

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

* * * * *

IN THE MATTER OF THE)
APPLICATION FOR CHANGE)
OF APPROPRIATION WATER) FINAL ORDER
RIGHT G(E)088756-76G BY)
ED AND KATHLEEN A. JANNEY)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on November 21, 1995. Objector Hollenback filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting an authorization to change an exempt water right by adding a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and a place of use in the W $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana. Applicants have constructed a ditch at the west end of the source in a northerly direction for approximately one-quarter mile to the additional place of use.

For this review, the Department must accept the Proposal's findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1995) and Mont. Admin. R. 36.12.229 (1994). The Department has considered the exceptions and reviewed the record under these standards and the Department finds that the Proposal for Decision is supported by the record and properly applied the law to the facts.

CASE # 88756

Objector fears the lengthened ditch will consume more water leaving less for his irrigation. An authorization for change of appropriation water right does not authorize an appropriator to increase his appropriation. According to Applicants' Notice of Water Right 76G-E-088756-00 they have a stock water right of 0.95 acre-feet per year. Since the water right was established when the water pooled and percolated into the ground at the corner of Applicants' pasture, Applicants can demand only the amount of water consumed by stock at that point. The ditch has been in place and in use since 1987. Since Applicants can appropriate no additional water, Objector cannot be adversely affected by the approval of an authorization to change Applicants' water right by adding a place of use.

Objector alleges he requested the record be left open and the hearing examiner ruled he was "out of order." Objector does not state the reason he wanted the record left open. A review of the record in this matter produced no such request. If the request was made after the record was closed, then Objector's request cannot be granted.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorization to Change Appropriation Water Right G(E)088756-76G is granted to Ed and Kathleen A. Janney to change an exempt stock water right by adding a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and a place of use in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana. Diversion will be by means of a ditch at the west end of the source, conveying water in a northerly direction for approximately one-quarter mile to the additional place of use.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann., Title 85, chapter 2, part 2 and § 85-2-404 (1995).

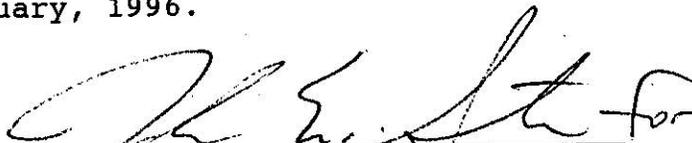
NOTICE

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 tran-

script. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 31 day of January, 1996.



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, first class mail, at their address or addresses this 1st day of

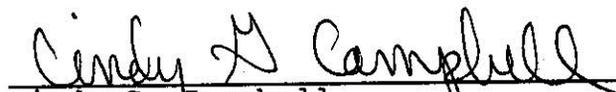
February
January, 1996 as follows:

Ed and Kathleen A. Janney
110 N. Frontage RD.
Deer Lodge, MT 59722

Robert Hollenback
151 Village LN.
Deer Lodge, MT 59722

T.J. Reynolds, Manager
James Beck, CES
Helena Water Resources
Regional Office
1520 E. 6th Avenue
Helena, MT 59620-2301

Vivian A. Lighthizer
Hearing Examiner
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, MT 59620



Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR CHANGE)	PROPOSAL
OF APPROPRIATION WATER)	FOR
RIGHT G(E)088756-76G BY)	DECISION
ED AND KATHLEEN A. JANNEY)	

* * * * *

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 November 1, 1995, in Deer Lodge, Montana, to determine whether authorization to change appropriation water right should be granted to Ed and Kathleen A. Janney for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1993).

APPEARANCES

Applicants Ed and Kathleen Janney appeared at the hearing by and through Ed Janney.

Objector Robert Hollenback appeared at the hearing *pro se*.

Jim Beck, Civil Engineering Technician with the Helena Regional Water Resources Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

EXHIBITS

Neither the Applicants nor Objector offered exhibits for the record.

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

CASE # 88 756

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(E)088756-76G in the name of Ed and Kathleen A. Janney and signed by Ed Janney was filed with the Department on May 16, 1994. (Department file.)

2. Pertinent portions of the application were published in the *Silver State Post* on April 12, 1995, and because there was an omission of the objection deadline, again on May 24, 1995. 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 proposed changes. One timely objection to the application was received by the Department. Applicants were notified of the objection by a letter from the Department dated May 19, 1995. (Department file.)

3. Applicants propose to change an exempt stock water right by adding a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and a place of use in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana. Applicants seek approval to use a ditch at the west end of the source flowing in a northerly direction for approximately one-quarter mile to the additional place of use.¹ Presently the stock drink directly from the

¹The ditch has been completed and in use since 1987. Applicants were not aware they needed permission from the Department to install the ditch.

source,¹ an unnamed tributary of the Clark Fork River, in the S½SW¼SE¼ of said Section 28. (Department file.)

4. Applicants have proven by a preponderance of evidence the proposed change will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. Objector, who has an irrigation permit, is upstream of the proposed point of diversion and cannot possibly be adversely affected by the proposed change. There has never been a user at the west end of the source. Applicants' proposed point of diversion is at the west end of the source which had, up until Applicants constructed the ditch, formed a small pool and disappeared into the ground on Applicants' property. The ditch lengthens the source by approximately 1,200 feet. (Testimony of Ed Janney.)

5. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. In 1987, Applicants constructed the ditch that is in use at this time. It has been working well conveying water from the south end, across the pasture, to the north end of the pasture, a distance of approximately 1,200 feet. (Department file and testimony of Ed Janney.)

¹When the interstate highway was constructed in 1962, springs and seepage emerged from the road cut at the highway interchange north of Deer Lodge. The water gathers, and is channeled down a ditch (borrow pit) bordering the frontage road into town. This stream is a perennial stream.

6. Applicants have proven by a preponderance of evidence the proposed use of water is a beneficial use. Stock water is a beneficial use. Mont. Code Ann. § 85-2-102(2)(a) (1995). The ditch now conveys water that was previously wasted, across the nearly forty-acre pasture so that the entire pasture can be used. If that ditch were not in place the water would simply disappear into the ground. (Department file and testimony of Ed Janney.)

7. Applicants have proven by a preponderance of evidence they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicants own the place of use. (Department file and testimony of Ed Janney.)

8. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

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

2. Applicants have met all the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3 through 8.

CASE # 88756

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorization to Change Appropriation Water Right G(E)088756-76G is granted to Ed and Kathleen A. Janney to change an exempt stock water right by adding a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and a place of use in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana. Applicants will construct a ditch at the west end of the source in a northerly direction for approximately one-quarter mile to the additional place of use.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann., Title 85, chapter 2, part 2 and § 85-2-404 (1995).

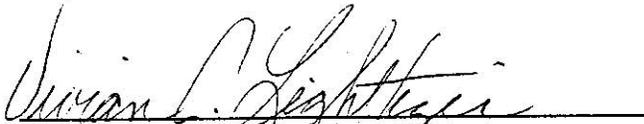
NOTICE

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 21st day of November, 1995.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-66

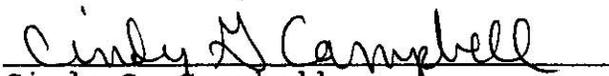
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 21st day of November, 1995, as follows:

Ed and Kathleen A. Janney
110 N. Frontage RD.
Deer Lodge, MT 59722

Robert Hollenback
151 Village LN.
Deer Lodge, MT 59722

T.J. Reynolds, Manager
James Beck, CES
Helena Water Resources
Regional Office
1520 E. 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 88756