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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

)
IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHT G(W) 96362-41K BY)
VICTOR W. KRUEGER)
)
Before the Department of)
Natural Resources and)
Conservation for the State)
of Montana.)

Cause No. ADV 92-1150

DECISION AND ORDER

The present matter before the Court is a petition for judicial review of a final order of the Department of Natural Resources and Conservation (hereinafter Department). The petition was filed July 30, 1992, by Victor W. and Rose Krueger. On August 19, 1992, Tee Bar Ranch, Inc. (hereinafter Tee Bar Ranch), an objector in the proceeding before the Department, filed a motion to dismiss the petition. Briefs on the petition and motion to dismiss were filed by Petitioners (hereinafter the Kruegers), the Department and Tee Bar Ranch. Oral argument was

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1 held on December 22, 1992, at which time Peter C. Pauly appeared
2 as attorney for the Kruegers, Donald MacIntyre appeared as
3 attorney for the Department and Ronald Waterman appeared as
4 attorney for Tee Bar Ranch. The petition and motion to dismiss
5 are now ready for decision.

6 BACKGROUND

7 This petition arose from an application for a change of
8 appropriation of water rights with respect to waters of Elk
9 Creek, a tributary of the Sun River. The Kruegers wanted to add
10 a second point of diversion for their water right upstream from
11 the original point of diversion on Elk Creek. They proposed
12 conveying the water to their land from the new point of diversion
13 by means of Swanson Ditch, Bell Flat Drain and Cemetery Ditch.

14 A hearing was held before a hearing examiner who found
15 that Swanson Ditch transports the water onto property belonging
16 to Tee Bar Ranch, which also uses Bell Flat Drain and Cemetery
17 Ditch to convey water from another source. The hearing examiner
18 found that Swanson Ditch has never been used as part of a system
19 for transporting Elk Creek water to Cemetery Ditch or Bell Flat
20 Drain. He also found that Swanson Ditch ends a few hundred yards
21 away from Bell Flat Drain and, under the Kruegers' proposal,
22 water would overflow the end of Swanson Ditch, and would then
23 have to flow by gravity across the ground for one-half to three-
24 quarters of a mile until it reached Bell Flat Drain. The water
25

1 would tend to fan out in a sheet over the land surface between
2 the end of the ditch and the drain, with some of the water being
3 absorbed in the soil. Water reaching the drain would not enter
4 at a single point, but would enter in a diffuse manner along an
5 undetermined length of the drain. Also, some water might reach
6 the drain through underground seepage. The amount of water that
7 would actually reach the Bell Flat Drain is undetermined because
8 there was no evidence that the Kruegers had any measuring devices
9 installed.

10 The hearing examiner made his findings of fact,
11 conclusions of law and proposed order based on testimony from
12 various witnesses, documentary evidence and a video tape made by
13 Carol Mosher of Tee Bar Ranch showing the diversion and
14 conveyance system used by the ranch to take water from Elk Creek,
15 as well as Bell Flat Drain and the Kruegers' proposed point of
16 diversion.

17 The hearing examiner concluded that the Kruegers failed
18 to prove by substantial credible evidence that the proposed means
19 of diversion and operation of the appropriation works would be
20 adequate. His proposed order was that the Kruegers' application
21 be denied.

22 The Kruegers filed exceptions to the hearing examiner's
23 findings, conclusions and proposed order. Among their excep-
24 tions, the Kruegers asserted that the hearing examiner erred in
25

1 failing to conduct a field investigation, which they had
2 requested, and that the hearing examiner erred in concluding that
3 the Kruegers failed to carry their burden of proof in establish-
4 ing the adequacy of the proposed system. After consideration,
5 the Department adopted the hearing examiner's findings of fact,
6 conclusions of law and proposed order denying the Kruegers'
7 application.

8 The Kruegers have filed this petition for judicial
9 review, raising two issues: (1) that the hearing examiner erred
10 in failing to conduct a field investigation, and (2) that the
11 hearing examiner (and the Department) ignored the fact that Tee
12 Bar Ranch has already been decreed the right to use the same
13 system in the same manner as requested by the Kruegers.

14 DISCUSSION

15 Scope of Review

16 A reviewing court may reverse an agency's decision if
17 it is "clearly erroneous in view of the reliable, probative, and
18 substantial evidence on the whole record." Section 2-4-
19 704(2)(a)(v), MCA. The Montana Supreme Court has recently
20 adopted the three-part test in Interstate Production Credit Ass'n
21 v. DeSaye, 250 Mont. 320, 820 P.2d 1285 (1991), to determine if
22 an agency's findings of fact are clearly erroneous. State Comp.
23 Mutual Ins. Fund v. Lee Rost Logging, 252 Mont. 97, 102, 827 P.2d
24 85, 88 (1992). Under that test, the court will first review the
25

1 record to determine if the findings are supported by substantial
2 evidence. Second, if the findings are supported by substantial
3 evidence, the reviewing court should determine if the trier of
4 fact has misapprehended the effect of evidence. Third, if
5 substantial evidence exists and the effect of the evidence has
6 not been misapprehended, a finding may still be clearly erroneous
7 "when, although there is evidence to support it, a review of the
8 record leaves the court with the definite and firm conviction
9 that a mistake has been committed." Id.

10 Substantial evidence is "evidence that a reasonable
11 mind might accept as adequate to support a conclusion; it
12 consists of more than a mere scintilla of evidence but may be
13 somewhat less than a preponderance." Barrett v. Asarco, 245
14 Mont. 196, 200, 799 P.2d 1078, 1080 (1990).

15 The standard for reviewing an administrative agency's
16 conclusions of law is whether the conclusions are correct.
17 Steer, Inc. v. Department of Revenue, 245 Mont. 470, 803 P.2d 601
18 (1990).

19 Whether the Hearing Examiner Erred in Failing to
20 Conduct a Field Examination

21 The legislature empowered the Board of Natural
22 Resources and Conservation to promulgate regulations implementing
23 statutory procedures for appropriation of water rights. Section
24 85-2-113(2), MCA. Accordingly, the Board adopted Section
25 36.12.225, ARM, which provides in part:

1 Upon his own motion or upon the motion
2 of any party, the hearing examiner may, at
3 any time in the proceeding, make a site
4 visit of the lands involved in the pro-
5 ceeding. The hearing examiner may enter
6 upon lands to view proposed works, sources
7 of water, location of proposed uses,
8 construction of works and such other views
9 that are deemed relevant by the hearing
10 examiner to gain a proper understanding of
11 the issues involved in the proceeding.

12 Clearly, the decision to hold a site visit is solely
13 within the discretion of the hearing examiner. In this case, the
14 hearing examiner considered the Kruegers' request for such a
15 visit and declined. At the beginning of the hearing, counsel
16 discussed the matter of a site visit and the hearing examiner
17 decided to wait until all the evidence was in before determining
18 whether a visit would be necessary. At the conclusion of the
19 hearing, the hearing examiner raised the matter again as follows:

20 I hate to say it, for two reasons, one
21 of them is that the weather really is great,
22 and second of all, I like to try to accommo-
23 date every request that's made for my time
24 from the parties that would like to have me
25 see their property and the area in question;
but I really, my time is at a premium these
days, and also, I really am not unclear
about the land and the issues here. I think
you've done a very thorough job of explain-
ing the lay of the land, and the video helps
quite a bit, and the maps are good that were
submitted with the application. So I think
I'm going to forgo the site visit on this
one. I do it regretfully, because -- I have
my nose to the grindstone, but unfortu-
nately, I just can't afford to lift it off,
unless I know that I really need to; and in
this case, I really don't feel I do. So I

1 think that I won't make a site visit on this
2 application, although I suppose I could take
3 a raincheck.

4 Transcript of Hearing at P. 157-58.

5 The hearing examiner here stated that a site visit was
6 not necessary in view of the evidence before him. The Department
7 considered this issue and concluded that the Kruegers provided no
8 indication that a site visit would have disclosed any facts not
9 already in evidence. Any such evidence that the Kruegers believe
10 a site visit would have disclosed could have been presented at
11 the hearing through testimony and documentary proof. The
12 decision to forgo the site visit was within the hearing
13 examiner's discretion and provides no basis for reversing the
14 Department's order.

15 Whether the Hearing Examiner and the Department Ignored
16 the Fact that Tee Bar Ranch, Inc., Was Already Decead
17 the Right to Use the Same System in the Same Manner as
18 Proposed by the Kruegers

19 The Kruegers raised this exception to the hearing
20 examiner's findings, conclusions and proposed order. The
21 Department addressed this issue and responded as follows:

22 The Applicant argues that the Hearing
23 Examiner improperly concluded the Objector's
24 Statement of Claim . . . is not sufficient
25 proof that the Objector conveyed water from
Elk Creek via the Swanson Ditch, Bell Flat
Drain and the Cemetery Ditch to their own
lands in Section 8 and that such conclusion
illustrates the need for a field investiga-
tion by the Hearing Examiner.

1 Mr. Mosher's testimony, Tr., p. 130,
2 indicated that he thinks it is possible to
3 convey waters as proposed by the Applicant
4 but would take quite a large volume of
5 water. Mr. Mosher's testimony is not that
6 the conveyance was ever used as per the
7 Claim but rather that the means of con-
8 veyance is possible. The Statement of Claim
9 is not sufficient proof that water had
10 actually been conveyed by the Objector in a
11 manner similar to that proposed by the
12 Applicant. The issue is the adequacy of the
13 conveyance system proposed by the Applicant.
14 Even if the system has been used in the
15 past, the Applicant does not indicate how
16 the water will be accounted for as it is
17 combined with other water rights in the
18 proposed ditches and drains and spreads out
19 over the gravelly soil between the end of
20 Swanson Ditch and the Bell Flat Drain. The
21 adequacy of the proposed system is not
22 proven.

23 Department's Final Order, at 5.

24 The record supports the Department's decision.
25 Moreover, as the Department noted, the question here is not
whether anyone previously used or had the right to use the same
system as proposed by the Kruegers, but whether it is adequate
under the present statutory requirements contained in Section 85-
2-402, MCA. The applicant carries the burden of proving that the
proposed system meets the statutory requirements. In re Appro-
priation of Water Rights for Royston, 249 Mont. 425, 428, 816
P.2d 1054, 1057 (1991). The Department's conclusion that the
Kruegers failed to meet their burden of proof is supported by the
record.

In summary, the record supports the Department's

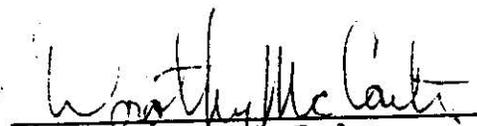
1 findings that a site visit was not necessary in this case and
2 that the contention that Tee Bar Ranch previously was entitled to
3 use the same system as proposed by the Kruegers is not a basis
4 for granting the application. Since the petition for judicial
5 review is denied on its merits, the motion to dismiss is moot.

6 Tee Bar Ranch has asked for attorney fees under Section
7 85-2-125, MCA. That section applies only to applications for
8 permits, the procedure for which is contained in Chapter 2, Part
9 3 of Title 85. Section 85-2-102(10), MCA. The Kruegers'
10 application for changing existing appropriation rights is
11 governed by Part 4 that chapter. Section 85-2-402, MCA. There
12 is no statutory right to attorney fees for this proceeding.

13 ORDER

14 IT IS HEREBY ORDERED that the Petition for Judicial
15 Review is DENIED. Respondent Tee Bar Ranch's request for
16 attorney fees is DENIED.

17 DATED this 6 day of February, 1993.

18
19 
20 Dorothy McCarty
District Court Judge

21 pc: Peter C. Pauly
22 Donald MacIntyre
Ronald F. Waterman

23 Krueger.d&o

24 k

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(W)96362-41K BY)
VICTOR W. KRUEGER)

* * * * *

On January 9, 1992, the Department Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended denying the subject Application. A timely written exception was received from the Applicant. Objector Tee Bar Ranch submitted a timely written response to the exception. The Applicant did not request an opportunity to present oral argument on his exception.

The Applicant takes exception to the Hearing Examiner's ruling denying Applicant's request that the Hearing Examiner conduct a field inspection of the point of diversion, means of diversion, and place of use for the water right for which this authorization for change is sought. The Applicant argues that the Objector's video (Objector's Exhibit 4) relied upon by the Hearing Examiner, does not accurately portray the layout of the ditches and topography of the area involved. The Applicant renews the request to conduct a field investigation in the exception.

It is the Department's policy that field investigations on the record are conducted by the Hearing Examiner only for complicated cases in which the evidence cannot be otherwise presented. In order to redirect this matter to the Hearing

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Examiner to make additional Findings of Fact as a result of a field examination, newly discovered evidence must be alleged that was not available for the hearing.

See ARM 36.12.231. A rehearing is prohibited. To avoid a prohibited "rehearing", any new evidence should either be newly discovered evidence that a party could not, with reasonable diligence, have discovered and produced at the hearing, or evidence which for other justifiable reason was not adduced at the hearing, and which the Department finds essential to its determination of a case.

The Applicant proposes to change his water rights by adding a second point of diversion on Elk Creek. The water is to be conveyed by the Swanson Ditch, Bell Flat Drain, and Cemetery Ditch to Applicant's property for irrigation. Finding of Fact 11, supported by the record, describes the conveyance system proposed by the Applicant as not continuous. The Swanson Ditch ends a distance estimated to be a few hundred yards from the Bell Flat Drain. Finding of Fact 13 states that water would spread out in a sheet over a one-half to three-quarter mile area between the ditch and the drain.

The Applicant argues that a field investigation would somehow conclude it is all right to allow water to find its way from the Swanson Ditch to the Bell Flat Drain. The reason given by the Applicant to conduct a field investigation does not appear to change the facts. The Applicant's arguments do not indicate that a field investigation would reveal facts not already of record in this matter.

The Applicant excepts, stating a field investigation by the Hearing Examiner is necessary to make the appropriate findings.

The Applicant excepts to the statement found in Finding of Fact 12 that: "There will continue to be a few hundred yards of open field between Bell Flat Drain and the end of Swanson Ditch." The Applicant excepts to Finding of Fact 13, contending that it is replete with conjecture; and Finding of Fact 14 describing the lack of measuring devices, since a field investigation would reveal otherwise.

The Hearing Examiner's Findings 12, 13, and 14 reflect the evidence presented on the record. It is the Applicant's burden to show clearly the proposal and the required criteria of Section 85-2-402, MCA. There is nothing in the record indicating the complicated nature of the proposal where a field investigation would reveal other than the facts as per the record in this matter.

The testimony of the Applicant when describing the proposed system indicates he did not want to trespass and so did not field investigate the conveyance of water from the end of the Swanson Ditch to the Bell Flat Drain. Obtaining an easement or other permission is a reasonable approach to obtain the necessary data and information to design an adequate conveyance system. The Applicant failed to conduct a reasonable and necessary design of the proposed conveyance system before the hearing.

On the record, the Applicant did not propose any measurement and accounting of the waters diverted and conveyed through the proposed ditches and drain that are used by the Objector, per Finding of Fact 14. The Applicant argues in the exception that a

field investigation by the Hearing Examiner would reveal that such measuring devices do exist. The Applicant presents no arguments as to why such evidence could not have been presented at the hearing on this matter. The proposed means of conveyance lacks the necessary measurement devices to assure the proper accounting of the water diverted and without these measurements is unable to prevent adverse effects to other water rights carried in the proposed ditches and drain.

The Applicant excepts to Hearing Examiner's repeated characterization of the channel or draw which forms a part of the means of diversion for Applicant's water right as a "drainway" known as "Bell Flat Drain" in the Hearing Examiner's Proposal for Decision. He argues that this misnomer demonstrates the need for a field investigation.

From the record the physical fact is that water is intended to find its own way from the end of the Swanson Ditch to a drainage ditch dug in the 1940's called Bell Flat Drain in these proceedings. The Applicant intends to divert the water from the "Bell Flat Drain" by an existing headgate into the Cemetery Ditch. From the record the Swanson Ditch does not flow directly into the Bell Flat Drain and has to find its way over an irrigated field before getting to the constructed channel of the drain. Finding of Facts 11, 12 and 13 are clear as to the intended means of conveyance by the Applicant. Regardless of the specific characterization of the drainway, the means of conveyance is not adequate. The inadequacy is not related to the

character of the waterway here called the Bell Flat Drain; it relates to the lack of connection between it and the Swanson Ditch.

The Applicant argues that the Hearing Examiner improperly concluded the Objector's Statement of Claim (Applicant's Exhibit 7) is not sufficient proof that the Objector conveyed water from Elk Creek via the Swanson Ditch, Bell Flat Drain and the Cemetery Ditch to their own lands in Section 8 and that such conclusion illustrates the need for a field investigation by the Hearing Examiner.

Mr. Mosher's testimony, Tr., p. 130, indicated that he thinks it is possible to convey waters as proposed by the Applicant but would take quite a large volume of water. Mr. Mosher's testimony is not that the conveyance was ever used as per the Claim but rather that the means of conveyance is possible. The Statement of Claim is not sufficient proof that water had actually been conveyed by the Objector in a manner similar to that proposed by the Applicant. The issue is the adequacy of the conveyance system proposed by the Applicant. Even if the system has been used in the past, the Applicant does not indicate how the water will be accounted for as it is combined with other water rights in the proposed ditches and drains and spreads out over the gravelly soil between the end of Swanson Ditch and the Bell Flat Drain. The adequacy of the proposed system is not proven.

Applicant's Exhibit 8 is treated as part of the record in this matter by the Hearing Examiner. The oversight or inadvertence to admit it as part of the record has no material effect on the decision in this matter.

The Applicant again excepts to the Hearing Examiner's conclusion that the so-called drain dug by the Moshers is in the bottom of a shallow draw and is not the channel or draw described by the Applicant as part of the proposed conveyance system.

Regardless of the exact location and nomenclature of the drain or tributary, the Applicant's conveyance system is clearly described and discussed by the parties. If there is a confusion among the parties about the exact draw to be used for conveyance, the record does not reflect it. Further, it is the Applicant's responsibility to clearly illustrate the proposed system using maps, photos, expert testimony and other reasonable means. The Hearing Examiner's Findings 6, 7, and 8 accurately reflect the record in this matter. The issue here is the adequacy of the conveyance system, specifically the overland flooding between the Swanson Ditch and the Cemetery Ditch, and the management with other water rights in those ditches. The exact nomenclature is not material to the Proposed Order.

Finally, the Applicant excepts to Conclusion of Law 4, that it is law that water can be turned into the natural channel of another stream, Section 85-2-411, MCA. The Applicant submits that for the Hearing Examiner to conclude the proposed system is not adequate, a physical inspection is necessary.

The Hearing Examiner properly concluded this system requires the natural conveyance of the unnamed tributary and Bell Flat Drain but the proposed system also crudely relies on running water across open ground, fanning out in a sheet between the end of the ditch and the drain. Mr. Mosher speculated that it would take an unusually large volume of water to convey water across the open ground. The Applicant couldn't say if the Swanson Ditch intersected the unnamed tributary (Tr., p. 46). The speculation offered is not the substantial credible evidence necessary to demonstrate the means of diversion, construction, and operation of the appropriation works would be adequate. The statutory criterion for authorization of a change has not been met.

Having given the exception 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 Proposal for Decision and incorporates them herein by reference. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation makes the following:

ORDER

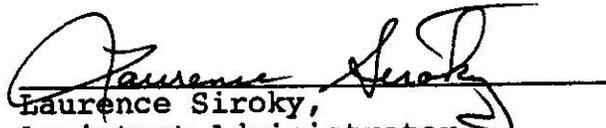
Application to Change Appropriation Water Right G(W)96362-41K by Victor W. Krueger is denied.

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 30 day of June, 1992.


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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 30th day of June, 1992 as follows:

Victor W. Krueger
Box 305
Augusta, MT 59410

Tee Bar Ranch
P.O. Box 389
Augusta, MT 59410

Peter C. Pauly, P.C.
P.O. Box 176
Helena, MT 59624

Ronald F. Waterman
Gough, Shanahan, Johnson &
Waterman
P.O. Box 1715
Helena, MT 59624

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620-2301

John E. Stults, Hearing
Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION)	
WATER RIGHT NO. G96362-41K BY)	PROPOSAL FOR
VICTOR W. KRUEGER)	DECISION

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on October 10, 1991, in Helena, Montana, to determine whether the above-entitled Application should be granted to Victor W. Krueger under the criteria in § 85-2-402(2), MCA.

APPEARANCES

Applicant appeared at the hearing in person and through Peter C. Pauly, attorney at law. Objector Tee Bar Ranch appeared at the hearing by and through Ronald F. Waterman, attorney at law. Carol Mosher, an owner of Tee Bar Ranch, appeared as witness in behalf of Objector Tee Bar Ranch. Roland Mosher, an owner of Tee Bar Ranch, appeared as witness in behalf of Objector Tee Bar Ranch. Objector Montana Power Company, represented by Holly J. Franz, attorney, attended the prehearing conference held immediately prior to the hearing, but withdrew its objection prior to the hearing and did not attend the hearing.

No person representing Objector United States of America - Bureau of Reclamation (USA) appeared at the hearing. The record shows the Notice of Hearing was served on Objector USA August 14, 1991. Objector USA made no arrangements with the Hearing Examin-

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er prior to the hearing. Therefore, the Hearing Examiner ruled at the hearing that Objector USA was in default. Mont. Admin. R. 36.12.208 (1984). That ruling is hereby confirmed. The objection of Objector USA is hereby stricken.

EXHIBITS

Applicant offered the following eight exhibits, all of which were accepted into the record without objection.

Applicant's Exhibit 1, consisting of fifty-seven pages, is a photocopy of an abstract of title for a parcel of land in the S½ of the NW¼ of Section 17, Township 20 North, Range 6 West, M.P.M.

Applicant's Exhibit 2, consisting of thirty-one pages, is a photocopy of a Supplemental Abstract of Title to two tracts of land in the Swanson's Addition of the Townsite of Augusta, Montana.

Applicant's Exhibit 3, consisting of thirty-seven pages, is a compilation of certified photocopies of relevant documents with respect to title to the lands of Applicant, and a listing of said documents.

Applicant's Exhibit 4, consisting of three pages, is a photocopy of a warranty deed from Marie L. Swanson to Henry Wertheimer, Jr., dated July 3, 1945.

Applicant's Exhibit 5, consisting of four pages, is a photocopy of a warranty deed from Marie L. Swanson to Sidney H. Linnerooth, dated July 3, 1945.

Applicant's Exhibit 6, consisting of two pages, is a photocopy of a warranty deed from Henry Wertheimer, Jr., and Audrey

Wertheimer, and Sidney Linnerooth and Lorraine Linnerooth to Robert Mosher, dated March 24, 1948.

Applicant's Exhibit 7, a single page, is a photocopy of the Abstract of Water Right from the Sun River Temporary Preliminary Decree for Water Right Number 41K-W096580-00.

Applicant's Exhibit 8, is a photocopy of pages 67 and 68 of the Sun River District Court Decree.

Objector Tee Bar Ranch (Objector) offered the following four exhibits which were accepted into the record. Exhibits 1, 2, and 3 were accepted without objection. Applicant objected to Exhibit 4 on grounds that it is an incomplete and selective portrayal of the distribution system and surrounding topography. The Hearing Examiner overruled the objection at the hearing, but noted the concerns of Applicant.

Objector's Exhibit 1 is a hand-drawn map, approximately 32 inches by 27 inches and not drawn to scale, of the area of the proposed change indicating the relative general locations of the streams, headgates, ditches, fields, and other features.

Objector's Exhibit 2 consists of seventy-three pages and is a copy of the records of the water commissioner's records on the South Fork of the Sun River (also known as and, for convenience, referred to herein as Elk Creek) from July 1968 through September 1991. Entries referring to allocations to Applicant have been highlighted and tagged.

Objector's Exhibit 3 is a chart, approximately 32 inches by 27 inches, titled "Krueger - Water Commissioner Water Use &

Billings", illustrating the data contained in the Water Commissioner records (Objector's Exhibit 2).

Objector's Exhibit 4 is a video-taped tour, with narrative, of the diversion and conveyance system used by Tee Bar Ranch to take water from Elk Creek and the unnamed tributary of Elk Creek (also known as and, for convenience, referred to herein as Bell Flat Drain), including the ditch Applicant proposes to be his additional point of diversion. The video is on a Kodak VHS T-120 Video Cassette, and is titled "Tee Bar Ranch Co. Irrigation System." It was made by Carol Mosher, on October 3, 1991.

Applicant requested and was given the opportunity by the Hearing Examiner, without objection by Objector, to submit a copy of the full District Court Decree on the Sun River, which was to have been an additional exhibit labelled "Applicant's Exhibit 9." The Hearing Examiner did not receive this exhibit, but finds the record sufficiently complete, without the additional material, to reach a decision in this matter.

Prior to and during the prehearing conference, all parties were expressly given opportunity to review the file maintained by the Department on this Application. No party expressed an objection to any contents of the file being accepted into the record. The file was accepted into the record at the hearing in its entirety.

Thorough expositions of Applicant's proposal and position with respect to objections and of the objections of Objector Tee Bar Ranch were made during the prehearing conference conducted

immediately prior to the hearing. The conference was recorded on audio-tape. At the opening of Applicant's case-in-chief, and in the interest of saving time, both the Applicant and Objector asked the Hearing Examiner to take notice of those expositions. The request was granted. The expositions of Applicant and Objector made and recorded during the prehearing conference are a part of the record in this matter.

In reaching a decision in this matter, the Hearing Examiner took notice of the United States Geological Survey quadrangle map, *Augusta, Mont. 1963*, and the pertinent maps in the *Lewis and Clark County Montana Water Resources Survey*, published by the State Engineer's Office (predecessor to the Department) in June 1957. These documents are cited where they were used.

PRELIMINARY MATTERS

On his Application form, Applicant proposed to change the subject water right by adding a second point of diversion and enlarging the place of use by adding additional acres of irrigation. At a prehearing conference immediately prior to the hearing, Applicant through Mr. Pauly provided considerable discussion of the details of the proposal. It became clear that Applicant no longer intended any future use of the subject water right on the additional area identified in the request for a change to place of use. Objector Montana Power Company moved that the Hearing Examiner dismiss the portion of the Application that addressed a change to the place of use. Objector Tee Bar Ranch joined in the Motion. Applicant expressly did not oppose,

and showed agreement with, the Motion. The Motion to dismiss the place of use portion of the Application was granted. In light of Applicant's agreement with the Motion, the action taken is in actual nature a withdrawal of the place of use portion of the Application rather than a dismissal imposed by the Hearing Examiner. In fact Applicant and both Objectors subsequently referred to this action as the "withdrawal" of the place of use portion of the Application.

Thereafter the Application was only for authorization to add a second point of diversion. As a result of this modification, Objector Montana Power Company withdrew its objection.

FINDINGS OF FACT

1. Application to Change Appropriation Water Right G(W)96362-41K was filed with the Department of Natural Resources and Conservation on July 14, 1988, at 10:11 a.m. (Department's file)
2. Pertinent portions of the application were published in the Great Falls Tribune, a newspaper of general circulation in the area of the proposed source, on July 12, 1989. 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 application. (Department's file)
3. Four timely objections were received by the Department. The principal issues raised by the objections were:

- Applicant's proposed change in point of diversion would result in the diversion of waters appropriated by Tee Bar Ranch.

- Applicant's proposed change to the place of use would result in increased diversion or consumption of water which would adversely impact senior water rights.

Two of the four objections were withdrawn prior to hearing, and one has been stricken. See Appearances and Preliminary Matters, above. The remaining objection is that by Tee Bar Ranch alleging adverse effects from inadequate construction and operation of the proposed diversion and conveyance system. (Department's file)

4. The Application was subsequently modified. See Preliminary Matters, above.

5. Applicant proposes, after modification of the Application, to change his water right, documented by Statement of Claim of Existing Water Right 41K-W96362-00, by adding a point of diversion in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 20 North, Range 6 West, Lewis and Clark County, Montana.¹ Applicant's water right would then have two points of diversion on Elk Creek. (Department's file)

6. There is a headgate on Elk Creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30 which is used to divert water from Elk Creek into an existing ditch, known as Swanson Ditch. Swanson Ditch transports the water under the Elk Creek Road, and onto property belonging

¹ Unless otherwise stated, all legal land descriptions herein are in said Township and Range.

to Tee Bar Ranch in Section 19. (Objector's Exhibit 4 and testimony of Victor Krueger)

7. There is a drainageway, known as Bell Flat Drain, which begins in Section 25, Township 20 North, Range 7 West, and continues northeasterly through Sections 24 and 25 in said Township and Range, and then Sections 19 and 17 until it joins a branch of Elk Creek near the center of Section 17. The drain is in the bottom of a shallow draw. Objector dug the drain ditch in the 1940s; it was four to six feet deep and nine feet wide across the bottom and about two and a half miles long. Water flows in Bell Flat Drain the year round. Water has been observed flowing in the drain in February. (Water Resources Survey, USGS Quadrangle Map, and testimony of Victor Krueger, Carol Mosher, and Roland Mosher)

8. There is a headgate on Bell Flat Drain in the SE $\frac{1}{4}$ of Section 17 which diverts water from Bell Flat Drain into Cemetery Ditch. Both Applicant and Objector use this headgate and ditch to convey water to their irrigated properties in Sections 17 and 8, respectively. (Department's file, Objector's Exhibits 1 and 4, and testimony of Victor Krueger and Roland Mosher)

9. Objector obtains both decreed water rights and shares of Nilan Reservoir water from Smith Creek (a major tributary of Elk Creek) by means of a headgate in Section 34 of Township 20 North, Range 7 West. Some of this water is released into the upper reach of Bell Flat Drain which is used to convey it to the Cemetery Ditch headgate for diversion into Cemetery Ditch and

conveyance to land in Section 8 belonging to and irrigated by Objector. (Objector's Exhibits 1 and 4, Department's file, and testimony of Roland Mosher)

10. The present Application is intended to legally establish the conveyance of water from Elk Creek by means of Swanson Ditch, Bell Flat Drain, and Cemetery Ditch to Applicant's property in the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 17 for irrigation, as part of water right W96362. Since, as stipulated by the parties hereto, area water users divert their shares of Nilan Reservoir water through existing systems, Applicant's proposal is also intended to assure his ability to do so using the route just described. Applicant alleges that this route has been used to transport water from Elk Creek to his property in the past. (Testimony of Victor Krueger)

11. The Swanson Ditch has not been used in the past as the initial diversion and conveyance structure for transporting water from Elk Creek to Applicant's place of use. Applicant had no knowledge of what had happened to water diverted into the Swanson Ditch or how the Swanson Ditch had been operated. Applicant's testimony about his knowledge of the past use of Swanson Ditch and about whether Swanson Ditch connected with Bell Flat Drain was contradictory. Applicant was only able to express assumptions about how water had been delivered to Cemetery Ditch from Elk Creek by the water commissioner to satisfy Applicant's water right and Nilan Reservoir shares. Nothing established that Objector's Statement of Claim identifying use of Swanson Ditch water on Objector's lands in Section 8 represent something that

had ever been done. (Applicant's Exhibit 7, and testimony of Victor Krueger and Roland Mosher)

Objector clearly established that Swanson Ditch ends a distance, roughly estimated to be a few hundred yards, away from Bell Flat Drain. Swanson Ditch has never intersected Bell Flat Drain. To the knowledge of the Moshers, long time residents of the area and Tee Bar Ranch (which owns the property across which much of Swanson Ditch passes and upon which Applicant alleges Swanson Ditch and Bell Flat Drain intersect), Swanson Ditch has never been used as part of a system for transporting Elk Creek water to Cemetery Ditch, or Bell Flat Drain. Swanson Ditch has never been used for anything other than conveying water onto the Tee Bar Ranch land in Section 19 where all of the water is used to irrigate fields around the ditch. (Water Resources Survey, Objector's Exhibit 4, and testimony of Carol Mosher, and Roland Mosher)

12. Applicant proposes to operate the diversion and conveyance system as it presently exists. No connection will be constructed between Swanson Ditch and Bell Flat Drain. There will continue to be a few hundred yards of open field between Bell Flat Drain and the end of Swanson Ditch. (Testimony of Victor Krueger and representations of Mr. Pauly)

13. Water diverted through Swanson Ditch would overflow the end of the ditch nearest Bell Flat Drain. It would then flow by gravity in the same direction Bell Flat Drain runs, generally northeasterly. Water that overflowed the end of Swanson Ditch,

if it continued to flow across the ground, would eventually reach Bell Flat Drain, but could take up to one-half or three-quarters of a mile to do so. It would tend to fan out in a sheet over the land surface between the end of the ditch and the drain.

Some of the water would be absorbed into the soil. It has been the experience of those who have owned and irrigated the area between Bell Flat Drain and the end of Swanson Ditch that the topsoil is thin and water spread on the area percolates quickly into the ground. Some of the percolated water might reach and be collected by the drain as intercepted underground seepage.

Water that might reach and be collected by the drain would not enter at a single point, but would enter in a diffuse manner along an undetermined length of the drain. In addition, actual interception of diffuse surface flows by Bell Flat Drain would be inhibited by a low berm that forms the edge of much of Bell Flat Drain on the Swanson Ditch side of the drain (USGS Quadrangle Map, Applicant's Exhibit 7, and testimony of Victor Krueger, Roland Mosher, and Carol Mosher)

14. The record contains nothing indicating that Applicant has measuring devices in place available to him or that Applicant will be installing measuring devices for determining how much of the water in Bell Flat Drain at the Cemetery Ditch headgate has entered by means of the diffuse accretions, both surface and underground, from the open area between Bell Flat drain and the end of Swanson Ditch.

CONCLUSIONS OF LAW

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

2. The Department gave proper notice of the 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, 2, 3, 4, and 5.

3. The Department must approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the criteria in effect at the time of the application for change, being in regard to this Application § 85-2-402(2) (1987), MCA, are met:

(a) The proposed use 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.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

4. Applicant has not proven that the appropriation works will be adequately constructed and operated.

Applicant must prove by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Codes Ann. § 85-2-402(2)(b) (1991). This has been interpreted to mean an applicant must show their proposed system can be constructed and operated

to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale; In re Application G114754-43D by Betty J. Thayer.

The system Applicant has proposed may, by the crudest of means, be physically capable of making water flow from Elk Creek to Applicant's place of use. See Findings of Fact 5, 6, 7, 8, 9, 12, and 13. What is being proposed may be susceptible to characterization as a system involving the most rudimentary form of natural conveyance, a method of conveyance which is usual and customary in Montana. But even given this leniency, the system as proposed cannot be considered adequate.

The system is clearly likely to suffer much larger than normal losses between the end of Swanson Ditch and Bell Flat Drain. See Finding of Fact 12 and 13. No evidence in the record indicates how much. Thus it cannot be said with certainty that the system would be wasteful, even though both common and general technical sense strongly favor a presumption that it would be wasteful. Nevertheless, Applicant's proposal provides no means of determining what portion of the commingled waters in Bell Flat Drain would be available to Applicant. See Findings of Fact 6, 7, 8, 9, 12, 13, and 14.

The record does show that, when the water flows over the open ground, there is no assurance the water will even reach Bell

Flat Drain. The distance it must travel is undetermined, and was only roughly estimated by Objector's witnesses. The slopes have been only logically hypothesized. Whether the soil is so coarse that all the water would percolate underground before reaching the drain is an unanswered question. See Findings of Fact 11, 12, and 13. There is no evidence in the record that such a method of conveyance has been used successfully anywhere.

Upon thorough review of the entire record, whether this method of "natural conveyance" can or will work here or anywhere is still speculation. Applicant has failed to provide substantial credible evidence the means of diversion, construction, and operation of the appropriation works would be adequate, therefore this statutory criterion for authorization of a change has not been met.

5. Since an Applicant is required to show by substantial credible evidence that all the criteria necessary for approval of the application have been met, and since Applicant in this matter has failed to demonstrate the proposed means of diversion and operation of the appropriation works are adequate, no finding is necessary as to the existence and extent of the subject water right, whether the proposed use will be beneficial, or whether 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 would be adversely affected. See In re Application 53221-s400 by John E. and Betty J. Carney; In re Application 61333-s40A by Reuben C. Pitsch.

PROPOSED ORDER

Application to Change Appropriation Water Right G(W)96362-41K by Victor W. Krueger is denied.

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. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues.

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

Dated this 9th day of January, 1992.



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 of record at their address or addresses this 10th day of January, 1992, as follows:

Victor W. Krueger
Box 305
Augusta, MT 59410

Tee Bar Ranch
P.O. Box 389
Augusta, MT 59410

Michael Zimmerman
General Counsel
Montana Power Company
40 East Broadway
Butte, MT 59701

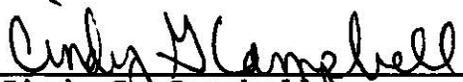
Peter C. Pauly, P.C.
P.O. Box 176
Helena, MT 59624

Ronald F. Waterman
Gough, Shanahan, Johnson &
Waterman
P.O. Box 1715
Helena, MT 59624

John Chaffin
Office of Solicitor
U.S. Dept. of the Interior
Bureau of Reclamation
P.O. Box 31394
Billings, MT 59107-1394

Holly J. Franz
Gough, Shanahan, Johnson &
Waterman
P.O. Box 1715
Helena, MT 59624

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary