

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. 55390-s76H BY HEATHER J.)
GRAYSON)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of January 24, 1986, and incorporates them herein by reference.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

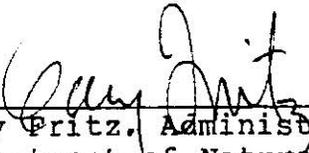
Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson is hereby denied without prejudice.

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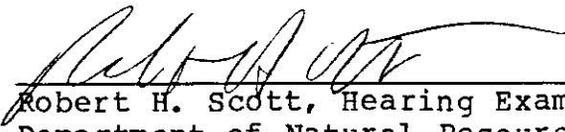
NOTICE

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 March, 1986.



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



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

AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 3, 1986, she deposited in the United States mail, first class mail, a Final Order by the Department on the Application by Heather Grayson, Application No. 55390-s76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Heather J. Grayson, NW 460 Blodgett View Rd., Hamilton, MT 59840
2. Ernest K. Stafford, 4022 So. Ave. W. #25, Missoula MT 59801
3. Billy M. & Ruby N. Williamson, NW 276 Blodgett View Rd., Hamilton, MT 59840
4. Jean & Bob Waldo, NW 229 Bowman Rd., Hamilton, MT 59840
5. Henry Menager Estate, NW 221 Bowman Rd., Hamilton, MT 59840
6. Clarence L. Moyle, 402 Blodgett View Rd., Hamilton, MT 59840
7. William Menager, NW 314 Blodgett View Rd., Hamilton, MT 59840
8. Francis W. & Donna Menager, NW 314 Blodgett View Rd., Hamilton, MT 59840
9. Lee & Regina Wittrock, NW 376 Oertli Rd., Hamilton, MT 59840
10. Ray J. & Mary C. Browning, NW 480 Bowman Rd., Hamilton, MT 59840
11. Diana K. Murr, for Donnie & Susan Murr Estates, NW 375 Ricketts Rd., Hamilton, MT 59840
12. Clarence S. Palin, NW 268 Ricketts Rd., Hamilton, MT 59840
13. Louise M. Parker, NW 426 Ricketts Rd., Hamilton, MT 59840
14. Blodgett Creek Ltd., Partnership, c/o Roberts Realty of Victor, Inc., Drawer B., Victor, MT 59875
15. Jeffrey H. Langton, Attorney at Law, P.O. Box 1497, Hamilton, MT 59840
16. Martha Isaacson, NW 275 River Rd., Hamilton, MT 59840
17. James F. Hartson, NW 361 River Rd., Hamilton, MT 59840
18. Marvin R. & M. Ruth Tolman, Box 2238, Hwy 93 N. Hamilton, MT 59840
19. Ernest T. & Marlys J. Pfyffer, 316 NW Ricketts Rd., P.O. Box 1336, Hamilton, MT 59840
20. Lloyd R. & M. Margaret Owen, NW 225 Bowman Rd., Hamilton, MT 59840
21. G.L. Owen, NW 225 Bowman Rd., Hamilton, MT 59840
22. Clifford E. Patzer, NW 403 Ricketts Rd., Hamilton, MT 59840
23. Albert C. & Elsie M. Haack, NW 286 Ricketts Rd., Hamilton, MT 59840
24. Richard Tollerud, NW River Rd., Hamilton, MT 59840
25. Gary L. & Judy M. Rouse, 325 W. Main, Hamilton, MT 59840

CASE # 55390

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 55390-s76H BY HEATHER J.)
GRAYSON)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and to the Montana Administration Procedures Act, Title 2, Chapter 2, Part 6, MCA (1985), the Department of Natural Resources and Conservation (hereafter, "DNRC" or "Department") held a hearing in the above-entitled matter on October 25, 1985, in Hamilton, Montana.

Appearances

The Applicant, Heather Joy Grayson, appeared, pro se.

R.K. Grayson, Applicant's husband, appeared as a witness for Applicant.

- Objectors Billy M. and Ruby N. Williamson were represented by Billy M. Williamson who appeared personally.
- Objector Clarence L. Moyle appeared pro se.
- Objectors Frances W. and Donna Menager appeared pro se.
- Objectors Ray J. and Mary C. Browning were represented by Ray J. Browning who appeared personally.
- Objector Louise M. Parker appeared personally and was represented by her husband, Marvin Parker.

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- Objector Blodgett Creek Limited Partnership appeared and was represented by and through its counsel, Jeffrey H. Langton, Attorney at Law.
- The interest of Objector George Isaacson, deceased, was represented by Martha Isaacson and Lois McKay.
- Objector James F. Hartson did not appear personally, but was represented by Sharoll F. Hartson.
- Objectors Marvin R. and Ruth Tolman were represented by Marvin R. Tolman, who appeared personally.
- Objectors Ernest T. & Marlys J. Pfyffer appeared pro se.
- Objectors Lloyd R. & M. Margaret Owen were represented by Gail L. Owen.
- Objectors Albert C. and Elsie M. Haack appeared pro se.
- Objectors Gary L. & Judy M. Rouse were represented by Gary L. Rouse who appeared personally.
- Jerry Bates, an untimely Objector under Administrative Rules of Montana (hereafter, "ARM") § 36.12.219, was represented by Jim Doyle.
- Frances Evans appeared pro se as an untimely Objector under ARM § 36.12.219.
- Carol Irion appeared pro se as an untimely Objector under ARM § 36.12.219.
- Joseph H. Higgins appeared pro se as an untimely Objector under ARM § 36.12.219.
- George H. Holman appeared pro se as an untimely Objector under ARM § 36.12.219.

- Lomo Irrigation District appeared as an untimely Objector under ARM § 36.12.219 and was represented by George H. Holman, President of Lomo Irrigation District.
- Ronald F. & Wilburta Fisher, immediately prior to commencement of the hearing, submitted a letter registering their untimely objection to the Application.
- Ernest K. Stafford, Jean and Bob Waldo, William Menager, Henry Menager, Lee and Regina Wittrock, Diana K. Murr for Donnie and Susan Murr Estates, Clarence S. Palin, Clifford E. Patzer and Richard Tollerud filed timely objections in this matter, but did not appear personally or by representative at the hearing, or make written submissions other than their initial objections.

Michael P. McLane from the Missoula Water Rights Bureau Field Office appeared as staff expert witness for the DNRC.

STATEMENT OF THE CASE

The Applicant seeks a Permit to appropriate 67.3 gpm up to 10 acre-feet of water per year from Blodgett Creek, a tributary of the Bitterroot River, for flood irrigation of 4 acres between April 15 and October 15 inclusive of each year. To effect such irrigation, Applicant proposes to divert water from the first lateral of a ditch, known and referred to hereafter as the "first right ditch", which is supplied by Blodgett Creek. Applicant would install a headgate on said lateral near the point it enters her property, allowing water therefrom to gravity flow to the area to be irrigated. The purpose of the irrigation is to stimulate the growth of native grasses for stock forage.

All Objectors hereunder object to the Application on the grounds that the waters of Blodgett Creek are already over-appropriated, that consequently there exist no unappropriated waters for Applicant to appropriate, and that any use by Applicant would adversely affect their water rights. Further, certain Objectors appropriating by use of the first right ditch object on the grounds that the first right ditch and its lateral are privately owned and that Applicant has no right to divert water from said ditch or its lateral as is proposed under the Application.

EXHIBITS

The Applicant did not offer any exhibits for the record.

Objectors Lloyd R. Owen and M. Margaret Owen submitted one exhibit in support of their objection in this matter.

Objector Owen Exhibit 1 consists of six typed pages, "Evidence in Support of Objection of Lloyd R. Owen and M. Margaret Owen" and prepared by G.L. Owen, who represented Objectors at the hearing. The Exhibit contains: a position statement; tables purporting to show estimated shortages of irrigation water on Blodgett Creek as a whole, the first right ditch system, and on Owen's secondary lateral to the first right ditch, using a comparison of decreed rights with actual water-flow rates; and an appendix listing the sources used to arrive at the calculations contained in these tables, including the independent observations of and tests made by G.L. Owen, B.S. (Engineering).

Objector Owen Exhibit 1 was accepted into the record without objection.

Objector Louise M. Parker submitted one Exhibit in support of her objection in this matter.

Objector Parker Exhibit 1 consists of four pages, the first three containing: information pertaining to the basis of her objection (Item 10), documentation of her existing water right (Item 11), representations of past water use (Item 12), an explanation of an appended map (Item 13), and a description of current irrigation by Objector (Item 14). The fourth page is a photocopy of a map purporting to show how Objector receives water from Blodgett Creek.

Objector Parker Exhibit 1 was accepted into the record without objection.

Objector Blodgett Creek Limited Partnership submitted one Exhibit in support of its objection in this matter.

Objector Blodgett Creek Exhibit 1 consists of a map, which is an enlargement of a portion of the 1958 Ravalli County Water Resources Survey, published by the Montana State Engineer's Office, showing the location of Blodgett Creek Heights Subdivision in relation to Applicant's property together with the purported location of ditches originating from Blodgett Creek.

Objector Blodgett Creek Limited Partnership Exhibit 1 was received into evidence over the objection of Applicant that the first and fourth right ditch laterals were not depicted in the correct portion relating to their property. The Hearing Examiner notes that the first and fourth right ditch laterals actually

cross Applicant's property in the North 4 acres thereof, rather than the South 4 acres, as shown, and admits the Exhibit as relevant to Objector's case.

The Department introduced three exhibits into evidence.

Department Exhibit 1 is a colored-in photocopy of a water resource survey map (Page 22) from the 1958 Ravalli County Water Resources Survey.

Department Exhibit 1 was received into evidence over the objection of Objector Owen, that the map contains several mechanical errors. As the Department introduced this Exhibit for the purpose of demonstrating the location at the first right ditch and its branches, the Hearing Examiner received the Exhibit as relevant but subject to Objector's testimony as to mechanical error in the point of diversion of the first right lateral and the location of the first right and fourth right laterals as they cross Applicant's property.

Department Exhibit 2 consists of photocopies of pages 45, 52 and 53 of the 1958 Ravalli County Water Resources Survey describing irrigation districts in the Blodgett Creek area.

Department Exhibit 2 was received into evidence without objection.

Department Exhibit 3 consists of a memo from DNRC Field Manager Michael McLane, dated October 23, 1985, describing the results of a review of the Ravalli County Clerk of Court records re: appointment dates for water commissioners on Blodgett Creek, together with an appendix consisting of copies of the orders appointing water commissioners reviewed in said memo.

Department Exhibit 3 was received into evidence without objection.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether or not they have appeared. Title 85, Chapter 2, MCA (1985).

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

3. The facts pertinent to Application No. 55390-s76H were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on July 25 and August 1, 1984.

4. Application for Beneficial Water Use Permit No 55390-s76H was regularly filed with the Department on May 14, 1984 at 2:50 p.m.

5. Applicant has a present bona fide intent to appropriate water for irrigation of approximately 4 acres of native grass pasture. (Application, Testimony of Heather Grayson.)

6. Applicant seeks to divert water at a rate of 67.3 gallons per minute (gpm) up to 10.00 acre-feet per annum from Blodgett Creek, a tributary of the Bitterroot River, at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, Township 6 North, Range 21 West, Ravalli County, Montana, for irrigation of 4 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$

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of Section 15, Township 6 North, Range 21 West, Ravalli County, Montana. The period of diversion and use would be April 15 to October 15 inclusive of each year. (Application.)

7. Applicant had also sought by his Application, to divert an additional amount of water from Blodgett Creek for "incidental" use as supplemental stock water. Due to Applicant's failure to specify the rate and volume sought, the Department could not act upon or publish notice regarding this portion of the Application, and said portion was therefore not properly before the Hearing Examiner. (Application, Department Records.)

8. Applicant intends to convey water to the place of use above specified by use of an existing ditch and its first lateral. The ditch is known as the first right ditch; its point of diversion on Blodgett Creek is that specified as the point of diversion under this Application. (Application, Department Exhibit 1.)

Water diverted would be conveyed from Blodgett Creek to the proposed place of use through the first right ditch, then its first lateral, which lateral crosses the north portion of Applicant's property in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15, Township 6 North, Range 21 West, Ravalli County, Montana. Applicant proposes to install a headgate in the downslope side of the lateral just after it enters her property. Appropriated water would pass through the headgate and, by gravity flow, flood-irrigate the 4 acres of pasture immediately downslope from the lateral. (Department Exhibit 1, Testimony of R.K. Grayson.)

9. Irrigation of the 4 acres would increase forage for stock which Applicant presently pastures thereon and thereby reduce Applicant's reliance on imported feed. (Testimony of R.K. Grayson.)

10. Whether Applicant possesses a legal right to use the first right ditch diversion works or its first lateral for the conveyance of water from Blodgett Creek is not ascertainable from the record.

11. In support of her contention that there is unappropriated water in Blodgett Creek, Applicant testified:

A. That several people on the source possess decreed water rights which are not being utilized; e.g., Clarence Moyle, Alan Larke;

B. That, at times, large quantities of water flood out of the first right ditch and other ditches supplied by the source, creating a nuisance, making ruts in the road and generally going to waste;

C. That Ada Morris' garden gets flooded out; and,

D. That there is so much unused water in the main first right ditch that it is causing trees to fall down.

(Testimony of Heather Grayson.)

12. The delivery systems, i.e., flume and ditches currently in use on Blodgett Creek, are relatively inefficient due to inherent inadequacies, degradation and inconsistent maintenance in unknown proportion. (Testimony of Joseph Higgins, Ernest Pfyffer.)

13. Objector Blodgett Creek Limited Partnership presently holds an interest in that tract of land known as the Blodgett Creek Heights Subdivision a/k/a "the Fulbright place." Legal title to the property is held by Larry Fulbright in whose name a claim of existing water right has been filed claiming 100 miner's inches of water from Blodgett Creek pursuant to a 1907 Blodgett Creek decree. (Testimony of Jeffrey Langton, Department Records.)

Larry Fulbright also owns ditch rights in the first and fourth right ditches and the lateral which crosses Applicant's property to reach the Fulbright property. Said ditch rights have been historically used to convey the above said 100 miner's inches of water from Blodgett Creek to the Fulbright property. (Testimony of Jeffrey Langton.)

14. Applicant, or her predecessors in interest, may have had basis to file a Statement of Claim for Existing Water Rights appurtenant to the property she seeks hereunder to irrigate; however, Applicant filed no claim within the statutory period. (Testimony of Jeffrey Langton.)

15. The carrying capacity of the first right ditch is a maximum of 400 miner's inches. (Testimony of Marvin Parker.) The carrying capacity of the first right lateral is not ascertainable from the record.

16. Blodgett Creek Limited Partnership has temporarily blocked the headgates of said first right and fourth right laterals which have historically supplied its property. The partnership intends that the lateral remain blocked for 2 years.

Blodgett Creek Limited Partnership does not intend to abandon its claimed water right delivered by said laterals. (Testimony of Jeffrey Langton.)

17. The period of low Blodgett Creek flow, which corresponds approximately with the need for irrigation, begins most years in early July and ends with fall rains. (Testimony of George Holman, Ray J. Browning, Gary L. Rouse.)

18. The flow of Blodgett Creek during periods of low flow unsupplemented by additional high-lake stored water, as measured just above the first point of diversion thereon, varies from 1,870 miner's inches (46.75 cf/sec) in an average summer to 900 miner's inches (25 cf/sec) in a severe drought summer such as 1985. (Objector Owen Exhibit 1.)

19. Filed, decreed and use rights claimed pursuant to § 85-2-211 et seq. MCA (1985) listing Blodgett Creek as their source, total approximately 6,000 miner's inches (150 cf/sec); of this amount 3,530 miner's inches (89.5 cf/sec) were claimed as decreed rights. (Department Records.)

20. Virtually every year there is insufficient water in Blodgett Creek during periods of low flow to provide prior appropriators with enough water to fulfill their claimed appropriations. (Testimony of Donna Menager, Joseph H. Higgins, Billy Williamson, Ray J. Browning, Gary L. Rouse, George Holman, Lomo Irrigation District, Ernest T. Pfyffer, Warren Parker, Gail L. Owen, Sharoll F. Hartson, Albert C. Haack, Jim Doyle, Martha Isaacson.)

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 3, MCA (1985).

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

3. MCA § 85-2-311 directs the Department to issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(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 use;

(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 proposed use, irrigation, is a beneficial use. MCA § 85-2-102(2), See generally, Sayre v. Johnson, 33 Mont. 15, 88 p. 389 (1905).

5. The Applicant has a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 159, 22 p. 575 (1912)

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

7. Whether the Applicant presently holds a ditch right or other easement necessary for carriage of the water she seeks hereunder to appropriate, is not an issue which requires resolution in order to make a determination of whether Applicant has met the criteria for issuance of a Permit.

Section 85-2-311 MCA (1985) does not expressly require that the Applicant, in order to receive a Permit, prove possession of a right to conduct the water she seeks to appropriate. Further, an interpretation of the statute as implicitly mandating such a requirement is untenable. The conditional nature of a Permit obviates such an interpretation; the practical exigencies of making an appropriation militate against it.

The Department has previously stated that 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 applies the water countenanced to beneficial use." In the Matter of the Application for Beneficial Water Use Permit No. 24821-s41E by Remi & Betty Jo Monforton, Proposal for Decision, September 30, 1981 at 19-20.

Thus, if the Applicant does not possess or cannot acquire ditch rights or other easement for the conveyance of water countenanced by Permit, the water will not be applied to beneficial use and the Permit will be revoked under § 85-2-314 MCA (1985). In short, the conditional nature of a Permit insures that if the Applicant is not able to complete the appropriation which she was allowed to initiate she will not acquire a water right.

Possession of a right to conduct water is an incident necessary to the completion of an appropriation and without it no water right will vest. However, to hold that § 85-2-311 MCA (1985) requires the prospective appropriator to prove possession of such incidents of completion prior to the issuance of the Permit which licenses initiation of the appropriation, would certainly place the cart before the horse. Such a requirement would force the hopeful appropriator to invest time, money and energy developing details of a plan for which he has not obtained the sine qua non; e.g., he may be required to purchase a ditch right which he may never need (should the Permit be denied on other grounds). Such a construction of the statute would, in contravention of the policy and purpose of the Montana Water Use Act, discourage the wise use of water in this State by turning the permitting process into high-stakes gambling which few could afford to risk. See § 85-2-101 MCA (1985).

Assuming arguendo that the project proposed was shown to be so blatantly infeasible that its completion and operation were an obvious impossibility, due for instance to insurmountable

legal or economic factors, the Department might be in a position to find in the negative on some element of the necessary criteria. For instance, the Department might find that water diverted could not conceivably be put to beneficial use. See e.g. In the Matter of the Application for Beneficial water Use Permit No. 49632-s41H by Estate of Lena Ryan, Proposal for Decision, March 13, 1985 pp. 15-16. However, such is not the case here.

First, evidence presented at the hearing indicates that the Applicant may indeed possess a ditch right in the first right ditch. (Finding of Fact 14.) Though, pursuant to § 85-2-226 MCA (1985), a water right possibly appurtenant to Applicant's land may have been lost, a ditch right for carriage of such water could continue in force. See generally, Connolly v. Harrell, 102 Mont. 295, 57 P.2d 781 (1936); Smith v. Kristan, 459 153 Mont. 325 (1969); O'Connor v. Brodie, 153 Mont. 129, 454 P.2d 459 (1969). Second, an arrangement for purchase or otherwise acquiring a ditch right or other easement for water carriage has not been shown to be outside the realm of possibility.

It must however be stated emphatically that the issuance of a provisional permit would in no way grant or imply a grant of a right-of-way, easement, ditch right, or other encumbrance upon the real property or incorporeal hereditaments possessed by other property owners in the vicinity. The proposed facility for transmission of the water from source to place of use is merely recognized as feasible with the issuance of a permit; the

Permittee must effect any necessary transfer of interest herself. The issuance of a permit grants no legal authority to take the property of others.

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

9. Applicant has failed to prove by substantial credible evidence that there are unappropriated waters in the source of supply at times when water can be put to the use proposed by the Applicant.

The record shows that claimed existing rights on Blodgett Creek far exceed, in terms of available flow, the supply of water throughout a substantial portion of the period in which Applicant seeks to divert. (Findings of Fact 18, 19.)

Though each filed claim constitutes prima facie proof of its content until issuance of a final decree by a court of competent jurisdiction, § 85-2-227 MCA (1985), the Department must, until such decree is issued, "deal with new use applications weighing the evidence in favor of unappropriated waters where it appears that the seniors exercise their rights in such a way that there is, more often than not, water physically available for new use." In the Matter of the Application for Beneficial Water Use Permit No. 28306-s41J by Ken Campbell, Proposal for Decision, August 27, 1985, p 16.

In the instant case, evidence presented by those Objectors claiming existing prior rights on Blodgett Creek, indicates that each such Objector yearly attempts to obtain the full amount of

water he has claimed, failing in such attempts largely because there is insufficient water in Blodgett Creek to supply claimed appropriations. (Finding of Fact 20.)

The central argument presented by the Applicant bearing on the issue of the existence of unappropriated water in Blodgett Creek focuses on the inefficiency of the present delivery system, i.e., the inefficiency of the ditches used by the prior appropriators. (Finding of Fact 12.) The thrust of Applicant's argument that unappropriated water exists in Blodgett Creek apparently is this: but for the inefficiency of the delivery system all prior rights would be fulfilled and there would be plenty of water for new appropriations. (Finding of Fact 11.)

Though it is probably true that the means of diversion used by appropriators on Blodgett Creek are, when compared to the same in other areas, relatively inefficient, absolute efficiency is not required. Rather, reasonable efficiency is what is required and the appropriator may employ the means most suitable in view of the existing physical conditions and circumstances of the case. State ex rel. Crowley v. District Court, 108 Mont. 88, 89 P.2d 23 (1939).

Thus Applicant, in order to prevail on the issue as framed, need prove by substantial credible evidence that (1) the delivery systems now in place are not "reasonably" efficient, and (2) that an upgrade in efficiency would result in full satisfaction of the claims of all prior appropriators with a surplus remaining for appropriation.

Applicants naked observations (Finding of Fact 11) do not meet this burden. It must be noted, however, that a future Applicant may well establish the above by presenting sufficient evidence on point.

In the instant case, the Hearing Examiner concludes that evidence presented by the Objectors who have claimed water rights on Blodgett Creek sufficiently corroborates filings made which indicate over-appropriation of the creek. Applicant has failed to overcome this evidence and has not met her burden of proof regarding the existence of unappropriated water in Blodgett Creek throughout the period she seeks to appropriate.

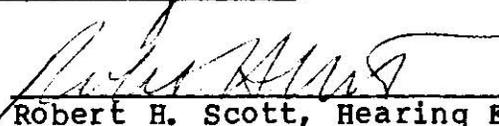
10. A new appropriation on an over-appropriated stream would a priori have adverse affect on prior appropriators.

WHEREFORE, based upon the foregoing, and the evidence on the record herein, the Hearing Examiner proposes the following:

ORDER

That Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson be denied without prejudice.

DONE this 24 day of January, 1986.


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

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., 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). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

CASE # 55390

AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 24, 1986, she deposited in the United States First Class mail, postage prepaid, a Proposal for Decision, an order by the Department on the Application by Heather Grayson, Application No. 55390-s76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Heather J. Grayson, NW 460 Blodgett View Rd., Hamilton, MT 59840
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20. Lloyd R. & M. Margaret Owen, NW 225 Bowman Rd., Hamilton, MT 59840
21. G.L. Owen, NW 225 Bowman Rd., Hamilton, MT 59840
22. Clifford E. Patzer, NW 403 Ricketts Rd., Hamilton, MT 59840
23. Albert C. & Elsie M. Haack, NW 286 Ricketts Rd., Hamilton, MT 59840
24. Richard Tollerud, NW River Rd., Hamilton, MT 59840

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- 25. Gary L. & Judy M. Rouse, 325 W. Main, Hamilton, MT 59840
- 26. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT 59801
- 27. Robert Scott, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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

On this 24th day of January, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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. Olson
 Notary Public for the State of Montana
 Residing at Helena, Montana
 My Commission expires 2-1-97