Nationwide Permit authorization was valid until May 11, 1994.

Applicants' Exhibit 8 consists of three pages and is an Order Approving Project Inlet Anti-vortexing Design issued by the Federal Energy Regulatory Commission (FERC) for the design submitted by Ross Creek Hydro, Inc.

Objectors Gibson's Exhibit 1 through 7 are photographs taken on July 15, 1994, by Pat Gibson. These photographs are different views of Ross Creek Hydro, Inc.'s partially completed concrete diversion works in Ross Creek. This exhibit was accepted into the record without objection.

Objector Howe's Exhibit 1 consists of three pages and is a declaration of grievances against Ross Creek Hydro Inc.'s procedures. This exhibit was accepted into the record without objection.

The Department files were made available for review by all parties who expressed no objection to any parts of them; therefore, the Department files are accepted into the record in their entirety.

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

FINDINGS OF FACT

1. On December 21, 1987, Provisional Permit 49632-s41H was issued to the Estate of Lena Ryen with a priority date of December 2, 1982, at 9:00 a.m. Estate of Lena Ryen was granted the right to divert 11.25 cubic feet per second up to 8,142.84 acre-feet per year of water from Ross Creek by means of a diversion dam with headgate and pipeline in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16 and the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, Township 1 North, Range 6 East, Gallatin County, Montana, for power generation in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 16. The permit is further subject to the terms, limitations, and conditions imposed by the Department's August 7, 1987, Final Order, *In re Application 49632-s41H by Estate of Lena Ryen* which was expressly made a part of the permit.

On September 4, 1987, Authorizations to Change Appropriation

Water Right G(W)120401-41H and G(W)120403-41H were issued to Estate of Lena Ryen to change the respective points of diversion of the two subject water rights from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 16 to the same points of diversion designated for Permit 49632-s41H. The two Authorizations are each further subject to the terms, limitations, and conditions imposed by the Department's May 15, 1987, Final Order, *In re Applications G(W)120401-41H and G(W)120403-41H by Estate of Lena Ryen* which was expressly made a part of each authorization. (Department records.)

2. Under the terms of the permit and each of the two authorizations, Estate of Lena Ryen was to have completed the diversion works and applied the water to beneficial use as specified in the permit and authorizations on or before November 30, 1990. Estate of Lena Ryen was further required to file the pertinent notices of completion on or before November 30, 1990. (Department records.)

3. On October 30, 1990, Estate of Lena Ryen filed three applications for extension of time; one for the permit and one for each of the authorizations, requesting an additional two years on each to complete the entire project. On November 13, 1990, the Department issued three notices of action on application for extension of time, temporarily extending the time limits on the respective applications for an additional 120 days or until the Department has completed its action on the request under Mont. Code Ann. § 85-2-312(3) (1989) whichever is greater.

After proper publication, two timely objections were received. A hearing was held on the matter on October 22, 1991, and extensions of time were granted for the permit and each of the authorizations. Estate of Lena Ryen was to complete the appropriation works and put the water to beneficial use on or before November 30, 1993. (Department files.)

4. On November 22, 1993, Estate of Lena Ryen filed three applications for extension of time, one for the permit and one for each of the two authorizations, requesting an additional three years on each to complete the entire project. (Department files.)

5. On November 23, 1993, the Department issued three notices of action on application for extension of time, temporarily extending the time limits on the respective applications for an additional 120 days or until the Department has completed its action on the request under Mont. Code Ann. § 85-2-312(3) (1991), whichever is greater.

6. Pertinent portions of the three applications for extension of time were published January 19, 1994, in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the source. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the requests for extensions of time. (Department file.)

7. The Department received timely objections to the applications from two objectors. Applicants were notified of the

objections by a letter from the Department dated February 10, 1994. (Department file.)

8. On May 10, 1994, the Department issued a notice of action for extension of time proposing denial of the extension of time in which to complete the project. (Department file.)

9. On May 13, 1994, Applicants requested a hearing on the proposed denial for an extension of time. (Department file.)

10. Since the last hearing, efforts expended on this project are:

(a) Ross Creek Hydro, Inc. has continued negotiations with Montana Power Company (MPC) for the details of the power purchase agreement. Since the last hearing, MPC has revised its standard terms for purchasing energy and capacity from projects using renewable resources that produce one megawatt or less. Ross Creek Hydro, Inc. and MPC had several significant disputes over the terms MPC proposed which have now been reduced to one lingering issue. The last draft power purchasing agreement proposed by MPC was tendered on May 26, 1994. Ross Creek Hydro, Inc. is now evaluating whether to accept the terms set forth in that draft or pursue other relief for the lingering issue. MPC is the only potential purchaser of the electricity to be generated by this project.

(b) Ross Creek Hydro, Inc. has completed its engineering, refined the engineering of yield power factors for the turbines and generators, and dealt with the turbine and generator

manufacturer assuring a delivery date of 12 weeks upon call.¹

On July 6, 1992, Ross Creek Hydro, Inc. filed calculations with FERC demonstrating that the inlet as shown in the final design drawings filed with FERC should not form a vortex at the penstock opening.

(c) On June 16, 1994, the intake was partially constructed and approximately 275 feet of pipe which will lead to the turbine and generator were installed. The remainder of the pipe is on order.

(d) Ross Creek Hydro, Inc. has discussed the state of the project with FERC and applied for and received an extension of time to complete construction to June 18, 1996. There has been a FERC inspection. A FERC official reviewed the project in June of this year and acknowledged construction had commenced pursuant to terms of the authorization from FERC.

(e) Ross Creek Hydro, Inc. has a 310 permit to alter or modify the natural streambed from the Gallatin Conservation District as required by the Montana Natural Streambed and Land Preservation Act. Ross Creek Hydro, Inc. has applied for and received an extension of one year dated June 14, 1994, for this permit. This project falls under the Department of the Army Nationwide Permit for the Federal Clean Water Act, instead of an individual permit to discharge dredged or placement of fill material into Ross Creek. Ross Creek Hydro, Inc. has applied for

¹Turbines and generators are built to unique flow and head conditions so they must be manufactured for each specific site.

and received an extension of the verification of the Nationwide Permit authorization to June 2, 1996. (Testimony of Matt Williams, Objectors Gibson's Exhibits 1 through 7, and Applicants' Exhibits 1 through 8.)

11. FERC would not have granted an extension absent a showing of due diligence. Ross Creek Hydro, Inc. was required to show it was diligently trying to bring the project on line, what has been done, and what it expects to accomplish. (Testimony of Matt Williams.)

12. Delay resulted from MPC revising its standard terms for purchasing energy and capacity from projects using renewable resources that produce one megawatt or less and submitting its draft power purchasing agreement as late as May 26, 1994.

13. Ross Creek Hydro, Inc. cannot obtain another extension from FERC. The deadline of June 18, 1996, is statutory, *i.e.*, under the federal power act there are limited time frames once a license has been issued for bringing power projects on line. FERC has authority to modify within those statutory parameters, but there is a total time limit that is set by Congress and the statutes that FERC cannot ignore. That is reflected in the June 18, 1996, deadline. If the project is not completed by that date, the FERC license will lapse and Ross Creek Hydro, Inc. would be required to start the entire process over. (Testimony of Matt Williams.)

14. Ross Creek Hydro, Inc. wants to complete the project. It has invested considerable funds in it. It now needs a meeting

of the principals to determine whether the draft contract is suitable to its venture. In the immediate future, there will be a meeting of the shareholders to review, line by line, the power purchase agreement to determine what to do about the capacity issue. If that is not an issue, Ross Creek Hydro, Inc. will meet with MPC to finalize the agreement, then call the turbine manufacturer who already has the specifications for the turbine and generator. Upon receipt of the pipe, turbine, and generator, Ross Creek Hydro, Inc. would be able to complete the project within six weeks. (Testimony of Matt Williams.)

15. Ross Creek Hydro, Inc. has an obligation to Permittees to use its best efforts to bring the project on line in order to make various payments to them based upon how much energy and capacity produced at the site. (Testimony of Matt Williams.)

Based upon the foregoing Findings of Fact and 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 the parties hereto. Mont. Code Ann. Title 85, Chapter 2.

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1 through 9.

3. Mont. Code Ann. § 85-2-312(3) (1991) states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

4. To prove good cause Applicants must show they have exercised reasonable diligence towards the completion of the appropriation but have nonetheless been unable to complete it. *See In re Application 39787-s76M by Rehbein.* Reasonable diligence is the steady good faith application of effort toward perfection of a permit. *See Montana Department of Natural Resources and Conservation v. Intake Water Co.*, 171 Mont. 416 (1976); *Holmstrom Land Co. v. Newlan Creek Water Dist.*, 185 Mont. 409 (1979). The due diligence requirement set forth in *Rehbein* is not controlling; however, on a request of extension of time to complete an authorized change to an appropriation water right, good cause is the only requirement. *See In re Application G(W)110476-76H by Christley.*

5. Applicant has proceeded with due diligence to perfect

the permitted appropriation. The efforts expended were directly related to bringing the project closer to completion. See Finding of Fact 10. Actions constituting due diligence can be performed by an agent of an applicant. See *In re Application 59179-s41D by Golden Star Mining, Inc.* In addition, efforts toward completion expended after the deadline for completion but during a temporary extension of time by the Department are acceptable as proof of diligence. See *In re Application 22047-g41E by Shervin.* Actively negotiating a power purchase contract, pursuing extensions on other licenses and permits, completing its engineering, filing calculations with FERC to show a vortex will not form at the penstock, partially completing the inlet structure, and installing pipe are due diligence. See Finding of Fact 10 and 11.

6. There is good cause for granting an extension of time. The delay caused by MPC revising its standard terms for power purchasing from projects using renewable resources that produce one megawatt or less was beyond Applicants' control. See Finding of Fact 10(a) and 12. Events beyond the control of Applicants are reasonable justification for delay, and delay so justified is good cause for granting an extension of time when accompanied by due diligence. See generally *In re Application 52843-g76G by Chirico and Tortoreti; In re Application G025010-s40P by Vaira; In re Application 62352-43BJ by Gunderson; In re Application 62946-s76LJ by Rasmussen.*

Ross Creek Hydro, Inc. has an obligation to Permittees to

use its best efforts to negotiate the most profitable power purchase agreement in order to make various payments to the Permittees. See Finding of Fact 15.

7. Two additional years to perfect the permitted appropriation, i.e., a completion date of July 18, 1996, is a reasonable amount of time for completion of the project. See Findings of Fact 13 and 14.

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

PROPOSED ORDER

Extension of Time to Perfect Beneficial Water Use Permit 49632-41H, Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120401-41H, and Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120403-41H are hereby granted to Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen. Anna Marie Bakken, Wayne Ryen, and Estate of Clark Ryen shall complete the appropriation works and put the water to the beneficial use as specified in Beneficial Water Use Permit 49632-41H, complete the changes authorized by Authorization to Change Appropriation Water Right G(W)120401-41H and Authorization to Change Appropriation Water Right G(W)120403-41H on or before July 18, 1996, file a notice of completion of permitted water right development, Form 617, and notices of completion of change of appropriation water right, Form 618, respectively, on or before December 31, 1996.

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. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. 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 7th day of September, 1994.


Vivian A. Lightizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6615

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 7th day of September, 1994, as follows:

Anna Marie Bakken
420 E Story
Bozeman, MT 59715

Wayne Ryen
209 S 6th Ave
Bozeman, MT 59715

Estate of Clark Ryen
c/o Lance Ryen, PR
2810 Ione St
Sacramento, CA 95821

Cindy E. Younkin
Moore, O'Connell & Reffling
P.O. Box 1288
Bozeman, MT 59771-1288

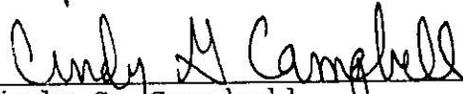
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Matthew W. Williams
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Scott Compton, Manager
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Regional Office
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Bozeman, MT 59715
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary

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GRANTED TO ESTATE OF LENA RYEN)

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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 December 16, 1991, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application for Extension of Time to Perfect Beneficial Water Use Permit 49632-41H, Application for Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120401-41H, and Application for Extension of Time to Perfect Authorization to Change Appropriation Water Right G(W)120403-41H are hereby granted to the Estate of Lena Ryen. Estate of Lena Ryen shall complete the appropriation works and put the water to beneficial use as specified in Beneficial Water Use Permit 49632-

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FEB 25 1992

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Moore, O'Connell, Refling
& Manos
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Bozeman, MT 59771-1288

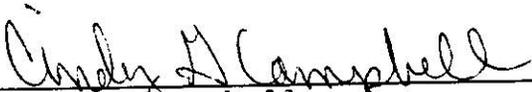
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Cindy G. Campbell
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G(W)120401-41H AND NO.)	
G(W)120403-41H GRANTED TO ESTATE OF)	
LENA RYEN)	

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing was held in the above-titled matter on October 22, 1991, in Bozeman, Montana, to receive evidence and hear arguments on whether Applicant, Estate of Lena Ryen, has diligently pursued completion of the permitted project and authorized changes within the time stated or any previously authorized extensions and, for this reason, or other good cause shown, should be granted under the provisions in § 85-2-312(3), MCA, an extension of time in which to complete the project.

APPEARANCES

Applicant Estate of Lena Ryen appeared at the hearing by and through Cindy Younkin, attorney at law. Appearing as witness in behalf of Applicant was Matt Williams, a lawyer, attorney for Ross Creek Hydro, Inc., lessee.

Objector Patricia L. Gibson appeared at the hearing in person as witness in her own behalf and through Mark Guenther,

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Applicant Exhibit 3 consists of eight pages, printed front and back, and being a photocopy of a notarized document titled "Lease Agreement" executed May 31, 1991.

Objector Patricia Gibson offered three exhibits which were accepted into the record without objection.

Gibson Exhibit 1 is a color photograph of one of Applicant's proposed points of diversion, and is purported to have been taken on October 6, 1991.

Gibson Exhibit 2 is a color photograph of a road, presumably leading to the area of the proposed project.

Gibson Exhibit 3 is a color photograph of another of Applicant's proposed points of diversion.

All parties were expressly given opportunity to review the files of the Department of Natural Resources and Conservation (Department) on these three applications immediately before the hearing. The files include, but are not limited to, the above-entitled Applications, the objections, processing forms, correspondence, and Applicant's Motion to Dismiss and attached exhibits. Most of the exhibits attached to Applicant's Motion are documents identifying activities related to the permitting and financing of the proposed project. No party expressed an objection to any contents of any of the files being accepted into the record. The three files were accepted into the record at the hearing in their entirety.

In the course of reaching a decision in this matter, the Hearing Examiner took notice of the files maintained by the

Final Order, In re Applications G(W)120401-41H, and G(W)120403-41H by Estate of Lena Ryen which was expressly made part of each Authorization.

2. Under the terms of the Permit and each of the Authorizations, the Applicant was to have completed the diversion works and applied the water to beneficial use as specified in the Permit and Authorizations on or before November 30, 1990. Applicant was further required to file the pertinent Notices of Completion (Forms 617 and 618, respectively) on or before November 30, 1990. (Department file.)

3. On October 30, 1990, Applicant filed three Applications for Extension of Time; one for the Permit and one for each of the two Authorizations. Applicant is requesting an additional two years on each to complete the entire project. (Department file.)

4. On November 13, 1990, the Department issued three Notices of Action on Application for Extension of Time, temporarily extending the time limits on the respective Applications for an additional 120 days or until the Department has completed its action on the request under Section 85-2-312(3), MCA, whichever is greater. (Department file.)

5. Pertinent portions of the three Applications for Extension of Time were published December 12, 1990, in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source. Additionally, the Department served notice by first-class mail on individuals and public agencies which the

(Department's file, testimony of Matt Williams, Applicant Exhibits 1 and 3, Department's Permit and Authorizations files)

9. A license from FERC is necessary to construct and operate the type of hydroelectric facility proposed by Applicant. Persons initiating the development of such hydroelectric projects cannot legally begin construction and, therefore, as a practical matter, cannot obtain financing without first receiving a license from FERC. (Testimony of Matt Williams)

10. It is impossible to complete a project such as this in the time that remained between the issuance of the FERC license and the date of completion established by the Department on the Permit and Authorizations, that is, the five months between June 19 and November 30, 1990. (Testimony of Matt Williams)

11. Efforts which have been expended on this project are:

a) On August 19, 1987, Applicant entered into an agreement with Hydrodynamics, Inc., for the development and operation of a hydropower facility.

b) When the Permit and Authorizations were issued by the Department, Hydrodynamics proceeded with engineering plans and submitted an Exemption Application to various state and federal agencies, including FERC and DFWP, for review and comment.

c) As required by FERC, Hydrodynamics submitted a FERC license application on June 6, 1989, which was accepted by FERC on July 28, 1989.

13. Delay resulted from complications in the financing and administration requiring the change of lessees to construct and operate the facility. (Applicant's Exhibits 2 and 3)

14. Efforts that remain to be expended to complete the project are: a) order a turbine designed and constructed to fit this project; b) obtain pipe specific to this project; c) construction of the project. (Testimony of Matt Williams)

15. Ross Creek Hydro, Inc., anticipates the time required for actual construction of the project will be up to two or three months, and that construction activity would need to be conducted in the warmer seasons. (Testimony of Matt Williams)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Title 85, Chapter 2, MCA.

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, 4, 5, and 6.

3. Section 85-2-312(3), MCA, states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has

In re Application P49605-s41G by Glenda and Gerald Ohs; In re Application G042151-76N by Richard J. and Georgenia Wilkinson. Actions constituting due diligence can be performed by an agent of an applicant. See In re Application 59179-s41D by Golden Star Mining, Inc. In addition, efforts toward completion expended after the deadline for completion but during a temporary extension of time by the Department are acceptable as proof of diligence. See In re Application P22047-g41E by Harold and Claudette Shervin.

6. There is good cause for granting an extension of time. The delays in progress towards completion of the project were real and beyond the control of Applicant. See Findings of Fact 9, 10, 12, and 13. Events beyond the control of Applicant are reasonable justification for delay, and delay so justified is good cause for granting an extension of time when accompanied by due diligence. See generally In re Application 52843-g76G by Paul Chirico, Jr., and Gregory and Linda D. Tortoreti; In re Application G025010-s40P by Guido F. and Lavonne A. Vaira; In re Application P62352-43BJ by Edward L. Gunderson; In re Application 62946-s76LJ by Dennis E. and Beverly A. Rasmussen.

7. An extension of time to complete this project is not precluded due to infeasibility of the project. There is a preponderance of substantial evidence in the record that the project is feasible. See Finding of Fact 8. Furthermore, a water right does not vest with a permittee until the water is put to beneficial use, and then only to the extent and in the amounts

November 30, 1993, and file a Notice of Completion of Permitted Water Development, Form 617, and Notices of Completion of Change of Appropriation Water Right, Form 618, respectively, on or before November 30, 1993.

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 16th day of December, 1991.


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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) . FINAL ORDER
NO. 49632-s41H BY ESTATE OF)
LENA RYEN)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. Timely exceptions to the Proposal for Decision were filed by Objectors Charles and Sarah Howe and Objector Llos Parker. Oral arguments were held before Water Resources Division Administrator Gary Fritz on August 16, 1985 in Bozeman, Montana.

The Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as set forth in the Hearing Examiner's March 13, 1985 Proposal for Decision, except as expressly modified herein, and incorporates them in the Final Order by reference.

RESPONSE TO EXCEPTIONS

The parties in this matter filed written exceptions to the Hearing Examiner's March 13, 1985 Proposal for Decision in this matter, and argues these issues before Water Resources Division Administrator Gary Fritz. To the extent that these issues have

CASE # 49632

not been addressed in other Department determinations made in this matter¹, or in the certification proceeding before the Water Court, the exceptions will be addressed herein.

Exceptions of Objectors Howe

A. Objectors Howe filed a written exception to the Proposal for Decision in this matter, arguing that it was necessary for the Department to determine instream flow requirements which would be imposed on the Applicant's hydropower project before a determination of the amount of water available for appropriation could be made. (April 2, 1985 Exception filed by Objectors Howe, pp. 1 and 2.) Objectors Howe, joined by Objector Brewster, renewed their argument on this issue at the August 16, 1985 oral argument in this matter. (Transcript, pp. 11-13, 15-16.)

To the extent that the Objectors suggest that the Department should have made a determination of instream flows on the basis of testimony by Fred Nelson of the Montana Department of Fish, Wildlife, and Parks (DFWP), the Department reiterates the Hearing Examiner's determination that the testimony in question would have been speculative in nature and therefore an insufficient

¹Some of the exceptions raised by the Objectors in their written exceptions and at oral argument have already been addressed by the Department. In example, the questions the Objectors raised concerning the existence and parameters of the Applicant's claimed water rights (Howe Exceptions, page 2; Parker Exceptions, pp. 1-2; Brewster testimony at oral argument) have been dealt with through a certification proceeding before the Water Court and through the discussion contained in the March 12, 1987 Proposal for Decision and the May 15, 1987 Final Order In the Matter of the Application for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H by Estate of Lena Ryen. These issues will not be reviewed again here.

basis for determining instream flow quantification. (See Proposal for Decision, Preliminary Matters and Finding of Fact 23.)

However, the Objectors stated at the hearing that the Department of Fish, Wildlife, and Parks had done studies subsequent to the Department's contested case hearing in this matter, and had arrived at a determination of the instream flow amount which would be recommended in the FERC process. The Objectors requested that the Department allow this instream flow recommendation into the record in this matter. (See Transcript, pp. 11-16.) Counsel for the Applicant stated that the Applicant would not have a problem with DFWP's instream flow recommendation becoming part of the record. (Transcript, pp. 14-15.) Therefore, the Department requested Fred Nelson of DFWP to submit a copy of any written instream flow recommendation which had been made in this matter. Mr. Nelson complied, sending the Department a copy of a letter which he had sent to Clark Ryen on November 23, 1984; the letter states that, on the basis of stream testing of Ross Creek, DFWP intends to recommend to FERC that the Applicant maintain an instream flow of 4 cfs, as measured at a point immediately upstream of the proposed power generation facility.

For purposes of determining water availability, the Department will recognize that DFWP's present intent is to recommend an instream flow requirement of 4 cfs for the Applicant's proposed project. However, DFWP has not made any formal recommendation to FERC at this point; therefore, the

Department cannot frame with specificity any permit conditions to recognize the instream flow requirement which will be imposed in the FERC process. In addition, any determination made by the Department on water availability is subject to change if DFWP's present recommendation of 4 cfs is amended through the FERC process.

Should FERC require the Applicant to maintain a higher instream flow than that now recommended by DFWP, the Department would review the issue of water availability for possible modification or revocation of the permit in this matter, (See MCA §85-2-314), if the Applicant was unable to apply water to the beneficial use contemplated in the permit because insufficient water was available to meet the Objectors' water requirements after maintenance of the instream flow.

B. Objectors Howe requested at the oral argument that the Department take notice of the Objectors' carriage water needs, as evidenced by the affidavits submitted by the parties in response to the Hearing Examiner's March 13, 1985 Proposal for Decision and Interlocutory Order. Since the question of how much carriage water is required to enable the Objectors to utilize their water rights is an issue which was certified to, and answered by, the Water Court, the Department has adopted the Water Court's determination in this matter rather than making an independent determination based on the affidavits.

C. Objectors Howe excepted, in writing and at the oral argument, to the Hearing Examiner's determination that there are unappropriated waters in the source of supply, at times when the

water can be put to the use proposed by the Applicant. The Objectors stated as the basis for their exception that "there is no substantial credible evidence in the record that there are unappropriated waters in the source of supply in the amounts needed by the Applicant (9.5 on the average at all times) in order to make his project economical." (April 2, 1985 Exception filed by Objectors Howe, page 2.)

The Department accepts and adopts the Hearing Examiner's determination that the Applicant cannot be denied a permit on the basis of economic infeasibility. The Proposal for Decision in this matter sets forth the pertinent discussion of why the Department will not deny a permit on the basis of economics, unless the evidence is clearcut that the proposed project is so blatantly infeasible that completion and operation of the project are unlikely, and the applicant therefore cannot show that the water will be put to a beneficial use. (See March 13, 1985 Proposal for Decision and Interlocutory Order, Preliminary Matters, pp. 15-16.)

The Department further notes that economic feasibility of the Applicant's project would not in any instance be determined solely on whether or not the present permit applicant could provide enough water to make the project economically viable, since the applied-for water is to be used in conjunction with existing water rights which total 18.75 cfs. Further, since 12.5 cfs of the existing rights is senior to all of the Objectors' water rights, feasibility of the project as a whole would depend on whether enough water is physically available on an average

(which the record indicates it is), not whether enough water is available after all diversions by the Objectors are taken into account.

D. Objectors Howe, joined by Objector Parker, argue that the Applicant did not provide substantial credible evidence that the water rights of prior appropriators will not be adversely affected. Counsel for Objectors Howe at the oral argument in this matter specifically argued that "the Applicant in this case failed in meeting his burden of proof on the issue of adverse effect because he failed to provide evidence "about the water rights of the other water users . . . There was no evidence on the extent of the Objectors' water rights; there was no evidence that he even knew what their water rights were." (Exception filed by Objector Parker, page 2; Transcript of August 16, 1985 Oral Argument, page 23.)

Information regarding extent and pattern of use of a party's water rights is information which is particularly, and sometimes exclusively, within the power of that party to produce. The Applicant's burden is to produce substantial credible evidence on the proposed use and--after the Objectors have met their own burden of producing evidence on their water rights, describing the operation (including diversion) of their water rights, stating how the proposed use may affect their rights, and alleging why they will not be able to reasonably exercise their water rights if the proposed use is allowed--to produce substantial credible evidence that the Objectors' water rights will not be adversely affected. See In the Matter of the

Application for Beneficial Water Use Permit No. G 60117-g76L by William C. Houston, April 24, 1987 Proposal for Decision; In the Matter of the Applications for Beneficial Water Use Permits Nos. 55834-s76LJ and 56386-S76LJ by Zon G. and Martha M Lloyd, January 22, 1986 Proposal for Decision (Final Order, April 23, 1987). To hold that an Applicant is required to produce evidence on the Objectors' water rights would require the Applicant to assume the Objectors' burden of production as well as his own, and place him in the untenable position of attempting to present the Objectors' water uses and concerns in order to address them.

The record indicates that the Applicant provided substantial credible evidence that the Objectors' water rights would not be adversely affected, through the testimony and evidence presented by the Applicant and his witnesses. (See Finding of Fact 28, Conclusion of Law 10; March 13, 1985 Proposal for Decision and Interlocutory Order.) Information on diversion structures and carriage water needs was not presented by the Objectors at the hearing, and therefore the Applicant had no way of specifically addressing these concerns. Subsequent to the issuance of the Proposal for Decision in this matter, the Water Court, in response to Certification in this matter, evaluated the reasonableness of the Objectors' diversion structures and determined the amount of carriage water needed for the Objectors to effectuate their water uses. In response to the Water Court's determination, further conditions have been placed upon the Applicant to ensure that the proposed project does not adversely affect the Objectors' water rights.

Exceptions of Objector Parker

Objector Parker filed written exceptions to the Proposal for Decision, arguing the need to recognize instream flows and to determine the Applicant's historic water use, alleging that the record does not address adverse affect to the Objectors, and making procedural exceptions. All of these exceptions have been addressed. See Response to Exceptions of Objectors Howe, above; Water Court Response to Certification; March 2, 1987 Order.

Objector Parker did not appear at the oral argument in this matter in person or by representation.

Exceptions of Objector Brewster

Objector Brewster appeared at the oral argument in this matter. She requested that the Department recognize DFWP's instream flow recommendation in making its determination in the matter, and that all parties be allowed to address any evidence the Applicant should present in response to the Interlocutory Order concerning the existence and parameters of the Applicant's claimed use rights. The Department has accepted DFWP's present instream flow recommendation for certain purposes. (See Response to Exceptions of Objectors Howe (A)). The Objector's concern with the Applicant's claimed use rights is not relevant to the present matter: the issue was certified to the Water Court and has been discussed fully In the Matter of the Application for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H by Estate of Lena Ryen, March 12, 1987 Proposal for Decision and May 15, 1987 Final Order.

Objector Brewster further alleged that the Hearing Examiner, in determining water availability, did not take into account a water right of Don Ryen which is diverted through the Parker-Brewster-Ryen ditch. A review of Department records indicates that this allegation is correct, and that Don Ryen has an 1873 claimed water right of 75 miner's inches (1.875 cfs) up to 337.5 acre/feet, used for irrigation between May 1 and November 1 of each year, which is diverted by means of the Parker-Brewster-Ryen ditch. See Statement of Claim of Existing Water Rights No. G115495-41H. (Although not alleged by Objector Brewster, Department records also indicate that the United States Department of Agriculture also has filed an 1880 use right (No. G55437-41H), for .1 cfs up to .48 acre/feet of water per year to be used from July 1 to September 30 for stockwater purposes, which must be taken into account should the Applicant decide to divert at the proposed site in Section 9.)²

The Department therefore determines that Finding of Fact 22 is inaccurate, since the listing of water uses which are being compared to available flow data is incomplete, and hereby modifies Finding of Fact 22. See MCA §2-4-621(3) (1987).

²The Department records also indicate that Joseph and Edith Wright claim an 1869 use right to 33½ miner's inches up to 410 acre/feet of water per year, with a claimed diversion through the Lee-Parker-Ryen (Parker-Brewster-Ryen) ditch. However, this claim is a duplicate of Objector Brewster's claimed use right (No. G136566-41H), and has been noted as such in the adjudication process. The Water Court has not yet ruled on which party is the legal successor to the claimed right; however, a recognition of the water right in Barbara Brewster serves the purpose of reflecting the underlying water right for purposes of determining the amount of unappropriated water.

Modification of Finding of Fact

For the reasons stated above, the Department determines that Finding of Fact 22, as contained in the March 13, 1985 Proposal for Decision in this matter, must be modified. In order that the amount of water which is available for appropriation pursuant to this permit may be determined as accurately as possible, the Department hereby also amends Finding of Fact 22 to reference the instream flow requirement presently recommended by the Montana Department of Fish, Wildlife, and Parks, and the carriage water requirements of the Objectors.³

Therefore, the Department modifies Finding of Fact 22 to read as follows (modifications underlined):

22. In January, USGS flows indicate an approximate average Ross Creek flow of 11 cfs, while demand consists of .5 cfs stockwater (Howe) plus .83 cfs of stockwater (Brewster) plus 2 gpm of domestic (Hasting) and approximately 60 gpm domestic by Llos Parker, for a total demand by Objectors of just over 1.33 cfs. In February, average flow is approximately 9.5 cfs, which

³All parties in this matter expressed agreement that DFWP's instream flow agreement should be accepted into the record. (See Response to Exceptions by Objectors Howe, A.) The Objectors' carriage water requirements were discussed in the Proposal for Decision (See Findings of Fact 17, 18, 19, and 28), but were not quantified at that time. The amount of carriage water required by the Objectors to effectuate their diversions subsequently was quantified in the Certification proceeding before the Water Court. Therefore, the Department makes reference to the quantified amount in order to clarify the water uses in the source of supply. No party is adversely affected by the inclusion of this data, since the quantification was made by the Water Court as a result of a proceeding in which all the parties in this matter participated.

Objectors' water uses are the same as in January. In March, the average flow is 10 cfs; the Objectors' water uses are identical to January and February. In April, average flow is approximately 11.5 cfs, while Objectors' uses are the same as in the preceding three months.

In May the approximate average flow in Ross Creek is 15 cfs, while Objectors' uses are the 1.33 cfs described, plus an additional 6.55 cfs in irrigation uses (2.5 cfs by Parker, 2.17 cfs by Brewster, 1.88 by Ryen) for a total use of 7.88 cfs. In June, the flow in Ross Creek averages approximately 23 cfs: the Objectors' uses repeat the May figures with the addition of 3.76 cfs irrigation (Howe) for a total of 11.64 cfs. Flow in Ross Creek averages approximately 26 cfs in July and 25 cfs in August, while the Objectors' water uses are 11.74 cfs (11.64 cfs plus .1 stockwater use by USDA). In September, the flow in Ross Creek averages approximately 20 cfs; Objector uses are 11.74 cfs for the first half of the month. On September 16 the Howe irrigation period ceases, and on September 21 the Parker irrigation period ceases: after September 21, the Objectors' uses total 5.48 cfs. The USDA stockwater use ceases after September 30.

In October, the approximate average flow in Ross Creek is 15 cfs, while Objectors' water uses are 5.38 cfs. In November, Ross Creek flow averages about 15 cfs. The Brewster and the Ryen irrigation period ends as of November 1, so Objectors' uses in November total 1.33 cfs (.5 cfs stockwater for Howe, .83 cfs stockwater for Brewster, and 2 gpm for Hasting domestic use). The Objectors' uses remain the same in December, while the average flow in Ross Creek declines to approximately 12.5 cfs.

The water use totals listed for the Objectors are slightly low, since domestic uses by Llos Parker and Kenneth Hasting have not been factored into the flow rates. However, the Hasting flow rate is less than 1/200 of a cfs (see Finding of Fact 15), and the Parker domestic use probably does not exceed a flow rate of 1/8 to 1/7 cfs (see Finding of Fact 18). Additionally, when using the flow data for purposes of comparing the supply to Applicant's and Objectors' water use demands, the Hasting flow rate does not need to be factored in, since it is taken out of the stream below the Applicant's proposed point of return. (The Howe claimed right from Jones Canyon Creek also has been excluded from the Objectors' water use totals).

The water use totals also do not account for the 5 cfs of carriage water which the Objectors require to effectuate their diversion, and the 4 cfs instream flow which the Montana Department of Fish, Wildlife, and Parks recommends be imposed on the Applicant's project as a requirement in the FERC process. These instream uses must be accounted for in every month of the year when determining water availability, although the Applicant may not be required to bypass the full amount for each use: to the extent that the Objectors' carriage water is not consumed or delayed in returning to Ross Creek, the carriage water will be available to meet the instream flow requirements.

The approximate flow rates in Ross Creek based on USGS data can be considered as base flows, since testimony and recent flow measurements indicate that the flows have increased in recent years. (Testimony of Clark Ryen, Department Exhibits 1-3).

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Conclusions of Law

Upon a review of the complete record, the Department determines that no modification of the Conclusions of Law contained in the March 13, 1985 Proposal for Decision is necessary. The additional uses which must be taken into account in determining water availability, as reflected in modified Finding of Fact 22, make it less likely that the Applicant will be able to obtain the full amount of the requested new appropriation at any given time. However, the fact that testimony indicates there has been substantial increase in the flow of Ross Creek since the USGS flow measurements used for comparison were taken (See Finding of Fact 11), combined with the likelihood that there will be periods of time when the Objectors are not diverting water or not all the Objectors are diverting full amounts (See Objectors' Statements of Claim for Existing Water Rights; Finding of Fact 18), indicates that water is available for the Applicant's proposed appropriation.

As discussed in the Proposal for Decision in this matter, the Applicant can make beneficial use of whatever amount of water is available for new use, since the water can be used to increment the Applicant's existing water rights for purposes of the proposed power generation. (See March 13, 1985 Proposal for Decision, Conclusion of Law 9: Response to Exceptions by Objectors Howe (C).) If the required record-keeping indicates that the Applicant is unable to obtain sufficient water to utilize the permit granted in this matter, the Department may modify or revoke the permit, pursuant to MCA §85-2-314 (1987).

CASE # 49632

Modification of Permit Conditions

Based upon a review of the complete record, and in order to achieve uniformity in the conditions and restrictions placed on the permit and change authorizations which cover the Applicant's project (See Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H; May 15, 1987 Final Order), the Department amends the wording of the conditions placed on the permit in this matter.

Therefore, based upon the Findings of Fact and Conclusions of Law and upon any modifications specified herein, and upon all files and records in this matter, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 49632-s41H is hereby granted to the Estate of Lena Ryen to appropriate 11.25 cfs up to 8,142.84 acre-feet per annum, for non-consumptive use for power generation between January 1 and December 31 of each year. The priority date for this Permit shall be December 2, 1982, at 9:00 a.m.

The points of diversion for this appropriation are the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, Township 01 North, Range 06 East, and the S $\frac{1}{2}$ SE SE $\frac{1}{4}$ of Section 09, Township 01 North, Range 06 East, all in Gallatin County, Montana. The place of use is the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$

of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. The source of supply is surface water from Ross Creek, to be diverted by means of a Federal Energy Regulatory Commission (FERC)-licensed diversion structure, and to be returned to the creek at the point of use specified above.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidence by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of the Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall in no event withdraw or cause to be withdrawn more water than the amount specified in the Permit. At all times when the water is not reasonably required for the specified purpose, the Permittee shall allow the waters to remain in the source of supply.

D. The Applicant shall install an accurate means to measure the flow of water over the spillway of the Applicant's diversion structure, in addition to a flow measurement device to measure the amount of water diverted through the facility, and shall keep

a written record of the flows in Ross Creek and of all flows diverted from the creek. The Applicant shall make these records available to the Department on request.

The Applicant shall submit to the Water Rights Bureau of the Department of Natural Resources and Conservation design information which specifies how various levels of by-pass flows will be measured, and how these flows can be accurately measured by the Applicant's proposed measuring devices. The Department may recommend modifications of the measuring devices, if such action is deemed necessary to ensure that accurate measurements can be taken.

The Applicant, in cooperation with the appropriate licensing agencies, shall develop and practice methods of recording water measurements which will ensure that the Applicant's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

E. The Applicant shall notify the Department of the amount of by-pass flow, if any, required of the project by other agencies, upon formal receipt of such information. Any Authorization issued to the Applicant will be amended or notated as necessary, to make the water rights records clear upon their face that the Applicant is not authorized to appropriate water pursuant to the permit granted herein when such appropriation would infringe upon any instream flow requirements imposed upon the Applicant's project.

F. At all times when water is required to meet the appropriation needs of appropriators who divert from Ross Creek between the point(s) of diversion herein authorized and the Applicant's place of use, and said appropriators are legally entitled to divert, the Applicant must by-pass past the diversion works the appropriators' needs plus carriage water in the amount of 5 cfs.

The amount of carriage water which is not consumed or delayed in returning to Ross Creek by the intervening diversion structures may be utilized to provide a corresponding portion of the required instream flow which the Applicant must bypass; provided, however, that the Applicant must ensure that enough water is bypassed to meet the full instream flow amount required by FERC, as determined by measurement to be made in compliance with FERC specifications.

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 thirty (30) days after service of the Final Order.

DONE this 7 day of August, 1987.



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

CASE # 49632

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 7, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application for Beneficial Water Use Permit No. 49632-s41H by Lena Ryen, addressed to each of the following persons or agencies:

Estate of Lena Ryen
c/o Clark Ryen
7960 Springhill Community Road
Belgrade, MT 59714

Anna Marie Bakken
Box 447
Bozeman, MT 59715

Lyle Ryen
8680 Walker Road
Belgrade, MT 59714

Wayne Ryen
209 South Sixth
Bozeman, MT 59715

David C. Moon
Attorney at Law
Moore, Rice, O'Connell & Refling
PO Box 1288
Bozeman, MT 59771-1288

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Ted Doney
Attorney at Law
Box 1185
Helena, MT 59624

Kenneth L. Hasting
3416 Valle Verde Drive
Napa, CA 94558

CASE # 49632

Scott Compton, Manager
Water Rights Bureau
Field Office
1201 East Main
Bozeman, MT
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 7th day of August, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12-1-1990

CASE # 49632

1. App. for a change must make threshold showing of the existence of the underlying it. pp 19-20
2. App. must show historic use pattern, to ensure that use is not being enlarged under guise of a change. p. 21

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

p. failed to show historic use pattern, Dept. can't grant change w/o more info pp 62, 63

4. Obj. must show reasonableness of means of diversion, p. 64

IN THE MATTER OF THE APPLICATION) FOR BENEFICIAL WATER USE PERMIT) NO. 49632-s41H AND APPLICATION) FOR CHANGE OF APPROPRIATION) WATER RIGHTS NOS. G 120401-41H) AND G 120403-41H BY ESTATE) OF LENA RYEN)	PROPOSAL FOR DECISION ON) APPLICATION FOR BENEFICIAL) WATER USE NO. 49632-S41H) AND) INTERLOCUTORY ORDER IN) APPLICATION FOR CHANGE OF) APPROPRIATION WATER RIGHT) NOS. G120401-41H AND G120403-41H
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* * * * *

Pursuant to 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 held on May 31 and June 1, 1984, in Bozeman, Montana.

Clark M. Ryen, one of the Applicants in this matter, appeared personally and by and through counsel, David C. Moon.

Objector Llos Parker appeared personally and by and through counsel, Donald A. Nash.

Objectors Charles and Sarah Howe appeared personally and by and through counsel, Ted J. Doney.

Objector Barbara Brewster appeared by and through counsel, Philip Davis.

Objector Kenneth L. Hasting appeared personally.

Dale Miller, hydrologist with Inter-Fluve, Inc., appeared as witness for the Applicant.

Paul Kinshella, consulting engineer with Sanderson, Stewart, and Gaston, appeared as a witness for the Applicant.

Patricia Gibson appeared as a witness for Objector Llos Parker.

Greg Morris appeared as a witness for Barbara Brewster.

Fred Nelson, fisheries biologist for the Montana Department of Fish, Wildlife, and Parks, attended the hearing in this matter and was called to testify by Ted J. Doney.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On December 2, 1982, the Applicant filed an Application for Beneficial Water Use Permit, seeking to appropriate 25 cubic feet per second ("cfs") (p to 18,094 acre-feet per year from Ross Creek for non-consumptive use for power generation at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. The water was to be diverted in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 10, Township 01 North, Range 06 East, Gallatin County, Montana, by means of a pipeline, for year-round use.

On December 21, 1982, Jan Mack of the Bozeman Water Rights Bureau Field Office made a site visit to the proposed project area and wrote a report for the file, dated December 23, 1982.

On January 20, 1983, the Applicant requested that the flow rate applied for be reduced from 25 cfs to 11.25 cfs, and that the volume applied for be reduced from 18,094 acre-feet per year to 8,142.84 acre-feet.

On January 27, 1983, the Applicant also filed two Applications for Change of Appropriation Water Rights, seeking changes in use of claimed water rights W120401-41H with a priority date of June 1, 1866, and W120403-41H with a priority date of June 1, 1874, from Ross Creek. The Applications requested changing the point of diversion of the two claimed water rights from the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16 to the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 10, all in Township 01 North, Range 06 East, Gallatin County, Montana. The use remains power generation, the place of use remains the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16, and the period of appropriation remains January 1 through December 31 of each year. The amount of water appropriated under both claimed water rights remains the same in terms of cfs amounts, although the acre-foot amounts for the claims were amended slightly downward; from 9,125 acre-feet to 9,047.6 acre-feet on W120401-41H, and from 4,562 acre-feet to 4,523.8 acre-feet on W120403-41H.

The pertinent portions of the Applications were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on March 9, 16, and 23, 1983.

Timely objections were filed to Application No. 49632-s41H, G120401-41H, and G120403-41H on Ross Creek by J.K. and Mary L. Maroney, Leona and Llos Parker, and Barbara A. Brewster. The Montana Department of Fish, Wildlife, and Parks submitted a "letter of concern" for inclusion in the record.

On July 21, 1983, the Department received a request from the Applicant to amend the proposed point of diversion on the Applications from the previously designated legal discription of

the S½SW¼ of Section 10, Township 01 North, Range 06 East, to two points of diversion; one on the Applicant's land in the NE¼NW¼NE¼ of Section 16, and one on Forest Service property in the S½SE¼SE¼ of Section 9, all in Township 01 North, Range 06 East, Gallatin County, Montana.

The pertinent portions of the amended Applications were republished in the Bozeman Daily Chronicle on August 31, 1983 and September 7, 1983.

Additional timely objections to the three Applications were filed by Charles and Sarah Howe, successors in interest to J.K. and Mary Maroney. Kenneth L. Hasting filed timely objections to the two Applications for Change.

Mr. and Mrs. Parker objected to the Applications on the basis that they would lose control over the water, since the proposed new points of diversion are above the Parkers' point of diversion, and the point of return for the flow is below it, and therefore the flow at the Parker point of diversion will be diminished. Barbara Brewster objected on the same basis, noting also that, if the permits are granted, expensive construction may be necessary to enable the Objectors to obtain their water use rights from the diminished creek. Mr. and Mrs. Maroney also objected to the Applications on the basis that they will be adversely affected if their point of diversion is bypassed, and noted that one of the claimed rights which the Applicant proposes to change is junior to the Maroney water use right. Kenneth

Hasting objected to the Applications for Change because of concerns about the effect of the proposed project on the quality of his downstream domestic (drinking) water.

The Montana Department of Fish, Wildlife and Parks submitted a letter stating their concern that "the project will have the capacity to divert the entire stream flow of Ross Creek during much of the year, thereby jeopardizing the rainbow trout population in the section of stream between the proposed diversion sites and powerhouse outlet", and stating that any FERC license or license objection will carry a stipulation guaranteeing that a year-round minimum stream flow will be maintained.

A March 26, 1984 Field Report was prepared by Scott Compton for inclusion in the Department's contested case file in this matter, documenting stream measurements taken on March 23, 1984 at the Howe point of diversion on Ross Creek. Mr. Compton submitted additional flow measurements taken on Ross Creek on May 2 and May 30, 1984, at the hearing in this matter.

EXHIBITS

The Applicant, Estate of Lena Ryen, submitted sixteen exhibits in support of the Applications in the above-entitled matter.

Applicant's Exhibit 1 is an ASCS aerial photograph of Ross Creek, labelled with proposed points of diversion and place of use, Applicant's present points of diversion, and with some of Objectors' points of diversion. It also contains marks made by witnesses at the hearing.

Applicant's Exhibit 2 is a photograph of the Howe point of diversion.

Applicant's Exhibit 3 is a photograph of the Parker/Brewster/Ryen point of diversion (also known as the Lee/Parker/Ryen ditch).

Applicant's Exhibit 4 is a graph depicting comparative discharge amounts (in cfs) of Ross Creek and Middle Cottonwood Creek from October, 1950 to September, 1951.

Applicant's Exhibit 5 is a graph like Exhibit 4, but showing the discharge amounts for the period from October, 1951 through September, 1952.

Applicant's Exhibit 6 is a graph like Exhibits 4 and 5, but showing the discharge amounts for the period from October, 1952 through September, 1953.

No Applicant's Exhibit 7 was offered or accepted.

Applicant's Exhibit 8 is a graph depicting daily precipitation amounts recorded at station "Bozeman 12 NE" for the period of October, 1951 through September, 1952. The data was put together by the United States Department of Commerce, in a publication entitled "Climatological Data of Montana" issued monthly.

Applicant's Exhibit 9 is a graph like Exhibit 8, but showing daily precipitation amounts for October, 1952 through September, 1953.

Applicant's Exhibit 10 is a graph depicting comparative water surface and ground surface elevations at the Howe point of diversion.

Applicant's Exhibit 11 is a graph depicting comparative water surface and ground surface elevations at the Parker/Brewster/Ryen point of diversion.

Applicant's Exhibit 12 is a U.S.G.S. map of the Bridger Mountain Range, marked at the hearing with locations of recording stations for precipitation and snowpack.

Applicant's Exhibit 13 is a map developed by William J. McMannis, "Geology of the Bridger Range, Montana" (1952 dissertation, Princeton University), Plate I.

Applicant's Exhibit 14 is a blueprint of the Applicant's proposed "Ross Creek Diversion System" prepared by the engineering firm of Sanderson, Stewart, and Gaston; the blueprint shows the proposed layout of the diversion structures and cross-sections of such structures.

Applicant's Exhibit 15 is a photocopy of U.S. Dept. of Interior gaging station data on Ross Creek for the period of June, 1951 through September, 1953.

No Applicant's Exhibit 16 was offered or accepted.

Applicant's Exhibit 17 is a chart of "snowpack as snow water equivalency in inches" for snowpack-recording stations New World, Hood Meadow, and Devil's Slide, for the period of January through May in 1951, 1952, and 1953.

Applicant's Exhibit 18 is a chart of precipitation at recording station "Bozeman 12 NE" for 1951, 1952, and 1953. It also shows monthly precipitation averages for 1951 to 1972.

Applicant's Exhibits 1-12, 14, and 15 were accepted into the record without objection.

Objection to Applicant's Exhibit 13 was made on the basis that, since Ross Creek is incorrectly identified on the map as "Potter's Gulch", there possibly might be more inaccuracies and the exhibit therefore does not have probative value.

Objection to Applicant's Exhibit 17 was made on the basis that the snowpack-recording stations which are used are located in the Hyalite Mountain Range, not in the Bridger Range where Ross Creek is located, and that therefore the data is not comparable.

Objection was made to Applicant's Exhibit 18 on the basis that it is irrelevant.

The objections to these exhibits, in all three instances, go to the weight and credibility of the evidence, not to the admissibility of the evidence. As stipulated on the record in this matter, the statutory rules of evidence do not apply in this contested case water rights hearing. § 85-2-121 MCA (1983). Rather, the applicable rules of evidence, which the parties agreed to, is that the Hearing Examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

Therefore, all of the evidentiary objections to the three exhibits have been overruled, although the exhibits have been given limited weight and reach.

Applicant's Exhibit 13 tends to corroborate testimony by Applicant's witness Dale Miller as to the probable reason for Ross Creek flow patterns (see Applicant's Exhibits 4, 5, 6, and Finding of Fact 9, infra), and is admitted into the record for that limited purpose.

Applicant's Exhibit 17 is duplicative of information available in other, more clearly relevant forms (Applicant's Exhibits 8, 9, 12, 18; testimony by Dale Miller and Clark Ryen); at most, it gives a slight amount of corroboration to the other exhibits, and has been given correspondingly little weight.

Applicant's Exhibit 18 adds probative value to witness evaluation of 1951, 1952, and 1953 as being "average years" in regard to precipitation patterns in the last 30 years; it tends to show that the years for which gaging records on Ross Creek are available are neither part of a low flow regimen, nor were the flows exceptionally high.

Objectors submitted nine exhibits in support of their objections to the Applications in this matter.

Objectors' Exhibit A is a photocopy of Statement of Claim for Existing Water Rights (hereafter, "SB76 Claim") No. 01682 for Irrigation, by Llos and Leona Parker. Attached are the maps, an affidavit, and a certified copy of a page from the 1923 Decree on Ross Creek.

Objectors' Exhibit A is a photocopy of portions of the 1923 decree of water rights in Ross Creek.

Objectors' Exhibit B was not offered for the record.

Objectors' Exhibit C is a photocopy of SB76 Claim No. 115553 for Irrigation, by J.K. Maroney. Attached are a map, an affidavit, and a certified copy of a page from the 1923 Decree on Ross Creek.

Objectors' Exhibit D is a photocopy of SB76 Claim No. 115554 for Irrigation, by J.K. Maroney, with the same attachments as Exhibit C.

Objectors' Exhibit E is a photocopy of SB76 Claim No. 115555 for Irrigation, J.K. Maroney, with the same attachments as Exhibit C.

No Objectors' Exhibit F was offered or accepted.

Objectors' Exhibit G is a photocopy of SB76 Claim No. 136564 for Irrigation, by Barbara Brewster. Attached is a map.

Objectors' Exhibit H is a photocopy of SB76 Claim No. 136566 for Irrigation, by Barbara Brewster. Attached are a map and certified copies of three pages from the 1923 Decree on Ross Creek.

Objectors' Exhibit I is a photocopy of SB76 Claim No. 136569 for Stockwater, by Barbara Brewster, with the same attachments as Exhibit H.

Objectors' Exhibit J is an A.S.C.S. aerial photograph of Section 16, Township 01 North, Range 06 East, showing area of Howe property.

Objectors' Exhibits A-D and G-I were accepted into the record without objection.

Objection was made to Objectors' Exhibit E on the basis that the SB76 Claim for Existing Water Rights is based on decreed water rights in Jones Canyon Creek, not in Ross Creek.

Objection was made to Objectors' Exhibit J on the basis that the evidence presented therein is "redundant".

Objectors' Exhibit E is not inadmissible on the basis that the claimed water right is in Jones Canyon Creek, rather than in Ross Creek proper. If the water claimed in this particular document was subject to the use priorities in Ross Creek, and could be "called" by the Applicant, as senior appropriator, for use in the proposed project, the Jones Canyon Creek right would be relevant evidence. However, a U.S.G.S. map of the area (Applicant's Exhibit 12) indicates that "Jones Creek" enters Ross Creek below Applicant's points of diversion and point of return. Therefore, Objector's Exhibit E is irrelevant because the rights it represents are not affected by Applicant's proposed project: it has been excluded on such grounds.

The Objection to Objectors' Exhibit J goes to the weight and credibility of the evidence, not to its admissibility. The Exhibit was introduced to show the tillable acreage for which the Objectors have claimed water rights. As such, it adds some corroborative weight to the Objectors' claimed water uses and their claim of resultant injury if the proposed project is completed, and has been admitted for that limited purpose.

The Department offered three exhibits for admission into the record.

Department Exhibit 1 is a report of flow measurements taken on Ross Creek by DNRC personnel on May 30, 1984.

Department Exhibit 2 is a report of flow measurements taken on Ross Creek by DNRC personnel on March 23, 1984.

Department Exhibit 3 is a report of flow measurements taken on Ross Creek by DNRC personnel on May 2, 1984.

Department Exhibits 1-3 were accepted into the record without objection.

Upon request of counsel for the parties, the record in this matter was left open for submission of post-hearing briefs which were limited to discussion of matters raised on the record at the hearing.

Additional documents submitted by the Applicant in this matter are:

1. Applicant's initial post-hearing brief, received July 2, 1984.
2. Applicant's reply brief, received July 16, 1984.

Additional documents submitted by the Objectors in this matter are:

1. "Parker Brief in Support of Objections to Ryen Application", received July 2, 1984.
2. "Post-Hearing Brief of Objectors Howe", received July 2, 1984.
3. Reply brief of Objectors Howe, received July 16, 1984.

PRELIMINARY MATTERS

A. Objections to Testimony

During the hearing in this matter, objections were made to certain questions or lines of questioning. Three objections were sustained at the time they were made: counsel for the Applicant's objections (1) to a question directed to Applicant's witness Paul Kinshella, concerning the viability of moving the project's point of use upstream from the Objectors' points of diversion; (2) to a question directed to Fred Nelson of Fish, Wildlife and Parks (FWP), concerning the amount of water that FWP might recommend as the minimum instream flow in Ross Creek, and (3) to questioning Objector Howe about his own hydropower plans¹.

These rulings are hereby affirmed. The questions directed to Mr. Kinshella and Mr. Nelson could have elicited only speculation on the part of these witnesses.

¹ Objector Charles Howe testified that he has applied for an exemption from Federal Energy Regulatory Commission, (hereafter, "FERC") which would enable him to use the water for both hydro-generation of power and for irrigation, and that therefore his proposed water use would be "the best and highest use of the water". While the legislature has declared that it is Montana's water use policy to encourage the wise use of the state's water resources for "the maximum benefit" (MCA 85-2-101(3)), it nevertheless remains true that water is allocated strictly on a priority date basis, wherein any water use which falls within the definition of a "beneficial use" takes its place on the ladder of priorities without regard to the type of use it represents. Montana does not have a water use system wherein different types of uses are prioritized, with, for example, municipal uses being given priority over irrigation, and irrigation over industrial uses.

In regard to the possibility that Mr. Howe's Application to the Federal Energy Regulatory Commission (FERC) for an exemption for his own planned hydropower uses could render a decision in the present matter moot, the response can only be that the possibility cannot affect the Department's decision in this matter. The Applicant is not required to complete the FERC process before obtaining a state water use permit or change. The Department has a statutorily-mandated duty to act on applications, (see MCA § 85-2-311; "...the department shall issue a permit", § 85-2-402; "...the department shall approve the proposed change.") which is not forestalled by possible future events. Mr. Howe's future plans are not "uses or developments for which a permit has been issued or for which water has been reserved", nor are they a choate water right which will be adversely affected. If, indeed, FERC should give the Howe application for an exemption priority over the Applicant's application for a license, the Applicant's project will not be developed, any water for which a permit as been issued will not be used for "the beneficial use contemplated in the permit", and the permit will lapse pro tanto. (See MCA § 85-2-314).

Although FERC cases such as First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946) and its progeny suggest that federal jurisdiction may supercede state jurisdiction over many aspects of hydropower project licensing and permit procedures, state agencies cannot be expected to base their actions on hypotheses

about future decisions to be made at the federal level, nor is there any basis for staying the state action in the absence of federal pre-emption.

In addition to the objections discussed above, two objections were made which were overruled, subject to further determination: (1) counsel for the Applicant objected to questions directed to the Applicant regarding the economic feasibility of his proposed project, and (2) to questions directed to Objector Llos Parker concerning historic use of the Applicant's claimed water use rights for hydropower. The questions and the witnesses' responses to them were allowed into the record pending a determination of the material's admissibility, to be set forth here in the Proposal for Decision.

The current statutory criteria require a review of the economic feasibility of a project only if the appropriation is for 10,000 or more acre-feet per year or 15 or more cubic feet per second. § 85-2-311(2) MCA (1983). However, such a review is not required in this matter. The Department is not applying the criteria of the current statute to applications where the priority date precedes the effective date of the legislation; House Bill 908, effective April 29, 1983. The priority dates of the Applications in this matter precede the effective date. However, even if the Department were to apply the current statutory criteria, the criteria are applied to new appropriations only; as noted in footnote 3, *infra*, the new appropriation portion of the Applicant's project is not large enough to trigger the additional statutory criteria.

To a certain extent, the economic feasibility of a project may play a part in determining that the use for which water will be appropriated is beneficial, since evidence which indicates that the proposed project is so blatantly infeasible that completion and operation of the project is unlikely tends to show that the water will not be put to a beneficial use. However, no such clearcut evidence is present in this matter. Absent such evidence, the Department is not in a position to find in the negative on beneficial use.²

Objection was made to allowing Objector Llos Parker to testify about the historic use of the Applicant's claimed hydropower use rights from personal knowledge of the flour mill and saw mill operations which formerly utilized the claimed rights, on the basis that making a determination about "old

² As the Department has previously noted, "Any contrary readings of the statutory criteria would lead the Department far afield in the evaluation of an application for a permit. Such theories would require administrative determinations of whether the prospective economic benefits to be derived from the use of the water would successfully amortize the capital investment represented (sic) by the diversion works themselves, coupled with all costs of maintenance and repair... Moreover, such determination would have to be exercised prospectively ... The Applicant cannot be charged with the duty of establishing the price of hay ten years hence. The Department, likewise, can find no authority pursuant to the Water Use Act to dictate to prospective appropriators how and when they are to spend their monies." In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, September 30, 1981 at 19-20. From the standpoint of monetary feasibility, the economic marketplace provides the most efficient check: the capital costs associated with the water use projects will discourage all but those projects which have a reasonable chance to make a profit.

rights" constitutes an adjudication and is therefore outside the scope of a Department permit hearing. The testimony was admitted into the record, pending a further determination of its admissibility.

It is true that final determinations concerning water rights which vested prior to 1973 is solely within the province of the water court and its adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. However, as the Department has previously stated:

Determining the character of an existing right for the purposes of implementing the change statute has nothing to do with such a determination for purposes of adjudicating that right. The character of the proceedings are fundamentally of different orientations. A finding of no extant water right pursuant to a change proceeding merely determines that an applicant has not shown himself to be entitled to a change pursuant to the statutory provisions detailing the method and manner of making such changes. In the Matter of the Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates Proposal for Decision, August 25, 1981.

A decision made for purposes of allowing the Department to proceed with a determination on whether a proposed change in water use will adversely affect other persons does not reach the res judicata level of finality such as is obtained in the

adjudication process. See Meadow Lake, supra, United States v. District Court of Fourth Judicial District, 121 Utah 18, 242 P.2d 774 (1952).

The adjudication process is designed to give finality to determinations of existing rights and of priorities, in order to provide a framework for subsequent regulation of the state's water resources. MCA § 85-2-101(2), § 85-2-234(2). Determinations made in the change process do not carry the equivalent weight of finality. A change approval can be modified or revoked pursuant to MCA § 85-2-402(5), or it can be reduced pursuant to the adjudication process: "If the Department should authorize the change of a water right for a greater quantity of water than is subsequently recognized in the adjudication process, the change inevitably must be pro tanto reduced in conformity with the decree." Meadow Lakes, supra. The change could be eliminated completely if the water right involved subsequently is not recognized in the adjudication process.

Since a decision on an application for change does not carry the weight of finality on determinations of ownership, and since an appropriator does not obtain any rights through a change approval that are not contingent upon determination of ownership by the adjudication process, the Department is not usurping the water court's jurisdiction by making a preliminary administrative finding which enables the Department to perform its mandated function of authorizing or denying applications for change in water rights.

It has been stated with reference to the authority of the state government, "...No powers will be implied other than those necessary for effective exercise and discharge of powers and duties expressly conferred." State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338 (1936). See also Guillot v. State Highway Commission, 102 Mont. 149 (1936).

Conversely, however, the Department does have the implied powers necessary for its "effective exercise and discharge of the powers and duties expressly conferred." Id. since the Department is charged with a statutory duty to administer the Water Use Act and has been delegated the power to issue change approvals, it follows that the Department is empowered to make such initial determinations on water rights as are needed to allow it to reach the decision required by MCA § 85-2-402. See In the Matter of the Application for Change of Appropriation Water Rights No. G-05081 and G-05083 by Neil W. Moldenhauer, Final Order, March 20, 1984.

One of the determinations that the Department must make in change proceedings is the existence of the right for which the application for change has been made.

Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructory interest only, and accords the appropriator no privileges by ways of ownership of the

corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some specified purpose. See Holstrom Land Co., Inc. v. Ward Paper Box Co., 36 St. Rep. 1403, _____ Mont. _____; _____ P.2d _____ (1979). A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings. Meadowlakes, supra, at 56.

To hold otherwise would allow any holder of a purported water right to circumvent the permitting process for new uses by utilizing change proceedings to enlarge the amount of water that actually had been used, or even to initiate a use that had never existed except on paper. See Holmstrom, 185 Mont. 409, 605 P.2d 1060 (1979), 79 Ranch v. Pitsch, 40 St. Rep. 981, 606 P.2d 215 (1983).

In the present matter, the Applicant must make a threshold showing of the existence of the water use right that he wishes to change. See City of Bozeman, infra. Since a water right is usufructuary, that is, based upon the actual use of the water rather than upon any "paper right" claim, evidence relating to the use of the claimed water right is relevant. Thus, the Llos Parker testimony about past use of Applicant's claimed water right is relevant and admissible, and it will remain in the record.

B. Historic Use

In conjunction with the requirement that the underlying water use right must be shown to exist before it can be changed, the Applicant must also show the extent and pattern of the past use of the water, i.e., its "historic use", to ensure that the use is not being enlarged under the guise of a "change". The doctrine of historic use differs from the question of the existence of the underlying right only in the scope of the scrutiny.

Numerous Montana cases embody the concept that a water right is defined by the actual use of the water, rather than by the amount claimed by, or even decreed to, the water right holder. See Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914), Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935), Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), 79 Ranch v. Pitsch, supra. Such caselaw indicates that uses of water which result in an increased consumption amount to a new appropriation, rather than a change. See, Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911).

The historic use pattern of a given water right defines not only the quantity of water which the holder of the right will be accorded, but also the time frame during which the right may be exercised. For example, an appropriator who changed his water use from mining to irrigation was held to be restricted to using the water in the spring and fall seasons, when the water had been used for mining. Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909). In Galiger, supra, the appropriator likewise was

restricted to using his changed use in conformity with the pattern of use he originally had established. See also Beaverhead, supra. An applicant for change of an appropriation water right 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.

As noted in Beaverhead, a contested application for change implicates two central values of western water law: a water right holder's ability to change the use of the underlying interest, in order to effectuate new and more productive uses of water, and the right of other appropriators to be protected from any adverse effects of such changes, so that their own uses of the water resource may continue unhindered. (Beaverhead, at 1).

The doctrine of historic use, although speaking to enlargements of use, is nothing more than a backhanded way of describing other appropriators' rights to maintenance of the stream conditions. That is to say, enlargements of use are significant precisely because they change the stream conditions to the detriment of junior appropriators. See Quigley v. McIntosh ...Because of the scarcity of water in the arid west, the doctrine of appropriation accords property interests in such stream conditions in order to provide security for the development of water... (Citations omitted). Beaverhead, supra, at 17-18.

Water use statutes and case-law indicate that appropriators' rights to maintenance of the stream conditions as of the time of their respective appropriations does not extend to the right to maintain the exact physical conditions which occurred at the time. (E.g., MCA § 85-2-401 clearly contemplates "changes by

later appropriators in the condition of water occurrence...if the prior appropriator can reasonably exercise his water right under the changed conditions.") Rather, an appropriator has a vested right to maintenance of those stream conditions which are necessary to allow him to make use of his appropriation. See generally, Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974), In re Moldenhauer, *supra*. To go beyond that would be to allow an appropriator to play "dog in the manger" by blocking beneficial uses by others; a result clearly not intended by case-law or statute. See MCA § 85-2-101(3), § 85-2-308, § 85-2-401, § 85-2-402. See generally, Miles v. Butte Electric and Power Company, 32 Mont. 45 (1904). Therefore, the test should be whether or not the proposed change increases the burden on the stream to the point that it is more difficult for other appropriators to obtain and utilize their appropriations.

The seminal Montana case on "reasonable means of diversion" is State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). Therein, the court found that reasonable efficiency is all that is required of a means of diversion, not absolute efficiency, and that an appropriator may employ the means most suitable in view of the existing physical conditions and the circumstances of the case. The court added the proviso that the means of diversion must not be unnecessarily wasteful, but that parties who utilized "usual and ordinary means of diverting water" would not be required to substitute another, more efficient means of diversion. Crowley at 103. "...There is a vanishing point at which the possible waste of water would be

more than overcome by the waste incidental to the abandonment of reasonably efficient diversion systems and the establishment of diversion systems whose expense is neither warranted nor permitted by the benefit to be derived from the water". Crowley at 97-98.

The determination of whether "the methods adopted for diversion are reasonable and economical" must be made on a case by case basis. Crowley at 103.

C. Burden of Proof

Historically (before the advent of the Montana Water Use Act), the burden of proof in change proceedings was on the objector. See Holmstrom Land Co. v. Meagher County Newland Creek Water Dist., 36 St. Rep. 1403, 605 P.2d 1060 (1979); "The burden is on the party claiming to be prejudiced by such change to allege and prove the facts". Lokowich v. City of Helena, 46 Mont. 575, 129 P., 1063 (1913).

However, in response to the changes wrought in water right processes by the advent of the Montana Water Use Act, the Department has recently redefined the allocation of the burden of proof in cases where a change of water right is involved. See In the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H, Proposal for Decision, June 4, 1984 (Final Order issued January 9, 1985), In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A, 36295-c41A,

36296-c41A, 36297-c41A, 36298-c41A 36299-c41A, 36300-c41A and 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985.

To summarize the lengthy discussion contained in these Proposals, "the applicant for a change of water right bears the burden of production on the specifics of his intended change and on the existence of the water right that is the subject matter of the change. The burden of production is discharged when the evidence and all reasonable inferences therefrom, viewed in a light most favorable to the applicant, is sufficient to allow a reasonable mind to conclude that the ultimate fact exists". City of Bozeman, supra, Addendum A. In addition, the applicant bears the burden of persuasion on all relevant and material issues, the standard being the preponderance ("more likely than not") test. See MCA § 26-1-403.

The objectors to an application for change bear the burden of production on the questions of the scope and character of their existing rights and on the issue of injury to their rights: the latter burden extends to the kind and character of adverse effect upon which the objection has been made, although not to the specific amount or measure of such adverse effect. "Much of this information will be peculiarly within the province of the objector, and it is not to be expected that the legislature intended an applicant to bear the burden of production thereon." (Citations omitted). City of Bozeman, supra, Addendum A.

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 Orders.

Findings of Fact

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Applicant in this matter is the Estate of Lena Ryen, an informal organization comprised of heirs of Lena Ryen and their heirs. Real parties in interest presently include Clark Ryen, Anna Marie Bakken, Iyle Ryen, and Wayne Ryen.

"The Applicant" is used herein to refer to the estate, or to Clark Ryen as the estate's representative in this matter.

3. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on December 2, 1982 at 9:00 a.m. The Applications for Change of Appropriation Water Rights were duly filed with the Department on January 27, 1983 at 10:00 a.m. and 10:01 a.m.

4. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

5. The Applicant intends to use the water for power generation, which is a beneficial use. M.C.A. § 85-2-102(2).

6. The source of supply for the proposed appropriation is Ross Creek, a tributary of the Gallatin River.

7. Available data on flow rates in Ross Creek consists of measurements made at a U. S. Department of Interior gaging station on Ross Creek between June, 1951 and September, 1953, three readings taken in spring, 1984, by Department personnel, two readings taken by Applicant's witness Dale Miller, and testimony of the parties in this matter.

8. The hydrographs prepared by Dale Miller on the basis of the available flow measurements (Applicant's Exhibits 4, 5, and 6) indicate that the flow rate pattern of Ross Creek is characterized by a pattern of "moderated discharge"; there is a gradual buildup of flow after low flow in April, high flow is sustained for about three months, then the flow gradually decreases.

Mr. Miller testified that such a flow pattern is atypical for a high mountain stream. For comparative purposes, he plotted Middle Cottonwood Creek flow data on the hydrographs, since researchers have described Middle Cottonwood as a creek which is typical of the west slope of the Bridger Mountains. The flow pattern for Middle Cottonwood shows a dramatic high flow period of 15 to 30 days during spring runoff, then an abrupt decline to a very low flow rate for the rest of the year.

Testimony in this matter substantiates the flow pattern indicated by the Exhibits: Ross Creek flow apparently is characterized by a dependable year-round base flow which increases and decreases gradually, rather than peaking for a short period of time and then decreasing drastically. (Testimony of Clark Ryen, Fred Nelson).

9. It is more likely than not that the water source for Ross Creek is a storage aquifer which receives water from other, more permeable, aquifers outside the immediate drainage basin, and releases it at a steady rate. This would account for the moderated pattern of flow, the absence of storm "peaks" in flow, the clearness of Ross Creek water even during spring runoff, and the large volume of the flow in comparison to the relatively small drainage basin. (Testimony of Clark Ryen, Dale Miller; Applicants' Exhibits 4, 5, 6).

10. Flow measurements taken in 1951-1953 at a U.S.G.S. gaging station located at a point on Ross Creek below all parties' points of diversion show that the flow of Ross Creek ranged from a low flow of 9 cfs in February/March of 1952 and 1953 to a high flow of 34 cfs in July, 1953. (Applicant's Exhibits 4, 5, 6).

The measurements show monthly flows (averaged over the 2½ year test period) of approximately 11 cfs in January, 9.5 cfs in February, 10 cfs in March, 11.5 cfs in April, 15 cfs in May, 25 cfs in June, 20 cfs in July, 25 cfs in August, 20 cfs in September, 15 cfs in October, 14 cfs in November, and 12.5 cfs in December.

Testimony indicated that measurements at the U.S.G.S gaging station would be higher than measurements taken at any point above the gaging site, since Ross Creek is a gaining stream. (Testimony of Clark Ryen, Dale Miller). However, measurements taken at the site also would already be depleted by any appropriations being made above that point by the Applicant and the Objectors.

Measurements taken by DNRC Bozeman Water Rights Bureau Field Office personnel show a flow of 13.49 cfs at a point approximately 20 feet upstream from Objector Howe's point of diversion on March 23, 1984. Measurements taken at the Howe diversion on May 2, 1984 show a flow of 16.26 cfs, and May 30, 1984 measurements above Howe's diversion show a flow of 31.95 cfs.

Field office measurements taken at other points on May 2, 1984 show a flow of 11.53 cfs at Applicant's proposed upper diversion point on Forest Service land, and of 14.4 cfs at the proposed lower point of diversion. May 30, 1984 flows were measured at 23.38 cfs at the proposed upper diversion point and at 32.73 at the proposed lower diversion point.

11. Testimony at the hearing tends to indicate that flows in Ross Creek have been higher in recent years (testimony of Clark Ryen, Dale Miller, Llos Parker), possibly as a result of the 1959 earthquake (testimony of Llos Parker). Clark Ryen testified that low flow is above 12 cfs in most recent years and around 10 cfs in dry years, that high flow averages from 36 up to 40 cfs, and that the overall average flow is higher than 15 cfs and often is over 20 cfs.

12. The Applicant has applied for changes of appropriative rights totalling 18.75 cfs; 12.5 cfs on the basis of a claimed 1866 right, and 6.25 on the basis of a claimed 1874 right. Clark Ryen has filed SB76 Claims for both of these rights, claiming continuous use of these amounts for hydropower on the basis of historical use and a 1923 decree on Ross Creek. The 1923 decree

gives a flow rate of 500 miner's inches (12.5 cfs) for the 1866 claimed right, and of 250 miner's inches (6.25 cfs) for the 1874 claimed right, but does not give a total volume for either right from which it would be possible to determine the period of use for the rights.

Both of the hydropower rights were originally used to run a flour mill, which burned down in 1930. Subsequently, the water was used to generate power for a lumber mill. The lumber mill remained in operation until the 1950's (testimony of Llos Parker), or 1960 (testimony of Clark Ryen). Ice destroyed the flume in 1960, but the belt remained in place for several years, and on occasion was used to cut lumber, utilizing the small amount of water which was still running through (testimony of Clark Ryen).

Clark Ryen testified that it was always his intention to rebuild the flume, and that he had purchased materials to do so, but had decided to try for more power generation rather than repairing the existing facility.

The Applicant's 1866 claimed right is senior to all of the Objectors' water use rights. The Applicant's 1874 right is junior to all of the Objectors' claimed rights except a 1917 claimed irrigation right (Brewster) and a 1935 claimed domestic right (Hasting).

13. Llos Parker testified that the sawmill was operated in the spring, and in the summer when logs were brought in, but that he does not remember the sawmill ever being operated in the winter.

14. In addition to applying for changes of the two claimed appropriation water rights, the Applicant has applied for 11.25 cfs of new use.

15. Objector Kenneth Hasting has filed an SB76 Claim for 2 gpm up to .20 acre-feet per year for year-round domestic use, with a claimed priority date of 1935. He has also filed an SB76 Claim for 12.5 cfs up to .50 acre-feet per year for year-round stockwater use, with the same priority date.

Mr. Hasting stated that his water is diverted from Ross Creek approximately 300 feet below the proposed powerhouse site. He testified that he is concerned about the effects that the proposed project might have on the quality of his water; that running the water through the power generation system can cause additional aeration and nitrogenation of the water, which in turn can have an affect on the microbe count in the water and therefore on its healthfulness.

Mr. Hasting testified that he is also worried about increased sedimentation caused by the project and the road which will service it. He stated that a previous road which was built along the same area about 1960 became impassable after five years, due to sloughing and washout along the road.

16. The diversion points of all of the Objectors, other than Kenneth Hasting, are located between the proposed points of diversion and the proposed place of use, and will be bypassed by the penstock which is to carry the Applicant's diverted water.

17. Objector Barbara Brewster has filed two SB76 Claims for irrigation; a claimed 1917 filed appropriation right for 53.5 miner's inches (1.34 cfs) up to 267.5 acre-feet of water per year to be used from May 1 to November 1 of each year, and a claimed 1869 decreed right for 33 1/3 miner's inches (.83 cfs) up to 600 acre-feet per year for use from May 1 to October 1 of each year. In addition, Barbara Brewster has filed an SB76 Claim for 33 1/3 miner's inches (.83 cfs) up to 3.02 acre-feet of water per year for stockwatering year-round, with a claimed 1869 priority date. (Objectors' Exhibits G, H, I).

Greg Morris, Barbara Brewster's son-in-law, appeared as a witness for Barbara Brewster at the hearing. He testified that the Brewster diversion is made by means of a ditch referred to at hearing as the "Parker-Lee-Ryen ditch" or the "Parker-Brewster-Ryen ditch". Mr. Morris testified that a dike constructed of rocks diverts a portion of the creek. The Objectors take their portion of the water and return the rest to the stream. (Applicant's Exhibit 3). The measuring device consists of a "certain size box", with headgate boards which are set at certain depths to determine the amount of water going through. The headgate, which is similar in design to that used at the Howe ditch and to the one on Ryen's "old diversion", was replaced last summer. The "Parker-Brewster-Ryen" ditch was rebuilt because it had been destroyed by erosion and "vandalism". Mr. Morris stated that he did not have personal knowledge of when the ditch had been used last for irrigation.

Mr. Morris testified that, as of the time of the hearing, the Parker-Brewster-Ryen ditch was filled in by sloughing-off from the Ryen road and by a tree which had been downed by the sloughing.

He also testified that in order to allow the objectors to divert their water rights, a new diversion, possibly a pipe, probably would have to be built upstream from the present point of diversion, if the only water which remained in the creek was the amount of the Objectors' water use rights and no carriage water was allowed.

18. Objector Llos Parker has filed an SB76 Claim for 100 miner's inches (2.5 cfs) up to 693.18 acre-feet per year for irrigation between May 1 and September 20 of each year, with a claimed 1869 priority date. (Objectors' Exhibits A, A1). Mr. Parker testified that this right and flood rights out of Dry Creek were used for flood and sprinkler irrigation of approximately 90 acres of tillable land out of 195 total acres, that the Parker-Brewster-Ryen ditch used to be able to carry the 100-inch right, and that no two parties would irrigate out of the ditch at the same time.

Patricia L. Gibson, daughter of Llos Parker, testified that water from Ross Creek is also used for domestic and "lawn and garden" uses at the Parker place. There is no quantification of the Parker domestic use in the record. Department records do not show that a SB76 claim has been filed, or a Beneficial Water Use Permit issued, for the domestic use. However, a permit would not appear on a historic domestic use, and the use is among the

exceptions to the SB76 Calim requirements. See MCA § 85-2-212. Using the Water Court standards of a maximum flow of 40 gpm for domestic uses, plus an incremental amount for lawn and garden, the Parker domestic use in all probability does not exceed 60 gpm or 1/7 to 1/8 cfs. The water is diverted from Ross Creek by means of a diversion "structure" consisting of an old washing machine tub set in the creek and covered with window screening to filter out the sand. A 2" plastic pipe is laid from the diversion point to the house. The diversion point is approximately one mile from the house and upstream from it, because the creek is much lower than the house site at the point closest to the house.

Mrs. Gibson testified that they are afraid sedimentation from construction of the proposed project will block the pipe or damage the Parker plumbing. She stated that her father and Clark Ryen had discussed putting in a well at the Parker's to provide domestic water. She stated also that they are concerned about the effect that road dust and possible slough-offs from the road might have on the quality of water in Ross Creek.

19. Objectors Charles and Sarah Howe are successors in interest to J.K. and Mary Maroney, who filed three SB76 Claims for irrigation; a claim for 75 miner's inches (1.88 cfs) up to 300 acre-feet per year for use June 1 to September 15 of each year, claimed priority date 1871; another claim for 75 miner's inches (1.88 cfs) up to 300 acre-feet per year for use June 1 to September 15, with a claimed priority date of 1873; and a claim for 25 miner's inches (.62 cfs) up to 100 acre-feet per year for use June 1 to September 15, with a claimed priority date of

1888. The SB76 Claim with the claimed 1888 priority date is accompanied by a decree which states that the source of 1888 portion of the rights is "Jones Canyon Creek," a tributary of Ross Creek". A U.S.G.S. map of the area shows Jones Creek entering Ross Creek below the Applicant's proposed points of diversion. (Applicant's Exhibit 12). As previously discussed, the latter claim is irrelevant in this matter. Each of the three SB76 Claims carries the notation that 10 miner's inches (.25 cfs) are used year-round for domestic and stock purposes.

In a 1981 affidavit accompanying the SB76 Claims, J.K. Maroney stated, in part, "Typically, for the last 30 years, I have irrigated two main fields, one about 23 acres, and another about 30 acres, for pasture. I turn the water out about the first of June or as soon as the snow goes. Usually I take the full ditch, about 175 mm, between the water in the diversion east of the main irrigation ditch and one or the other of the two main irrigation diversions. On pasture we try to keep the water moving all summer to keep the pasture up. When it is dry, we have to run both the upper and lower ditches, so the whole head has to be available. Since we have been on the place we have only grown occasional grain, when pasture needs revitalizing. With sprinklers, the whole place could be irrigated (150 out of 418)."

Charles Howe, present owner of the Maroney property and successor in interest to the Maroney water rights, testified that he presently flood irrigates through a system of a main ditch and laterals. The Howes have three points of diversion; an "upper

ditch" located approximately half-way between Applicant's upper proposed point of diversion and the point of use, a "middle ditch" located approximately 30 feet above the Parker-Brewster-Ryen ditch, and a "lower ditch" located just below the proposed powerhouse site. Mr. Howe testified that they need all three ditches to irrigate different parts of the ranch. They are raising barley and hay, and have leased out pasture for 30 head of cattle.

Mr. Howe stated that the upper and lower ditches are fully useable, but that the middle ditch is obstructed by a landslide caused by washout of the upper ditch, and that he has not been allowed to get in through Ryen land with equipment to clear the ditch; he testified that he is concerned that Mr. Ryen will not cooperate with the Objectors on the use of Ross Creek.

Mr. Howe reconstructed the upper ditch to handle the "full water right" of 150 miner's inches (3.75 cfs) out of Ross Creek. The headgate is located around the corner from an outside curve to protect it from floods, and consists of a diversion box described as an "adjustable submerged orifice headgate". The headgate requires carriage water in addition to the use amount in order to force the water to be diverted into the ditch. The extra water is returned to the creek at the headgate structure.

Mr. Howe testified that, if the proposed project is constructed, he will have to rebuild his diversion to take the minimum water necessary to divert his water right. He also expressed concern that there would be a "lag time" between the

time that he called for his water right and the time that he received it, caused by the necessity of requesting the Applicant to let the water bypass his point of diversion and the time it would take to effect the increased flow at the Howe ditch. An additional concern expressed by Mr. Howe is that construction and operation of the proposed project will cause sedimentation to block the pipe which Howes have laid as a "closed system" for domestic and stock water.

Mr. Howe stated that he has applied to FERC for an exemption allowing him to install a hydropower project. The project would be used for creating power to run a sprinkler irrigation system.

20. Scott Compton, Field Manager for the Bozeman Water Rights Bureau Field Office, testified that rough flow measurements can be taken with a diversion structure such as the Howes', if the headgate is calibrated; the Parker-Brewster-Ryen diversion structure is similar to Howes', but does not currently have an adjustment to raise the gate. He stated that weirs and Parshall Flumes are more accurate in measuring flow, and do not require a head of water in order to divert the desired amount, but that these diversion methods are also more expensive.

In response to a question concerning the common practice in Ross Creek for measuring water, Mr. Compton stated that prior to the recent installation of the headgates, the common practice had been no measurement of water.

21. Clark Ryen stated that the Objectors currently divert more water than they need in order to have carriage water to get their diversion amounts into their ditches; that alternatively the Objectors could do away with their need for carriage water by installing a pipe in the stream.

Dale Miller, witness for the Applicant, stated that the Objectors could divert their water use amounts without any excess water in the stream if they created an impoundment, with rocks or a log, that raised the water level enough to send water into the Objectors' ditches. He stated that a log placed across the stream could be notched to allow any water above the amount of the diversion to flow through.

Mr. Miller testified that the cost of such a diversion could be a few hundred to a thousand dollars, depending on the need for heavy equipment, and that .30 to .50 cfs could be lost to the stream through loss in "dead water" and water forced downward into the creek bottom by the log.

22. In January, U.S.G.S. flows indicate an approximate average Ross Creek flow of 11 cfs, while demand consists of .5 cfs stockwater (Howe) plus .83 cfs of stockwater (Brewster) plus 2 gpm of domestic (Hasting) and approximately 60 gpm domestic by Llos Parker, for a total demand by Objectors of just over 1.33 cfs. In February, average flow is approximately 9.5 cfs, while Objectors' water uses are the same as in January. In March, the average flow is 10 cfs; the Objectors' water uses are identical to January and February. In April, average flow is approximately 11.5 cfs, while Objectors' uses are the same as in the preceding three months.

In May the approximate average flow in Ross Creek is 15 cfs, while Objectors' uses are the 1.33 cfs described, plus an additional 4.67 cfs in irrigation uses (2.5 cfs by Parker, 2.17 cfs by Brewster) for a total use of 6 cfs. In June, the flow in Ross Creek averages approximately 23 cfs: the Objectors' uses repeat the May figures with the addition of 3.76 cfs irrigation (Howe) for a total of 9.76 cfs. Flow in Ross Creek averages approximately 26 cfs in July and 25 cfs in August, while the Objectors' water uses remain at 9.76. In September, the flow in Ross Creek averages approximately 20 cfs; uses are 9.76 cfs for the first half of the month. On September 16 the Howe irrigation period ceases, and on September 21 the Parker irrigation period ceases: after September 21, the Objectors' uses total 3.5 cfs.

In October, the approximate average flow in Ross Creek is 15 cfs, while Objectors' water uses are 3.5 cfs. In November, Ross Creek flow averages about 15 cfs. The Brewster irrigation period ends as of November 1, so Objectors' uses in November total 1.33 cfs (.5 cfs stockwater for Howe, .83 cfs stockwater for Brewster, and 2 pgm for Hasting domestic use). The Objectors' uses remain the same in December, while the average flow in Ross Creek declines to approximately 12.5 cfs.

The water use totals listed for the Objectors are slightly low, since domestic uses by Llos Parker and Kenneth Hasting have not been factored into the flow rates. However, the Hasting flow rate is less than 1/200 of a cfs (see Finding of Fact 15), and the Parker domestic use probably does not exceed a flow rate of

1/8 to 1/7 cfs (see Finding of Fact 18). Additionally, when using the flow data for purposes of comparing the supply to Applicant's and Objectors' water use demands, the Hasting flow rate does not need to be factored in, since it is taken out of the stream below the Applicant's proposed point of return. (The Howe claimed right from Jones Canyon Creek also has been excluded from the Objectors' water use totals).

The approximate flow rates in Ross Creek based on the U.S.G.S. data can be considered as base flows, since testimony and recent flow measurements indicate that the flows have increased in recent years. (Testimony of Clark Ryen, Department Exhibits 1-3).

23. Fred Nelson, fisheries biologist with the MDFWP, stated that federal law allows his Department to make recommendations in regard to mitigation measures to be taken on a FERC-licensed project or project exemption. Such recommendations include evaluation of existing fish populations within a project area, and determination of minimum instream flows.

Mr. Nelson testified that no studies had been conducted on Ross Creek in regard to the Ryens' FERC application as of the time of the water rights hearing, but that a March, 1983 preliminary analysis based on electrofishing in the area of the proposed place of use showed that Ross Creek does support a fish population, and that the MDFWP will be making some kind of instream flow recommendation.

Mr. Nelson stated that he had "no idea whatsoever" as to what the instream flow recommendation might be, and that his Department's usual recommendations concerning withdrawals on mountain streams would not be applicable, since Ross Creek is not a typical high mountain stream.

24. Two points of diversion have been proposed for the Applicant's project. The upper point of diversion is located in S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, Township 1 North, Range 6 East, on Forest Service property. Clark Ryen testified that he had not applied to the Forest Service for a special use permit for the proposed diversion site, but that he understood that it would not be a problem. He further testified that he plans to replace the old stream crossing with a culvert for the road which would be built, and that he has applied to the Forest Service for a special use permit for the road and the Forest Service has approved the proposed road location.

The lower proposed point of diversion is located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, Township 1 North, Range 6 East, on Ryen property. In documents included in the Applications, Clark Ryen stated that "at this diversion point on our own land we get a measurement of a higher volume of water than any other place on stream above point of use". (Letter to DNRC, dated July 14, 1983).

The upper proposed point of diversion would yield approximately 480 feet of fall from diversion to place of use; the lower proposed point of diversion would yield approximately 310 feet of fall.

The Applicant proposes to use both points of diversion, but would only be utilizing one point of diversion at a time.

(Testimony of Paul Kinshella).

25. Both proposed points of diversion are located above all of the Objectors' points of diversion, while the proposed place of use and point of return for Applicant's flow is below all of the Objectors' points of diversion apart from the Howe lower ditch and the Hasting point of diversion.

26. The historic use rights for which Applications for Change have been made were diverted below all of the Objectors' points of diversion, apart from those of Hasting and the Howe lower ditch, and the water was returned to the creek within 400-500 feet of the point of diversion.

27. The Applicant's proposed diversion structures each consists of a 10-foot high concrete structure across the entire width of Ross Creek, creating a reservoir of approximately .30 to .50 acre in size. The diversion structure would have a 12-foot wide spillway placed 2 feet from the top of the structure and would include a measuring device to measure bypass flow. The spillway would include a 3-foot wide notch 6" lower than the rest of the spillway to allow for spills at lower water levels. The spillway would be able to handle flows in excess of 100 cfs.

(Testimony of Paul Kinshella).

The water level sensor would be connected to a needle valve located at the power house. The sensor would transmit water level information to the power house, where the valve could be

open or closed; if closed, pressure would increase back up the line and allow less water into the penstock and more water over the spillway.

The penstock (pipeline) would be located about 6 feet below the top of the diversion structure, low enough to prevent air from getting into the pipe. (Testimony of Clark Ryen). It is important to keep the penstock full and air out of the line in order to minimize head loss. (Testimony of Clark Ryen, Paul Kinshella). A consistent spill over the structure would ensure pressure on the water entering the intake. (Testimony of Clark Ryen).

The penstock would be 30 inches in diameter, since preliminary studies indicate that a 30 inch pipe will minimize head losses at about 1% of the total head (velocity which is converted into pressure). (Testimony of Paul Kinshella). The intake structure would include a bar screen to catch debris, and a sluiceway with sufficient gradient to allow smaller sediment to settle on the concrete apron to be sluiced away, so that materials will not build up to block the intake, located approximately 2½ feet above the sluiceway. (Testimony of Clark Ryen, Paul Kinshella).

At the intake, water would enter the penstock and would remain enclosed, building up head, the entire length of diversion to the power house. The penstock would be equipped with a surge arrest valve to eliminate the chances of a water surge ("hammer") creating intense, destructive levels of pressure within the system.

Clark Ryen testified that he does not intend to utilize the hydropower plant which is currently in operation; the present plant would be retained at its site, with the same water uses and priority date, for personal use. The hydropower project relevant to the Applications in this matter would be housed in a completely new power plant with new equipment, including electronic gauging devices and controls which would make it possible to control relative diversion rates and spill rates at the diversion structures.

Once the water reached the power house, it would be aimed at high velocity through a nozzle directed at a Pelton-Wheel Turbine. The water then would free-fall off the wheel onto a wide tailrace with a gentle slant down into the creek channel. (Testimony of Paul Kinshella).

Two separate Pelton Wheels might be utilized, one to handle low flows and one to handle high flows, since a wheel which is designed to peak in efficiency at a lower flow will lose efficiency with higher flows, and vice versa. (Testimony of Paul Kinshella, Clark Ryen). The wheels would be set above flood level. (Testimony of Paul Kinshella).

Paul Kinshella testified that most of the water velocity would be spent in producing energy, and that a wide tailrace and a gradual angle of re-entry into the creek would minimize turbulence and erosion. In addition that there would be no heat gain. In regard to possible water quality problems, Mr. Kinshella testified that water would have less debris than if it remained in the natural creek channel, and that there would be no

aeration or nitrogenation of the water at the intake, but there might possibly be some at the Pelton Wheel. No additional sedimentation to the creek should occur during the construction phase of the project; the creek's flow would be bypassed around the construction site in a pipe, which would be left in place to allow for future maintenance on the diversion structure.

(Testimony of Clark Ryen, Paul Kinshella).

Applicant applied to FERC for a preliminary permit for the proposed project in June, 1983.

28. Clark Ryen testified that he does not want to dewater the creek; that it is to his benefit to have water constantly spilling over the diversion structure, since this would ensure that the penstock remains underwater and doesn't have air entering the line, and would help to maintain pressure on the water feeding into the penstock.

Mr. Ryen testified that he would allow sufficient bypass flow to satisfy the other water uses in the stream and whatever instream flow requirement is imposed through the FERC licensing procedure in response to the MDFWP recommendation. He stated that the Objectors should be able to get their claimed use amounts, although they might not receive the same carriage water, and that he doesn't think the Objectors will be adversely affected even though the stream will be lower. Mr. Ryen testified that there is a good fall at the Howe point of diversion and that there shouldn't be a problem getting water

into the ditch, since a pipe or a wood or rock structure could be installed. He also testified that he believes the Parker-Brewster-Ryen ditch will still be able to divert water.

Clark Ryen additionally stated that he has never cut off junior appropriators, even though his 1866 right for 500 miner's inches (12½ cfs) is the oldest priority on Ross Creek.

29. Clark Ryen testified that the probable cost of the project is in the range of half a million dollars. He intends to sell the generated power to Montana Power under the federal mandatory "buy-back" regulations, and has contacted Montana Power personnel concerning buy-back. No contract had been entered as of the hearing in this matter. Testimony indicates that a 9.5 cfs average flow for the project is needed to recover the capital investment, at current interest rates and power buy-back rates. (Testimony of Paul Kinshella).

Clark Ryen testified that, since the high flow in Ross Creek coincides with the irrigation season, his senior right of 12½ cfs should be available year-round for the project, unless instream flow requirements required cutting back the flow during the low flow period in the winter. Additional flow amounts should be available during periods of high flow when irrigation is not taking place. (Testimony of Clark Ryen, Dale Miller). Paul Kinshella testified that the project might not be feasible if the Applicant couldn't divert any flows during the winter and could divert only part of the requested amount during the summer.

APPLICATION FOR BENEFICIAL WATER USE NO. 49632-S41H

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following Proposed Conclusions of Law in the Matter of Application for Beneficial Water Use No. 49632-s41H:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.

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

3. The Department must issue a permit in an application for new appropriation if the applicant proves by substantial credible evidence:³

³ Although the water quantity involved in this matter totals 30 cfs and over 21,714 acre-feet per year, 18.75 cfs up to 13,571.4 acre-feet of this amount is the result of change applications which fall under different statutory criteria, M.C.A. § 85-2-402, and thereby under a different burden of proof. Therefore, the Applicant's burden of proof on the new appropriation portion of his project is "substantial credible evidence", rather than "clear and convincing evidence". MCA § 85-2-311 (1983).

(a) there are unappropriated waters in the source of supply:

- (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial one;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The use proposed by the Applicant, the generation of power, is a beneficial use of water. NCA § 85-2-102(2).

5. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

The Applicant has provided sufficient information to indicate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. He has introduced specific information concerning the proposed type of turbine and turbine operation, length and diameter of the pipeline, project location, and intake structure. Exhibits and testimony introduced by the Applicant indicate that time, money, and expertise have been involved in developing the proposed layout of the project, they are sufficient to meet the threshold requisite of "adequate"

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7. The evidence does not show that other water uses will be adversely affected by changes in water quality pursuant to the proposed use. Water quality should not be materially affected by activities related to the proposed use if the Applicant acts in accordance with specifications imposed by other authorizing agencies.

The Objectors' concerns about the potential impacts the proposed project might have on the water quality of the creek have been noted. Kenneth Hasting, Patricia Gibson, and Charles Howe expressed concern about the possibility of increased sedimentation in Ross Creek as a result of construction on the proposed project, and also as a result of slough-off from the road leading to the project. (See Findings of Fact 15, 17). Kenneth Hasting also expressed concern about increased nitrogenation and aeration of the water above the point of diversion for his domestic uses.

Clark Ryen and Paul Kinshella testified that Ross Creek will be bypassed around the construction site in a pipe so that no additional sedimentation will occur. (See Applicant's Exhibit 14). Once the diversion structure is in place, no additional sedimentation should occur as a result of the construction.

Testimony indicates that sloughing problems are a real concern in the drainage. (Testimony of Kenneth Hasting, Patricia Gibson, Charles Howe and Greg Morris on erosion to ditches and roads in the area). It appears possible that Applicant's road to the proposed project could increase the sedimentation in Ross Creek through sloughing and washouts. However, pursuant to the applicable statute, Department jurisdiction over the construction

and maintenance of the road appears to be tenuous. The proper authorities with jurisdiction over this aspect of the proposed project are the Soil Conservation Service (Title 75, Chapter 7, Part 1, MCA), and the Water Quality Bureau. (Under the Water Quality Act, Title 75, Chapter 5, Part 6, MCA 1983, the Department of Health and Environmental Sciences can require mitigating action by any party who pollutes any state waters; pollution includes changes in turbidity of the waters. See MCA § 75-5-103, 75-5-601 et seq.). The Applicant testified that he has applied for, and received, SCS approval of his proposed road crossings.

Kenneth Hasting's additional concern about possible aeration and nitrogenation of the water also appears to be a problem which cannot be properly handled in the present forum. This is not to be construed as saying that the Department will not take degradation of water quality into consideration: these specific characteristics of any given water right which need to be maintained in order to ensure that the appropriator may make beneficial use of his water right will vary according to the use for which the water is being appropriated. An appropriator who is using water for domestic purposes needs to maintain a higher water quality standard than an appropriator who is using water for irrigation. In order for the domestic appropriator to reasonably exercise his water right, the element of "quality" must be protected to the extent that the water will still be satisfactory for domestic purposes. See Atchison v. Peterson, 87 U.S. 507 (1874); In the Matter of the Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch.

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However, the record in this matter shows only that Mr. Hasting testified that aeration and nitrogenation of water have an effect on the water's "microbe count", and thereby on its healthfulness, and that Paul Kinshella testified that there might possibly be a "small amount" of aeration and nitrogenation of the water at the Pelton Wheel. (Findings of Fact 15, 27.)

This paucity of evidence does not allow a specific permit condition to be tailored, nor can a permit be denied on the basis of a nebulous chance that operation of the project may result in aeration and nitrogenation of Ross Creek to the point that its waters cannot reasonably be used for domestic purposes. Rather, such concerns must be dealt with, when and if they occur, through the Water Quality Act or through modification of the permit (See MCA § 85-2-314). However, it is obviously to the advantage of an applicant for a water use permit to forestall any problems that the proposed project might result in, in order to avoid expenses, delays, and possible litigation at future points in time.

8. There is substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant pursuant to MCA § 85-2-311.

Although a comparison of filed and decreed water use rights with the available U.S.G.S. flow data suggests that no water is available for a new appropriation, the Applicant has testified that flows in Ross Creek have been substantially higher in recent years, with high flows up to 36 to 40 cfs. (Finding of Fact 11.)

Mr. Ryen has had several decades of experience with Ross Creek flows, and is familiar with the creek's flow patterns. His testimony is entitled to great weight. See, e.g., Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939), In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, September 30, 1981. Additionally, his testimony is substantiated by the testimony of other witnesses. (See Finding of Fact 11).

Flow rates in the quantity testified to by the Applicant will meet the Applicant's and Objectors' existing water use requirements and still provide water for further appropriations from the source of supply.

9. Water measurement data on the source of supply, in conjunction with testimony concerning flow rates, indicates that the full amount of the requested new appropriation is not available during low flow periods, even with the recent increase in flow. Additionally, the full amount requested may not be available if flows in Ross Creek decline to former levels. However, the Applicant can make beneficial use of whatever amount of water is available to increment his power generation. (See Finding of Fact 27).

"An applicant is entitled to complete an appropriation of whatever waters that are in fact unappropriated, and which may be diverted without injury to other appropriators. A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature, until such time as that

permittee actually applies the waters countenanced by the permit to beneficial use. See MCA 85-2-312(2) (1979), MCA 85-2-315 (1979)". Monforton, supra, at 19.

10. The water rights of a prior appropriator will not be adversely affected by the granting of a Beneficial Water Use Permit. The water rights of the Objectors in this matter will not be affected by the granting of a new appropriation: such an appropriation would be junior to all of the Objectors' uses. As senior appropriators, the Objectors are entitled to "call" the water represented by any new use permit which might be granted, whenever they need it to fulfill their appropriative rights.

Concern was expressed over possible "lag time" between a call for the water and the arrival of the water at the Objector's point of diversion. (See Finding of Fact 19). However, the distance involved can be measured in thousands of feet, rather than in miles. (See Applicant's Exhibit 1). This, in conjunction with the fact that flow is to be controlled electronically and therefore can be released almost instantaneously (See Finding of Fact 27), indicates that no substantial "lag time" should occur. The possibility raised by Objector Howe, that the Applicant will not cooperate with the Objectors, is not within the Department's purview; the Department cannot assume bad faith on the part of the Applicant. See generally, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following Proposed Order in the Matter of Application for Beneficial Water Use Permit No. 49632-s41H:

PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 49632-s41H is hereby granted to the Estate of Lena Ryen to appropriate 11.25 cfs up to 8,142.84 acre-feet per annum, for non-consumptive use for power generation between January 1 and December 31 of each year. The priority date for this Permit shall be December 2, 1982 at 9:00 a.m.

The points of diversion for this appropriation are the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, Township 01 North, Range 06 East, and the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 09, Township 01 North, Range 06 East, all in Gallatin County, Montana. The place of use is the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. The source of supply is surface water from Ross Creek, to be diverted by means of a Federal Energy Regulatory Commission (FERC) - licensed diversion structure, and to be returned to the creek at the point of use specified above.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. The water rights evidenced by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of the Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall in no event withdraw or cause to be withdrawn more water than the amount specified in the Permit. At all times when the water is not reasonably required for the specified purpose, the Permittee shall allow the waters to remain in the source of supply.

D. The Permittee shall install an accurate means of flow measurement of the stream above the point of diversion, in addition to a flow measurement device to measure the amount of water actually diverted through the facility, and shall keep a written record of the flows in Ross Creek and of all flows diverted from the creek. The Permittee shall make these records available to the Department upon request.

The Permittee shall cooperate with other licensing agencies in determining methods and records of measurement which will ensure that the Permittee's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

E. The Permittee shall notify the Department of the amount of by-pass flow, if any, required of his project, upon his receipt of such information. Any Permit issued to the Permittee will be amended or notated, as necessary, to make the water rights records clear upon their face that the Permittee is not authorized to appropriate the full amounts of water granted by the Permit when such appropriations would infringe upon the instream flow requirements.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS

NOS. G 120401-41H AND G 120403-41H

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following Proposed Conclusions of Law in the Application for Change of Appropriation Rights Nos. G 120401-41H and G 120403-41H:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.

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

3. The Department must issue a permit in an Application for Change of Appropriation Water Right if it determines that the proposed change will not adversely affect the rights of other persons. MCA § 85-2-402(2).

4. The evidence does not show that other water uses will be adversely affected by changes in water quality pursuant to the proposed use. Water quality should not be materially affected by activities related to the proposed use if the Applicant acts in accordance with specifications imposed by other authorizing agencies.

The Objectors' concerns about the potential impacts the proposed project might have on the water quality of the creek have been noted. Kenneth Hasting, Patricia Gibson, and Charles Howe expressed concern about the possibility of increased sedimentation in Ross Creek as a result of construction on the proposed project, and also as a result of slough-off from the road leading to the project. (See Findings of Fact 15, 17). Kenneth Hasting also expressed concern about increased nitrogenation and aeration of the water above the point of diversion for his domestic uses.

Clark Ryen and Paul Kinshella testified that Ross Creek will be bypassed around the construction site in a pipe so that no additional sedimentation will occur. (See Applicant's Exhibit 14). Once the diversion structure is in place, no additional sedimentation should occur as a result of the construction.

Testimony indicates that sloughing problems are a real concern in the drainage. (Testimony of Kenneth Hasting, Patricia Gibson, Charles Howe and Greg Morris on erosion to ditches and roads in the area). It appears possible that Applicant's road to the proposed project could increase the sedimentation in Ross Creek through sloughing and washouts. However, pursuant to the applicable statute, Department jurisdiction over the construction and maintenance of the road appears to be tenuous. The proper authorities with jurisdiction over this aspect of the proposed project are the Soil Conservation Service (Title 75, Chapter 7;, Part 1, MCA), and the Water Quality Bureau. (Under the Water Quality Act, Title 75,

Chapter 5, Part 6, MCA 1983, the Department of Health and Environmental Sciences can require mitigating action by any party who pollutes any state waters; pollution includes changes in turbidity of the waters. See MCA § 75-5-103, 75-5-601 et seq.)
The Applicant testified that he has applied for, and received, SCS approval of his proposed road crossings.

Kenneth Hasting's additional concern about possible aeration and nitrogenation of the water also appears to be a problem which cannot be properly handled in the present forum. This is not to be construed as saying that the Department will not take degradation of water quality into consideration: these specific characteristics of any given water right which need to be maintained in order to ensure that the appropriator may make beneficial use of his water right will vary according to the use for which the water is being appropriated. An appropriator who is using water for domestic purposes needs to maintain a higher water quality standard than an appropriator who is using water for irrigation. In order for the domestic appropriator to reasonably exercise his water right, the element of "quality" must be protected to the extent that the water will still be satisfactory for domestic purposes. See Atchison v. Peterson, 87 U.S. 507 (1874); In the Matter of the Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch.

However, the record in this matter shows only that Mr. Hasting testified that aeration and nitrogenation of water have an effect on the water's "microbe count", and thereby on its

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healthfulness, and that Paul Kinshella testified that there might possibly be a "small amount" of aeration and nitrogenation of the water at the Pelton Wheel. (Findings of Fact 15, 27.)

This paucity of evidence does not allow a specific permit condition to be tailored, nor can a change authorization be denied on the basis of a nebulous chance that operation of the project may result in aeration and nitrogenation of Ross Creek to the point that its waters cannot reasonably be used for domestic purposes. Rather, such concerns must be dealt with, when and if they occur, through the Water Quality Act or through modification of the change approval (See MCA § 85-2-402(5)). However, it is obviously to the advantage of an applicant for a change of water use authorization to forestall any problems that the proposed project might result in, in order to avoid expenses, delays, and possible litigation at future points in time.

5. The Applicant has met the burden of production on the issue of the existence of the underlying water rights for which the applications for change have been made. (As discussed in Preliminary Matters, supra, the Department cannot grant a change authorization unless it has enough evidence to make a preliminary finding that the underlying right exists). In the present matter, the Applicant has offered probative evidence in the form of testimony about use of the water rights by his father and himself, and through the 1922 decree on Ross Creek (Cause No. 6640, Gallatin County, Montana) and SB76 Claims for the uses. The evidence indicates that the claimed historic uses are usufructuary, rather than "paper", rights.

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The Objectors pursued lines of questioning at the hearing in this matter concerning possible abandonment of the claimed historic uses. (See, e.g., the discussion on the objection to Llos Parker's testimony, Preliminary Matters, supra). However, the Applicant's testimony in this matter makes it clear that there was no intent to abandon.

While the recent case of 79 Ranch, Inc. v. Pitsch, supra, indicates that a lengthy period of nonuse will raise a rebuttable presumption of abandonment, the court did not specify the extent of nonuse which would trigger the presumption. The evidence in the present matter shows a period of nonuse of about 20 to 25 years (see Finding of Fact 12), in comparison with the forty years of continuous nonuse in Pitsch. In addition, the Applicant testified that he had purchased materials to repair the diversion structure so that use could be resumed; that repairs had not been completed only because they were exploring the possibility that the water could be applied to the generation of commercial power. (But see Pitsch, "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope". At 985.)

Although a Departmental decision on abandonment does not reach the level of finality (see Preliminary Matters, supra) as a legal matter, it does have the effect of ending Departmental action on an Application for Change, since a change authorization must be denied if the existence of the underlying right has not

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been proven. However, it is not necessary at the present time for the Department to reach a final (for Departmental purposes) decision on abandonment; the question of whether or not the claimed historic rights have been abandoned will of necessity be enfolded in any determination on the parameters of the historic use. (See Conclusion of Law 7, infra).

6. The Applicant has not presented adequate evidence to support his claimed historic uses from Ross Creek, in terms either of water quantities or periods of use.

The Applicant has filed SB76 claims for a constant, year-round flow rate of 12.5 cfs, based on a decreed 1866 right, and a constant, year-round flow rate of 6.25 cfs, based on a decreed 1874 right. However, there is no evidence in the record to support a year-round water right. The only testimony on periods of use of the rights in question was testimony by an Objector that the water had been utilized for its intended purpose (hydropower for a saw mill) in the spring and occasionally in the summer; his testimony was not rebutted by the Applicant. (See Finding of Fact 13). In addition, the Applicant made the notation "intermittened" (sic) under the heading "period(s) of use" on both of the SB76 Claim forms.

There also is no evidence in the record to support the quantity of water which the Applicant has claimed. The flow rates which are claimed for the two rights were decreed to the Applicant's predecessor in interest in a 1922 decree on Ross Creek (Cause No. 6640, Gallatin County, Montana), but no volume

(total quantity) measurements were assigned. The volumes claimed in the SB76 claims appear to be calculations based on continuous use of the claimed flow rates on a 24-hour a day, 365 days a year basis. The record in this matter lacks not only evidence that full-time use was made of the water, but also evidence that the full flow rates were utilized on a consistent basis.

7. The two applications for change cannot be granted unless the Department is provided with evidence that defines the underlying historic uses in terms of water quantities and periods of use.

An applicant is not entitled to change what he does not possess, nor to expand his uses while maintaining a priority date based on historic use. (See, Preliminary Matters, supra). However, these results can be avoided only if the parameters of the historic use are known. The record in the present matter is devoid of evidence concerning the claimed historic uses.

In the absence of sufficient information to delineate the Applicant's historic use, the Applications for Change must be denied. (A change application, if denied, simply leaves the Applicant with the same right to use water that he had before applying to the Department for a change authorization. Although it may not be worthwhile, due to the change of circumstances, to continue to exercise the rights as they existed prior to the Applicant's application for change, such a situation is not the result of Departmental action in the matter, but rather is the result of the Applicant's failure to meet his burden of proof).

See Moldenhauer, supra, In the Matter of the Application for Beneficial Water Use Permit No.51282-s410 by Ben Lund Farms, Inc., Final Order, January 21, 1985.

8. The Objectors in this matter also must provide further information, in the form of evidence on the reasonableness of their means of diversion and of the amount of carriage water which is necessary to the utilization of their appropriation rights.

The Objectors have met the burden of producing evidence on the issue of injury to their rights, as far as indicating the kinds of injury which might be caused by the proposed project. However, they have not produced evidence as to their requirements for carriage water beyond a general allegation of need.

Appropriators are entitled to a reasonable amount of carriage water in order to effectuate their appropriation. See State ex rel. Crowley, supra. However, the Objectors must meet the burden of providing evidence on the scope of their right. (See Burden of Proof, supra.)

9. Apart from those findings of fact and conclusions of law which can be made only if the Department receives additional information from the Applicant and the Objectors in this matter (see Conclusions of Law 6, 7, 8), all Findings of Fact and Conclusions of Law necessary to a decision on the Applications for Change have been made. The Findings of Fact and Conclusions of Law contained in this Interlocutory Order will be incorporated in any Proposal for Decision which is issued in this matter.

10. The parties in this matter have had a full and fair opportunity to be heard. They are estopped from raising issues which they failed to raise at the hearing in this matter. Furthermore, the parties are collaterally estopped from submitting further evidence on those issues which have been raised and considered, and upon which Findings of Fact and Conclusions of Law already have been made.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner issues the following Interlocutory Order in the Matter of Application for Change of Appropriation Water Rights Nos. G 120401-41H and G 120403-41H:

INTERLOCUTORY ORDER

The Applicant, if he wishes to continue with his Applications for Change, must submit written evidence documenting the historic use patterns of the water uses for which the Applications have been made. The evidence must be sufficient to allow Findings of Fact and Conclusions of Law to be made on the questions of when, and in what quantities, the water historically has been used.

The Objectors must submit written evidence on the reasonableness of their means of diversion, and the exact flow rates which they require in order to obtain their appropriation amounts.

The evidence may take the form of public records, other verifiable written documents, and affidavits by parties and other persons.

Any evidence which is submitted to the Department in response to this Order must be filed with the Hearing Examiner (32 S. Ewing, Helena, MT 59620) within 45 days after the Order is served upon the party.

After the time period for filing evidence has expired, the Hearing Examiner will take any further action necessary to protect the due process rights of the parties before issuing a Proposal for Decision in this matter.

DONE this 15th day of March, 1985.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 13, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Estate of Lena Ryen, Application No. 49632-s41H, for an Application for Beneficial Water Use Permit, and Application No. G 120401-41H, for an Application for Change of Appropriation Water Right addressed to each of the following persons or agencies:

1. Estate of Lena Ryen, c/o of Clark Ryen, 7960 Springhill Community Rd., Belgrade, MT 59714
2. Anna Marie Bakken, Box 447, Bozeman, MT 59715
3. Lyle Ryen, 8680 Walker Rd, Belgrade, MT 59714
4. Wayne Ryen, 209 So. 6th, Bozeman, MT 59715
5. David C. Moon, Moore, Rice, O'Connell & Refling, P.O. Box 1288, Bozeman, MT 59771-1288
6. Llos F. & Leona Parker, 8081 Springhill Community Road, Belgrade, MT 59714
7. Donald A. Nash, Attorney, Box 1330, Bozeman, MT 59715
8. Barbara Brewster, RFD 1 Box 201, Brattleboro, VT 05301
9. Philip Davis, 109 E. Main St., Bozeman, MT 597815
10. Charles & Sarah Howe, 8360 Springhill Community Rd., Belgrade, MT 59714
11. Ted doney, Box 1185, Helena, MT 59624
12. Kenneth L. Hasting, 3416 Valle Verde Dr., Napa, CA 94558
13. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
14. Peggy A. Elting, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 13th day of March, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr

Notary Public for the State of Montana
Residing at *Montana City* Montana
My Commission expires *3-1-88*

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