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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. 65689-s76LJ BY RODGER A. AND)
DONNA L. WORTH)

* * * * *

On October 3, 1989, a Proposal for Decision was issued in the captioned matter. On October 13, 1989, exception thereto was timely filed by Applicants. The exception is addressed below.

Applicants filed exception to the denial of the irrigation applied for in the application in this matter. In filing this exception the Applicant seems unsure as to the meaning of the language ". . . denied in part without prejudice".

The Proposed Order in Conclusion of Law 9 states that the Applicant failed to prove by substantial credible evidence that the proposed operation of the irrigation use is adequate and was based on Finding of Fact 9. The Applicant asserts in her exception that sufficient plans for operation were presented at the hearing. My review of the testimony reveals that the Hearing Examiner's Finding of Fact 9 is not clearly in error. The Examiner's Findings can be reversed only if they are clearly erroneous and the Conclusion of Law 9 is accepted as proposed. See, Billings v. Billings Firefighters Local No. 521, 200 Mont. 421 (1982).

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Therefore, the Proposed Order states that a permit is ". . . granted in part and denied in part without prejudice". This means that the stock water use applied for is permitted, however, the irrigation portion of the application is denied without prejudice. Since the denial of the irrigation portion of the application is based on the failure of the Applicants to prove by substantial credible evidence the criteria required by § 85-2-311, MCA, the Applicants can reapply for the irrigation use once they have obtained the necessary information to prove by substantial credible evidence that the proposed operation of the irrigation use is adequate.

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 October 3, 1989 Proposal for Decision and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 65689-s76LJ is hereby granted in part and denied in part without prejudice. The Permit is hereby granted to Rodger A. and Donna L. Worth to divert 25 gpm up to .13 acre-feet of water per year for stock water purposes only.

The water will be diverted from Brown Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 20 North, Range 19 West, Flathead County, Montana, by means of an existing underground domestic pipeline, and at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 20 West, Flathead County, Montana, by means of a ditch.

The period of use shall be January 1 through December 31, inclusive of each year. The priority date for this Permit is July 16, 1987, at 1:00 p.m.

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

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

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

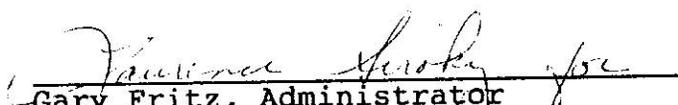
C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit use. No more than 25 gpm may be diverted by the Permittee at one time. Therefore, the diver-

sion system must be adjusted or modified to limit the diverted flow rate to this amount.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 8 day of January, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, MT 59620

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served by first class mail upon all parties of record at their address or addresses this 8th day of January, 1990, as follows:

Rodger A. and Donna L. Worth
2264 Foothill Road
Kalispell, MT 59901

Robert W. Boxwell
2320 Foothill Road
Kalispell, MT 59901

Randall A. Snyder
Attorney at Law
P.O. Box 717
Bigfork, MT 59911

Peter and Lauri Gall
2300 Foothill Road
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Donald and Diane See
2358 Foothill Road
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Chuck Brasen
Field Manager
P.O. Box 860
Kalispell, MT 59603

CASE #

Douglas and Barbara Crowell
2310 Foothill Road
Kalispell, MT 59901


Irene V. LaBare
Legal Secretary

CASE #

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. 65689-s76LJ BY RODGER A. AND)
DONNA L. WORTH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 8, 1989, in Kalispell, Montana. The record was closed at the conclusion of this hearing.

APPEARANCES

Applicant Donna L. Worth (hereafter, "Applicant" or "Applicant Worth") appeared pro se.

Objector Barbara Crowell (hereafter, "Objector Crowell") appeared pro se.

Objector Donald See (hereafter, "Objector See") appeared pro se.

Objector of record not present at the hearing is Robert W. Boxwell.

Charles Brasen, Manager of the Kalispell Water Rights Bureau Field Office was present at the hearing but was not called to testify by any party to the proceedings. Mr. Brasen did, however, clarify a few points during the course of the hearing.

CASE #

PRELIMINARY MATTERS

The basis for Objector Crowell's objection is a Claim of Existing Water Right No. W141588-s76LJ for domestic purposes, filed with the Kalispell Water Rights Bureau Field Office on May 14, 1982.

A recent decision rendered by Chief Water Judge W. W. Lessley, In the Matter of the Adjudication of Existing Water Rights . . . for a portion of the Yellowstone River and certain tributaries, Case No. 438-LC-1 (Montana Water Court, July 17, 1989), concludes that all water right claims not received and filed with the Department of Natural Resources and Conservation (DNRC) prior to April 30, 1982, 5:00 p.m., are forfeited and are declared null and void.

Based on the above described decision by the Water Court, the Hearing Examiner finds Objector Crowell has no standing in this case. Furthermore, the testimony given by Objector Crowell at the hearing is found to have no relevance.

EXHIBITS

Applicant Worth submitted seven exhibits for inclusion in the record.

Applicant's Exhibit 1 is two copies of ownership maps, of different scale, stapled together. This exhibit shows the upper and lower proposed points of diversion as well as Applicant Worth's property and Objector See's property.

Applicant's Exhibit 2 is a copy of a portion of a USGS topographical map that shows Brown Creek from its headwaters as

it flows through and past the Applicant's proposed points of diversion and places of use.

Applicant's Exhibit 3 is eight 4" x 6" 35 mm color prints that show Applicant's proposed points of diversion as well as Objector See's present point of diversion. These photographs were marked as Applicant's Exhibit 3A through 3H.

Objector See objected to the introduction of Applicant's Exhibit 3 since the photographs were not dated and thus not indicative of the flow rate on Brown Creek for any particular time period. Objection is denied.

The Hearing Examiner accepts Applicant's Exhibit 3 (3A through 3H) into the record. The value given to this exhibit is twofold:

1. It is accepted as a visual aid in showing where Applicant Worth's proposed points of diversion will be located, as well as the geographical relationship between Applicant's proposed points of diversion and Objectors' present points of diversion.

2. It is accepted as indicative of water being available at Applicant's proposed points of diversion sometime during the summer of this year.

The Hearing Examiner notes that the foliage and size of the leaves shown on photographs 3D and 3F reflect a period of time well into the growing season. Additionally, photograph 3F shows the water flowing in the culvert below the high water mark thus

indicating that the photograph was taken after the spring runoff event.

Applicant's Exhibit 4 is an envelope for photographs from the Drug Fair store dated July 31, 1989, as the date the photographs were received by the store. In addition, this envelope has a cash register receipt dated August 3, 1989, showing the amount paid to be \$7.86.

Objector See objected to the introduction of Applicant's Exhibit 4 because the envelope doesn't show any tie to the pictures. Objection denied. No evidence was introduced by Objector See to support his allegation that Applicant's Exhibit 4 is not the envelope for the photographs introduced as Applicant's Exhibit 3.

Applicant's Exhibit 5 is two legal sheets of paper. The first sheet summarizes the rights of the Objectors by type of use and volume of water allocated to each water right annually. The second sheet has three pocketbook sheets stapled to the legal sheet of paper showing the specifics of two flow rate measurements taken by the Applicant, and the amount of precipitation for January through May of 1989 obtained from a weather station.

Applicant's Exhibit 6 is a copy of portions of pages 44 and 45 from the DNRC's report WRSR52 showing all the water rights of record for Brown Creek.

Objector See objected to the introduction of Applicant's Exhibit 6 because exhibit is inaccurate since it shows Objector

See's volume of water for irrigation as 30.8 acre-feet instead of 34.8 acre-feet, and also because the flow rate readings were taken by an amateur and not a qualified uninterested party.

Objection denied. Applicant's Exhibit 6 is a copy of two pages from a DNRC water rights report which shows Objector See's volume of water for irrigation at 30.8 acre-feet. Further checking by the Hearing Examiner disclosed no reason for Objector See's irrigation volume to be other than what is shown by Applicant's Exhibit 6. Furthermore, this exhibit is based on flow rate and volume of water claimed by the respective water right holders. This exhibit does not include any water flow measurements taken by Applicant Worth or anybody else.

Applicant's Exhibit 7 is a brochure, 1988 Local Climatological Data, published by the U.S. Department of Commerce, National Climatic Data Center, for Kalispell, Montana.

Objector See objected on the grounds that Brown Creek is spring fed and thus rainfall in the area does not affect the flow of the creek.

Objection denied. Rainfall plays an important part in the water supply for a drainage, either by directly contributing to the flow of the creek in the form of surface water runoff, and/or by recharging the aquifer from which springs flow.

Applicant's Exhibits 1 through 7 were admitted for inclusion in the record in this matter.

Objector See did not offer any exhibits for inclusion in the record in this matter.

The Department did not offer any exhibits for inclusion in the record in this matter.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The Applicant has not made application for appropriation of water as described under § 85-2-306, MCA. Therefore, § 85-2-302, MCA, applies in this matter.

2. Application for Beneficial Water Use Permit No. 65689-s76LJ was duly filed with the Department of Natural Resources and Conservation on July 16, 1987, at 1:00 p.m.

3. The pertinent portions of the Application were published in the Daily Inter Lake, a newspaper of general circulation in the area of the source, on August 26, 1987.

4. The source of water for the proposed appropriation is Brown Creek, which is in a closed basin, i.e., Brown Creek does not contribute surface water to another water source.

5. The Applicants have applied for 25 gallons per minute (gpm) up to 12.13 acre-feet of water per year. From the total volume of 12.13 acre-feet of water, .13 acre-feet will be used for stockwatering purposes on the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, and 12 acre feet will be used for irrigation purposes on six acres

located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, all in Township 28 North, Range 20 West, Flathead County, Montana.

6. Water is to be diverted from Brown Creek at two different locations. Water is to be diverted from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 28 North, Range 19 West, by utilizing an existing domestic underground pipeline and is to be used for stockwatering and sprinkler irrigation of two acres. The lower point of diversion is located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 20 West, and it will consist of a holding tank for sprinkler, or flood irrigation of four acres, and for stockwatering purposes.

7. Applicant Worth has taken two flow rate measurements from Brown Creek at each of the two proposed points of diversion. In October 1989, the Applicant measured the flow rate in Brown Creek at the upper point of diversion, in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 28 North, Range 19 West, at 36 gpm, and in August 1989, the Applicant measured the flow rate at the same location at 201 gpm. The lower point of diversion is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 20 West, and in October 1987 the Applicant measured the flow rate in Brown Creek at 192.8 gpm, and in August 1989 the Applicant measured the flow rate at the same location at 592 gpm.

Applicant Worth made the above measurements using a five gallon bucket and stopwatch.

8. Applicant's Exhibit 3A through 3H shows sufficient

water physically available for appropriation on Brown Creek at both points of diversion during June or July of this year.

9. Applicant Worth consistently testified as to being unsure of the irrigation use applied for in the application. Concerning the two acres of irrigation from the upper point of diversion, the Applicant testified about irrigating the "2 acres if need be" and of not being "quite sure what we would do." Applicant testified about discussing a sprinkler system, but had not looked into it to make it work.

Concerning the four acres of irrigation from the lower point of diversion, the Applicant testified as to not having talked to the co-applicant (spouse) about clearing the four acres for irrigation. Additionally, no final plans were evident as to the type of irrigation, sprinkler, flood, or both, that was going to be utilized.

In direct response to the Hearing Examiner's question Applicant Worth testified that as of the day of the hearing they (Applicants) were not sure about irrigating.

10. Applicant has a possessory interest of the land at the intended place of use.

11. Objector See's point of diversion from Brown Creek is between the Applicant's upper and lower points of diversion.

12. Objector See uses water from Brown Creek for domestic and livestock purposes, and for irrigating eighteen acres at a maximum, and eight to ten acres on the average. Last year Objector See testified that he used little or no water for

irrigation. He feels he would have dried up the creek had he used the extent of his water rights.

13. Objector See's concern with the overall appropriation of water by Applicant Worth is that since the Worth's presently have no irrigated fields, nor any livestock, that the purpose of obtaining a water right is to raise the monetary value of the Applicant's property. Another overall concern of Objector See to the issuance of a permit on Brown Creek is that there would be nothing stopping other people from filing for water rights on Brown Creek.

Objector See objects to the Applicant receiving a permit from the lower point of diversion alleging too many water rights have been issued from Brown Creek.

Objector See also objects to the Applicant's upper point of diversion because he feels there is not sufficient water on Brown Creek for him (Objector See) to use all of his water rights and still maintain sufficient water for the fisheries in the creek.

14. Although Objector See testified that he cannot irrigate his fields, he did not testify that water was not physically available from Brown Creek at his point of diversion. His testimony indicated that during 1988, which is one of the worst drought years on record, he (Objector See) voluntarily decided not to utilize all of his water rights for fear of interrupting the fisheries on Brown Creek. However, that decision seemed to be based on visual observation rather than on actual stream and/or water withdrawal measurements.

15. By his own admission, Objector See was mainly concerned with Applicant Worth obtaining a water right on the upper diversion, thus increasing Applicant's property value, than on the amount of water necessary to satisfy Applicant's stockwater use. Objector See testified that he would not object to Applicant Worth using sufficient water from their (Worth's) existing domestic water right to satisfy the livestock watering needs.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantial and procedural requirements of law or rules have been fulfilled, therefore, the matter was properly before the Hearing Examiner. (See Findings of Fact 2 and 3.)

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. (See Findings of Fact 1.)

3. The Department must issue a Beneficial Water Use 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 uses of water, stockwatering and irrigation, are beneficial uses of water. (See § 85-2-102(2), MCA. See also Findings of Fact 5.)

5. Applicant Worth has proven by substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to the proposed use, in the amount requested, and throughout the period during which the applicant seeks to appropriate.

The Applicant has taken measurements of the flow of Brown Creek at both proposed points of diversion during October 1987 and August 1989. (See Findings of Fact 7.) Although the flow rate measurements are not indicative of the annual water availability for Brown Creek they are, however, the only flow measurements on Brown Creek on record and as such they are indicative of water availability at the time the measurements were taken.

6. Applicant Worth has proven by substantial credible evidence that the water rights of prior appropriators will not be adversely affected.

Applicant's lower point of diversion is downstream from Objector See. (See Findings of Fact 11.) Therefore, water withdrawal from the Applicant's proposed lower diversion will not affect Objector See's water rights.

Comparing Applicant Worth's flow measurements at the proposed upper diversion with the flow measurements taken at the proposed lower diversion indicates that Brown Creek gains water as it flows downstream. (See Findings of Fact 7.) Therefore, prior appropriators below Applicant's proposed lower point of diversion should not be adversely affected.

Objector See's claim to have used very little or no water in 1988 for irrigation was not due to the physical unavailability of the water, but rather to Objector See's preference to leave the water in the stream for the fish. (See Findings of Fact 12, 13, and 14.)

Objector See does not object to the Applicant diverting stockwater from the upper point of diversion with Applicant's present domestic water right. (See Findings of Fact 15.) This statement is taken as an admission that a stockwatering diversion by Applicant Worth upstream from Objector See's point of diversion would not have an adverse impact to Objector See.

The concern expressed by Objector See that the Applicants have no irrigated fields or livestock, therefore, their purpose must be to raise the value of Applicant's property, is not supported by the Montana Water Law. (See Finding of Fact 13.) Section 85-2-302, MCA, states that ". . . a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit by the department." This

indicates that the Applicant's have proceeded as required under the present laws.

7. The Applicant has proven by substantial credible evidence that the proposed uses will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

Applicant has taken into consideration all the water rights on record with the DNRC from Brown Creek. (See Applicant's Exhibit 6.) This exhibit shows that there are no other planned uses or developments for which a permit has been issued or for which water has been reserved. Additionally, Brown Creek flows into a closed basin, therefore, the downstream area of potential impact is limited. (See Findings of Fact 4.)

8. The Applicants have possessory interest of the land at the intended place of use. (See Findings of Fact 10.)

9. Applicant has proven by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the stockwatering use from both points of diversion. (See Findings of Fact 6. See also the map submitted by Applicant and made part of the application.)

However, Applicant Worth has failed to prove that the proposed operation of the irrigation use is adequate. Before the adequacy of the proposed irrigation use can be evaluated, the intent and commitment to proceed with the proposed irrigation use applied for must be present. Concerning the proposed irrigation

use, Applicant Worth admitted not being sure how the irrigation would take place, or how much land would be irrigated, and even not sure about irrigating in general. (See Findings of Fact 9.)

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 65689-s76LJ is hereby granted in part and denied in part without prejudice. The Permit is hereby granted to Rodger A. and Donna L. Worth to divert 25 gpm up to .13 acre-feet of water per year for stockwater purposes only.

The water will be diverted from Brown Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 20 North, Range 19 West, Flathead County, Montana, by means of an existing underground domestic pipeline, and at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 20 West, Flathead County, Montana, by means of a ditch.

The period of use shall be January 1 through December 31, inclusive of each year. The priority date for this Permit is July 16, 1987, at 1:00 p.m.

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

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided

by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit use. No more than 25 gpm may be diverted by the Permittee at one time. Therefore, the diversion system must be adjusted or modified to limit the diverted flow rate to this amount.

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 Examiner (204 South Daws, P.O. Box 438, Lewistown, MT 59457); The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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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 pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 3rd day of October, 1989

Silvio Rodriguez
Silvio Rodriguez, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 438
Lewistown, MT 59457
(406) 538-7459

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served by first class mail upon all parties of record at their address or addresses this 3rd day of October, 1989, as follows:

Rodger A. and Donna L. Worth
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