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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V111165-76H BY WILLIAM A. ~~WORF AND EVA J.~~ WORF AND THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V151753-76H BY JOSEPH E. BROWN	)	ADDENDUM TO FINAL ORDER

* * * * * * * * * * *

The description of the past place of use of Water Right No. V151753-76H, occurring at page 9 of the Proposal for Decision, July 7, 1986, and repeated on page 2 of the Final Order, May 5, 1987, contains two typographical errors.

The past place of use of said right is erroneously described as being " . . . located in the NE¼NE¼ of Section 20 and in the SE¼SE¼ of Section 20; all in Township 09 North, Range 20 West, Ravalli County, Montana, ..." The correct description is " . . . located in the NE¼NW¼ of Section 20 and in the SE¼NW¼ of Section 20; all in Township 09 North, Range 20 West, Ravalli County, Montana, ..."

The Final Order is hereby amended to reflect the correct description.

DONE this 14 day of March, 1988.

Gary Fritz

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

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing ADDENDUM TO FINAL ORDER was served by mail upon all parties of record at their address or addresses this 22nd day of March, 1988, as follows:

Joseph E. Brown
363 Kootenai Creek Road
Stevensville, MT 59870

Vernett H. Ellis
186 Silverthorn Drive
Stevensville, MT 59870

Charlynn J. Steele
3800 Salish Trail
Stevensville, MT 59870

Dominick L. Ruffatto
Verna I. Ruffatto
Route 2, Box 197
Stevensville, MT 59870

Baldwin Land & Cattle Co.
Carl W. Baldwin, Jr.
3549 Salish Trail
Stevensville, MT 59870

Darlene M. Cotton
Kay M. Cotton
3734 Salish Trail
Stevensville, MT 59870

Mike McLane
Missoula Field Manager
P O Box 5004
Missoula, MT 59806
(inter-departmental mail)

William A. Worf
Eva J. Worf
585 Kootenai Creek Road
Stevensville, MT 59870

Bruce R. Nelson
Patsy M. Nelson
P O Box 416
Stevensville, MT 59870

Carl S. and Nancy Scott
P O Box 424
Florence, MT 59833

Lonnie T. Ebel
3720 Salish Trail
Stevensville, MT 59870

William T. Gilleard
3759 Salish Trail
Stevensville, MT 59870

Maurice Owen
463 Timber Trail
Stevensville, MT 59870

Robert Scott
Hearing Examiner
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand delivered)

Susan Howard

Susan Howard
Hearings Reporter

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BB

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V111165-76H BY WILLIAM A. WORF AND EVA J. WORF AND THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V151753-76H BY JOSEPH E. BROWN	)	FINAL ORDER

* * * * * * * * * *

The time period for filing exceptions to the Hearings Examiner's Proposal for Decision in this matter has expired. Timely exceptions to the Proposal for Decision were submitted by Applicants, William A. Worf and Eva J. Worf, and Applicant, Joseph E. Brown on July 29, 1986. Oral arguments were held before the agency in Hamilton, Montana on December 10, 1986.

The Department of Natural Resources and Conservation (Department or DNRC) accepts and adopts the Findings of Fact of the Hearings Examiner as contained in the July 7, 1986 Proposal for Decision, and incorporates them herein by reference. The agency modifies the Conclusions of Law contained in the Proposal for Decision as specified in the attached Memorandum to the Order. Based on the Findings of Fact and Conclusions of Law as modified, all files and records herein, and the Memorandum to the Order, the Department makes the following:

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ORDER

Subject to the terms, restrictions, and limitations specified below, Application to Sever and Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown is hereby granted to sever, for sale to William A. and Eva J. Worf, no more than 20 miner's inches from certain lands to which it is presently appurtenant, located in the NE¼NE¼ of Section 20 and in SE¼SE¼ of Section 20, all in Township 09 North, Range 20 West, Ravalli County, Montana, as follows:

Applicant Brown may sever up to 20 miner's inches; however, he must remove from irrigation under above-said water right 1.04 acres for every miner's inch severed hereunder. (The acres removed must be contiguous one to another.) Within 30 days of service hereof, he must file with the Department a statement of the number of miner's inches to be severed as well as an exact description of the acreage to be removed from irrigation under Appropriation Water Right No. 151753-76H. The volume severed from said right will be 3.08 acre-feet per miner's inch severed.

Receiver Worf must apply the severed and transferred portion of Appropriation Water Right No. 151753-76H to a number of acres equal to that number of acres from which it has been severed by Applicant Brown. (The acres to which it is to be applied must be contiguous one to another.)

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Within 30 days of service hereof Worf must file with the Department an exact description of the (contiguous) acreage to which the severed right is to be applied.

Subject to the terms, restrictions and limitations specified below, Application to Sever and Sell Appropriation Water Right No. V111165-76H by William A. and Eva J. Worf is hereby granted to sever, for sale to Joseph E. Brown, no more than 20 miner's inches from certain lands to which it is now appurtenant, located in the NE¼NE¼ of Section 19 and in the W½NW¼NW¼ of Section 20; all in Township 09 North, Range 20 West, Ravalli County, Montana, as follows:

Applicant Worf may sever up to 20 miner's inches; however, he must remove from irrigation under Appropriation Water Right No. W111165-76H 1.6 acres for every miner's inch severed hereunder. (The acres removed must be contiguous one to another.) Within 30 days of service hereof, he must file with the Department a statement of the number of miner's inches to be severed as well as an exact description of the acreage to be removed from irrigation under Appropriation Water Right No. 111165-76H. The volume severed will be 3.84 acre-feet per miner's inch severed.

Receiver Brown must apply the severed and transferred portion of Appropriation Water Right No. 111165-76H to a number of acres equal to that number of acres from which it

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was severed. (The acres to which it is to be applied must be contiguous one to another.) Within 30 days of service hereof, Mr. Brown must file with the Department an exact description of the (contiguous) acreage to which the severed portion of Appropriation Water Right No. 111165-76H is to be made appurtenant.

No Change Authorizations will issue until the required information has been received from the parties hereto.

These Change Authorizations, when issued, are subject to the following express terms, conditions and restrictions:

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

B. The Applicants shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Each Applicant shall maintain a device in his diversion system for taking accurate measurements of the flow being diverted. He shall keep written records in which are noted (1) the dates on which water is diverted; (2)

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under which right water is being diverted; (3) the duration of the diversion on that date. (If diversion is made pursuant to more than one right on a given date, the duration of diversion of each right shall be separately recorded for that date.) Applicants shall submit such records to the Department upon request.

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 5th day of May, 1987.

Gary Fritz

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

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MEMORANDUM TO FINAL ORDER
Applications V111165-76H and V151753-76H by Worf/Brown

The Applicants in this case seek to exchange water rights with different priority dates. Specifically, Applicant Brown seeks to sever and sell to Applicant Worf 20 mine inches of his claimed "first" water right in exchange for 20 inches of Worf's "eighth" right and other valuable consideration. Based on the facts and evidence on the record the Hearings Examiner concluded that the Applicants had failed to demonstrate that the sever/sell will not adversely affect the water rights of other persons, and that the proposed change could not be administered so as to eliminate potential adverse effect. Conclusions of Law Nos. 10 and 11, Proposal for Decision.

Applicants filed exceptions to the Proposal for Decision. These exceptions concentrate on two major issues: 1) Whether the Applicants can make use of all waters diverted from Sharrott Creek without adversely affecting other appropriators because water entering Kootenai Ditch No. 6 should be classified as seepage, drainage, and waste water, instead of return flow; and, 2) whether Applicants should be entitled to expand acreage irrigated by the first right because of substantial water salvaged by upgrading the conveyance and irrigation system.

A. RETURN FLOW

The Hearings Examiner found that the Applicant's historic irrigation practices generated return flows, such flows ultimately returning to Sharrott Creek by way of Kootenai Ditch No. 6. Finding of Fact No. 13, Proposal for Decision.

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In their exceptions, Applicants acknowledge that "some very small amount" of water leaving the Brown property could have reached Sharrott Creek via the Kootenai Ditch No. 6. Applicant's Exception No. 5. However, they contend that this water should be characterized as "seepage, drainage, and waste waters" and not return flows. The Applicants rely on Section 2.3.6 of the Montana Water Law Handbook to support their claim that since no runoff water returns to the source of supply naturally, this water must be considered seepage, drainage, and waste water, and the fact that it returns to the stream via a manmade ditch does not change its status to return flow. Doney, Montana Water Law Handbook, §2.3.6, (1981) pages 20-22. While this is an interesting argument, it is unnecessary to make a distinction between return flows and seepage, drainage, and waste waters in this particular instance.

As the Proposal for Decision aptly points out, a water right does not include the right to recapture return flows unless this right was exercised along with the original appropriation. Conclusion of Law No. 7, Proposal for Decision. Applicants try to avoid this by alleging that these waters are not return flows, but seepage, drainage, and waste waters. However, as the Montana Water Law Handbook points out, although an appropriator has no right to have waste waters continue, waste waters can be appropriated on a first in time, first in right basis. Doney, Montana Water Law Handbook, §2.3.5, (1981) pages 19-20. Therefore, even if considered waste water, Applicant's recapture of the waste water would amount to an appropriation and is

subject to the right of prior appropriators.[1] This exception is overruled.

B. SALVAGE

The Applicants also except to Finding of Fact No. 15 in the Proposal For Decision, which states: "neither Applicant has presented evidence as to the amount of water, if any, salvaged." The facts in this case show that the Applicants have replaced the old earthen ditch system with pipe in order to cut down on conveyance losses, and that they have changed the irrigation system at the place of use from flood to sprinkler. Therefore, the Applicants claim that they should be entitled to expand the amount of acres irrigated with the first right because they have "salvaged" some portion of the water under that right which was previously lost. See Final Order, In the Matter of the Application for Change of Appropriation Water Right No. G34573-76H by Carrie M. Grether, September 10, 1986 [hereinafter Grether].

[1] The Department makes no determination as to whether the water that rejoins Sharrott Creek through Kootenai Ditch No. 6 should be characterized as return flow or seepage, drainage or waste water. However, for the sake of convenience and in keeping with the Hearing Examiner's Proposal for Decision, these waters will be referred to as return flow.

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The Hearings Examiner concluded that:

> Applicants have presented no factual evidence to support the allegation that water is salvaged by changed delivery and irrigation systems...Absent substantial credible evidence allowing quantification of amounts salvaged, no conclusion can be reached as to whether the salvaged amount is sufficient for continued full-service irrigation of the original place of use. As any shortage could be taken from the historic return volume, which must now remain undiverted, and because lack of quantification renders impossible a determination of when said return flow is being diverted, the possibility of adverse affect to other appropriators exists. Conclusion of Law No. 10, Proposal For Decision. (Footnote omitted.)

The Applicants assert there is strong evidence on the record as to the amount of salvage. They cite the testimony of Dee McPherson that conveyance losses were up to half of the amount diverted, that aerial photos showed phreatophyte use of water, and their own testimony as to the inefficiency of the old conveyance system and the increased efficiency of the irrigation system. Applicants Exception No. 7. They also claim that return flows through Kootenai Ditch No. 6 received by Objector Gilleard were not "given much significance" by the Objectors. Applicant's Exception No. 4.

The Grether case, on which the Applicants rely, defines the term "salvage" as:

> Making available for beneficial use through water-savings practices water of acceptable quality from existing water entitlements that would otherwise be irretrievably lost to the source of supply. Irretrievable losses typically result from nonproductive evapotranspiration, evaporation, water loss through deep percolation which is not physically or economically retrievable for use, return flows that are rendered unusable to other appropriators because of deterioration in water quality, etc. Grether, supra Final Order at 4-5.

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Applicants in Grether were allowed to expand acreage with water salvaged. In that case, Applicants delineated the extent of historic use and provided factual information on increased efficiencies and acreage to be added under the proposed change. The facts of the case also showed that there were no other appropriators on that reach of the source of supply to be affected.

By statute the agency may only grant changes if the Applicant proves by substantial credible evidence that he has an existing water right for which a change can be granted (including water developed through salvage) and that other appropriators will not be adversely affected. §85-2-402, MCA. The burden of proof lies with the applicant to show the amount of water salvaged. The Applicants in this matter offer no specific proof as to actual amounts of water that they claim are salvaged, only stating that it is "substantial."

Testimony presented in this case shows that there may indeed be substantial, though unquantified, amounts of water salvaged. However, the Hearings Examiner concluded that the evidence on the record was insufficient to quantify the amount of water salvaged by increased efficiencies in the conveyance and irrigation systems. The Hearings Examiner is given wide latitude to adjudge the facts of the case. §85-2-621(3), MCA. The Hearings Examiner's conclusion that there is insufficient evidence to quantify salvage is reasonable and based on the record and will not be overturned.

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In order for the DNRC to grant a change allowing an applicant to expand acreage, the applicant must provide sufficiently detailed evidence to quantify salvage. For example, in this case the Applicants could have quantified salvage by delineating historic use in the conveyance system or at the place of use. The difference in efficiency between the ditch when the appropriation was first perfected and the more efficient pipeline, supported by expert or detailed factual testimony, would be substantial credible evidence on which a finding on the amount of water salvaged and available to irrigate additional acreage could be based. The Hearings Examiner's finding that a passing statement by Dee MacPherson that "at least half" of the water diverted from the ditch when it was in a dilapidated condition, that phreatophytes were growing in the area, and that the old system was antiquated and in desperate need of repair is not substantial credible evidence sufficient to base a finding on the quantity of water salvage is correct.

An applicant in a change proceeding may also show that he has salvaged water by going to a more efficient irrigation system at the place of use. The applicant must demonstrate the reasonable historic use (typically the historic consumptive use) and the difference in efficiencies between system historically used and the proposed system. The quantity of salvage can then be determined. In this case the Applicant's have gone from flood to sprinkler irrigation. Sprinkler irrigation is generally recognized as being more efficient; however, no evidence exists in the record to determine historic use sufficient to quantify

salvage. The Applicants have failed to meet their burden of proof to quantify salvage and the Hearings Examiner properly denied Applicant's proposed expansion of irrigated acreage.

A limitation inherent in examining whether an appropriator has salvaged water is that a senior water rights holder "cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the water right was [established], <u>to the injury of subsequent appropriators</u>." <u>Quigley v. McIntosh</u> 100 Mont. 495, 505 (1940). (Emphasis added.) The Hearings Examiner noted that the record was insufficient to establish how much return flow reached Kootenai Ditch No. 6 and was appropriated by other persons. Statute requires that the DNRC make an affirmative finding that the proposed change will not adversely affect the water rights of other persons. §85-2-402(2)(a), MCA. It is up to the Applicant to show that other appropriators' water rights will be met under the proposed change or that water sufficient to meet those rights will remain in the stream for their use. Lack of substantial credible evidence on the record adequate to meet the Applicants' burden of proof to show no adverse affect to other appropriators by delineating the extent of salvage water available prevents the DNRC from granting a change that allows expanded acreage.

C. ALTERNATIVE

Extrapolating from the reasoning set forth in the Proposal, it appears that a simple exchange of places of use (without expanding acreage or altering the other important parameters such

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as the flow rate to acreage ratio) would not result in more than minor changes in the pattern of historic use and hence would not yield any significant increase in the consumptive use of water by the Applicants. Cf. Conclusion of Law 11, Proposal for Decision. Hence, under a simple exchange there would be no adverse effect to appropriators of return flow, for the water, formerly resulting in return flow under flood irrigation, would remain undiverted under sprinkler irrigation and available to appropriators diverting from Sharrott Creek. Cf. Conclusion of Law 10 at p. 20, Proposal for Decision. However, in order that the exchange result in only minor changes in the historic use pattern, it remains essential that the parameters of the historic use be preserved to the greatest possible extent. Therefore, if the Applicants exchange 20 miner's inches of water, each must retire the proportionate parcel of land historically irrigated with that water (i.e., Brown must retire 20.8 acres and Worf must retire 32 acres.) The Applicants' choices in this regard are set forth in the Order. By maintaining the significant parameters of the rights as near the historic use as possible, a simple change in location of place of use should have only a de minimus effect on water availability to other appropriators.

Therefore, the Proposal for Decision is modified to grant the Changes as specified in the Final Order. To provide that historic parameters of use are not exceeded and to aid in administration and monitoring of the rights, land irrigated by the exchanged right must be contiguous (as delineated by the

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Applicants). Furthermore, for ease of administration and to prevent expanded use of the first right, specific records must be kept for areas irrigated by first right water.

Wherefore, the Department makes the following modifications to the Proposal for Decision of July 7, 1986:

I. The last paragraph of Conclusion of Law 11, on p. 23 is hereby deleted and the following inserted:

> The only plan under which severance and transfer of these rights could be administered so as to minimize the risk of adverse effect to other appropriators (absent quantification of return volume) is a plan which does not significantly alter the parameters of the claimed historic rights. In the present case this may be accomplished by maintaining unchanged through the severance and transfer the present flow to appurtenancy ratio (flow rate per acre irrigated). That is, every miner's inch transferred must irrigate the same amount of acreage as was claimed historically irrigated with that miner's inch. More precisely, for each miner's inch of first right water transferred, 1.04 acres must be removed from irrigation under that right at the historic place of use, and <u>only</u> 1.04 acres may be irrigated thereunder at the new place of use. Similarly, for each miner's inch of eighth right water

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transferred, 1.6 acres must be removed from irrigation under that right at the original place of use, and only 1.6 acres may be irrigated thereunder at the new place of use.

II. Conclusion of Law 12, at p. 24 is hereby deleted and the following inserted:

12. Either Applicant, or both, is free to apply for an Authorization to Change his Appropriation Water Rights to allow expansion of acreage irrigated when sufficient substantial credible evidence has been amassed to meet the burden imposed by § 85-2-402(1) MCA (1985).

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AFFIDAVIT OF SERVICE
MAILING

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

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 5, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department of Natural Resources & Conservation (DNRC) on the Application by William A. Worf & Eva J. Worf, Application to Sever & Sell Appropriation Water Right No. V111165-76H, and Application to Sever & Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown, addressed to each of the following persons or agencies:

Joseph E. Brown
363 Kootenai Cr. Rd.
Stevensville, MT 59870

Vernett H. Ellis
186 Silverthorn Dr.
Stevensville, MT 59870

Charlynn J. Steele
3800 Salish Trail
Stevensville, MT 59870

Dominick L. Ruffatto
Verna I. Ruffatto
Rt. 2, Box 197
Stevensville, MT 59870

Baldwin Land & Cattle Co.
Carl W. Baldwin, Jr.
3549 Salish Trail
Stevensville, MT 59870

Darlene M. Cotton
Kay M. Cotton
3734 Salish Trail
Stevensville, MT 59870

William A. Worf
Eva J. Worf
585 Kootenai Cr. Rd.
Stevensville, MT 59870

Bruce R. Nelson
Patsy M. Nelson
PO Box 416
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Carl S. Scott
Nancy Scott
PO Box 424
Florence, MT 59833

Lonnie T. Ebel
3720 Salish Trail
Stevensville, MT 59870

William T. Gilleard
3759 Salish Trail
Stevensville, MT 59870

Maurice Owen
463 Timber Trail
Stevensville, MT 59870

CASE #

Mike McLane
Water Rights Bureau
Field Office Manager
PO Box 5004
Missoula, MT 59806
(inter-departmental mail)

Robert Scott
Hearing Examiner
DNRC
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand-issue)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

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

On this 5th day of MAY, 1987, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1990

CASE #

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V111165-76H BY WILLIAM A. WORF AND EVA. J. WORF AND THE APPLICATION TO SEVER AND SELL APPROPRIATION WATER RIGHT NO. V151753-76H BY JOSEPH E. BROWN	)	PROPOSAL FOR DECISION

* * * * * * * * * *

Because both above-captioned Applications involve substantially the same questions of law and fact, and because a ruling on one Application would affect the rights of parties in the other case, and whereas consolidation would not substantially prejudice any party, both Applications were consolidated for a single hearing, pursuant to the consent of all parties. See ARM § 36.12.210.

Subsequently, pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985) and The Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-captioned consolidated matter was held on March 13, 1986 in Hamilton, Montana.

Appearances

Applicants William A. Worf and Eva J. Worf (hereafter, "Applicant Worf") both appeared in person, and were represented by William A. Worf.

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Applicant Joseph E. Brown appeared pro se.

--James M. McKinley, former owner of Applicant Brown's claimed water right, appeared as a witness for both Applicant Worf and Applicant Brown.

--Maurice L. Owen appeared as a witness for both Applicant Worf and Applicant Brown.

Objector Baldwin Land and Cattle Co. appeared by and through Carl W. Baldwin, Jr. pro corpore.

Objectors Darlene M. Cotton and Kay M. Cotton (hereafter, "Objector Cotton") were represented by Kay M. Cotton.

Objector William T. Gilleard appeared pro se.

--Effie Lubbers appeared as a witness for Objector Gilleard.

--Dee MacPherson appeared as a witness for Objector Gilleard.

Objectors Bruce R. Nelson and Patsy M. Nelson (hereafter, "Objector Nelson") were represented by Bruce R. Nelson.

Objector Charlynn J. Steele appeared and was represented by Bob Steele.

Michael P. McLane from the Missoula Water Rights Bureau Field Office appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC").

STATEMENT OF THE CASE

On June 11, 1985 at 5:30 p.m., Joseph E. Brown filed an Application to Sever and Sell a portion of his claimed Appropriation Water Right No. W151753-76H to William A. Worf and Eva J. Worf. Simultaneously, William A. Worf and Eva J. Worf

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filed an Application to Sever and Sell a portion of their claimed Appropriation Water Right No. W111165-76H to Joseph E. Brown.

These Applications were made pursuant to an agreement between Applicant Worf and Applicant Brown whereby, in consideration for services rendered by Applicant Worf, Applicant Brown would grant to Applicant Worf 20 miner's inches of his claimed water right, priority date December 20, 1881, in exchange for 20 miner's inches of Applicant Worf's claimed water right, priority date April 1, 1895. Each water right would be severed from the land to which it presently is appurtenant and made appurtenant to land owned by the designated receiving parties.

Objector Gilleard alleges partial abandonment of Applicant Brown's water right, further claims that neither Applicant is acting in good faith vis-a`-vis his intent to abide by the parameters of the Authorization as applied for, and finally claims that the exchange will adversely affect the return flow historically available to other users of the source.

Objectors Baldwin, Cotton, and Steele allege partial abandonment of Applicant Brown's water right, claiming that the 20 miner's inches which Brown seeks to sever and sell has not historically been beneficially used, and further allege that splitting the December 20, 1881 right now owned by Applicant Brown, between Applicant Brown and Applicant Worf, will result in increased diversion of water by volume over that which the owner of that right is entitled to divert, thereby adversely affecting appropriators with later priority dates by reducing the amount of water historically "turned back", i.e. left undiverted due to lack of need.

Exhibits

Applicant Brown submitted four exhibits for the record.

Applicant Brown Exhibit 1 consists of a nine-page statement which Applicant Brown read at the hearing, signed by Applicant Joseph Epes Brown, to which are appended nine "Exhibits". "Exhibit A" is a photocopy of a document entitled "Basis of Objection" signed by Bruce R. Nelson and Patsy M. Nelson, dated September 4, 1985; "Exhibit B" is a photocopy of a topographic map purporting to show the general area of use of the Worf and Brown claims; "Exhibit C" is a photocopy of a Water Resources Survey field form for Ravalli County prepared on October 21, 1957 by Vaughn Chadbourne re Daniel Harrington lands; "Exhibit D" is a photocopy of Plat 8 showing Township 09 North, Range 20 West, Ravalli County, Montana; "Exhibit E" is a photocopy of a Ravalli County Water Resource Survey Map for Township 09 North, Range 20 West; "Exhibit F" is a photocopy of an aerial photo purporting to show the borders of Applicant Brown's property marked in red and water delivery system marked in black; "Exhibit G" is a photocopy of a statement purportedly signed by James M. McKinley, dated February 10, 1986; "Exhibit H" is a photocopy of a statement purportedly signed by Maurice L. Owen, dated February 9, 1986; "Exhibit I" is a photocopy of an affidavit purportedly sworn to by William T. Gilleard on August 25, 1985, together with photocopies of statements purportedly signed by Leo Lubbers, Jeff Cadier and Marilyn Cadier.

Applicant Brown Exhibit 1 was admitted without objection.

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Applicant Brown Exhibit 2 is a hand-drawn map entitled "Kootenai Creek Ranch--Proposed Sprinkler Irrigation System: Sharrott Creek Water".

Applicant Brown Exhibit 2 was admitted without objection.

Applicant Brown Exhibit 3 is a photocopy of a two-page agreement, dated April 29, 1985, by and between Joseph E. Brown and William A. Worf and Eva Jean Worf, husband and wife.

Applicant Brown Exhibit 3 was admitted without objection.

Applicant Brown Exhibit 4 is a photocopy of a one-page agreement, dated May 21, 1985, by and between Joseph E. Brown and Maurice Owen.

Applicant Brown Exhibit 4 was admitted without objection.

Applicant Worf submitted two exhibits for the record.

Applicant Worf Exhibit 1 consists of a four-page statement signed by (Applicants) William A. Worf and Eva Jean Worf, which Applicant read at the hearing, to which are appended "Exhibit B" through "Exhibit G". "Exhibit B" is a photocopy of the same subject matter referenced as "Exhibit C" under Applicant Brown Exhibit 1, supra; "Exhibit C" is a photocopy of the same subject matter referenced as "Exhibit D" under Applicant Brown Exhibit 1, supra; "Exhibit D" is a photocopy of the same subject matter referenced as "Exhibit E" under Applicant Brown Exhibit 1, supra; "Exhibit E" is a photocopy of the same subject matter referenced

as "Exhibit G" under Applicant Brown Exhibit 1, supra; "Exhibit F" is a photocopy of the same subject matter referenced as "Exhibit F" under Applicant Brown Exhibit 1, supra; "Exhibit G" is a photocopy of the same subject matter referenced as "Exhibit B" under Applicant Brown Exhibit 1, supra.

Applicant Worf Exhibit 1 was not formally admitted at the hearing due to an oversight on the part of the Hearing Examiner. However, as its content was simply a recapitulation of testimony presented at the hearing, and as its Exhibits are duplicative of those admitted under Applicant Brown Exhibit 1, and as no objections to its admission were voiced at the hearing, the Hearing Examiner hereby accepts Applicant Worf Exhibit 1 into the record.

Applicant Worf Exhibit 2 consists of an aerial photograph of the vicinity of Applicant Worf's and Applicant Brown's properties. Property lines and ditch routes are marked thereon.

Applicant Worf Exhibit 2 was admitted without objection.

Objector Gilleard submitted seven exhibits for the record.

Objector Gilleard Exhibit 1 consists of a typed statement, dated March 13, 1986, purportedly signed by Tom Ruffato, Bitterroot Conservation District Supervisor.

Objector Gilleard Exhibit 2 consists of a typed statement, dated December 30, 1985, purportedly signed by Tom Ruffato, Bitterroot Conservation District Supervisor, which references appended photocopied pictures.

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Objector Gilleard Exhibit 3 consists of a typed memo, dated September 6, 1985, addressed to Keith Robertson, District Conservationist, Soil Conservation Service (hereafter, "SCS"), purportedly signed by Forrest E. Berg, Civil Engineer, SCS.

Applicants objected to the admission of Objector Gilleard Exhibits 1, 2 and 3 on the grounds that the documents are hearsay, the purported authors not being present at the hearing. Hearsay is admissible in the proceeding, see Administrative Rule of Montana § 36.12.221, if it has probative value and is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs.

The exhibits were introduced in an attempt to substantiate alleged bad faith on the part of the Applicants vis-a`-vis their intent to abide by the terms of the Authorization if granted. The Hearing Examiner finds the documents have some small probative value relating to a determination of administrability of the Authorization applied for, and further finds they are of the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. Therefore, Objector Gilleard Exhibits 1, 2 and 3 are hereby accepted into the record in this matter.

Objector Gilleard Exhibit 4 is a recapitulation of the basis of Objector Gilleard's objections to these Applications, which he stated and expanded upon at the hearing.

Objector Gilleard Exhibit 4 was admitted without objection.

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Objector Gilleard Exhibit 5 is an aerial photograph, taken by Maurice Owen in 1985, purporting to show the Dee MacPherson property and pipeline cuts on and near said property.

Objector Gilleard Exhibit 5 was admitted without objection.

Objector Gilleard Exhibit 6 is an aerial photograph taken by Maurice Owen in 1985, purporting to show the Dee MacPherson property, and marked in blue ink to emphasize the Latta ditch and Larson Creek.

Objector Gilleard Exhibit 6 was admitted without objection.

Objector Gilleard Exhibit 7 consists of two documents and a note. One document, unsigned and undated, is entitled "Easement" from Dee MacPherson to Joseph E. Brown. The other document is a photocopy of a "Termination of Easement", dated June 7, 1985 and signed by Joseph E. Brown and Maurice L. Owen. The note is addressed to "Dee" and purportedly includes instructions regarding the two documents above described.

Objector Gilleard Exhibit 7 was admitted without objection.

No other Objector submitted exhibits.

Michael P. McLane submitted two Department files pertaining to the matter for the record. The files were admitted without objection.

PROPOSED FINDINGS OF FACT

1. Both Applications in this matter were regularly filed with the DNRC on June 11, 1985 at 5:30 p.m.

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2. The DNRC has jurisdiction over the parties hereto and over the subject matter herein.

3. The pertinent facts of both Applications were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on August 14 and August 21, 1981.

4. The source to which both Applications in this matter pertain is Sharrott Creek, a tributary of the Bitterroot River.

5. Applicant Brown has filed Claim of Existing Water Right No. W151753-76H bearing a priority date of December 20, 1881 (rights with this priority date are known as the "first rights" on Sharrott Creek) to 50 miner's inches up to 154 acre-feet per year of Sharrott Creek water (hereafter, "Brown's 50 miner's inches") appurtenant to 52 acres: 40 acres in the NE¼NE¼ of Section 20 and 12 acres located in an unspecified portion of the SE¼NE¼ of Section 20, all in Township 09 North, Range 20 West, Ravalli County, Montana. (Department Records, Testimony of Applicant Brown.)

Applicant Brown seeks hereunder to sever 20 miner's inches (.5 cfs) up to 61.6 acre-feet per year (hereafter referred to as "Brown's 20 miner's inches") from above-said acreage. (Application.) Applicant Brown has not specified a particular tract from which the right is to be severed, as it is his intent to utilize the 30 miner's inches remaining unsevered to irrigate the entire 52 acres to which 50 miner's inches is presently claimed appurtenant. (Testimony of Applicant Brown.)

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Applicant Brown would transfer Brown's 20 miner's inches to Applicant Worf, designated receiver in Brown's Application, for sprinkler irrigation of 20 acres: 17 acres located in the NE¼NE¼ of Section 19 and 3 acres located in the W½W½NW¼ of Section 20, all in Township 09 North, Range 20 West, Ravalli County, Montana. (Application.) Exact legal descriptions of these proposed places of use were not submitted for the record.

6. Applicant Worf has filed Claim of Existing Water Right No. 111165-76H bearing a priority date of April 1, 1895 (rights bearing this priority date are known as the "eighth rights" on Sharrott Creek) to 31.25 miner's inches up to 120 acre-feet (hereafter, "Worfs' 31.25 miner's inches") per year appurtenant to 50 acres, to wit: 40 acres in the NE¼NE¼ of Section 19 and 10 acres located in an unspecified portion of the W½NW¼NW¼, all in Township 09 North, Range 20 West, Ravalli County, Montana.

Applicant Worf seeks hereunder to sever 20 miner's inches (.5 cfs) up to 61.6 acre-feet per year (hereafter referred to as "Worf's 20 miner's inches") from above-said acreage. Applicant Worf has not specified a particular tract from which the right is to be severed, as it is his intent to utilize the 11.25 miner's inches remaining unsevered to irrigate the entire 50 acres to which 31.25 miner's inches is presently claimed appurtenant.

Applicant Worf would transfer Worf's 20 miner's inches to Applicant Brown, designated receiver in Worf's Application, for sprinkler irrigation of 20 acres: 17 acres located in the NE¼NW¼ of Section 20 and 3 acres located in the SE¼NE¼ of Section 20,

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all in Township 09 North, Range 20 West, Ravalli County, Montana. (Application.) Exact legal descriptions of these proposed places of use were not submitted for the record.

7. The point of diversion of Brown's 20 miner's inches would be moved hereunder approximately 10 feet upstream to Worf's point of diversion presently in use pursuant to Claimed Existing Water Right No. 111165-76H. (Field Report in Department File.) However, the legal description of said point of diversion would remain unchanged; it is, and would remain, the NW¼SW¼SE¼ of Section 19, Township 09 North, Range 20 West, Ravalli County, Montana.

The point of diversion of Worf's 20 miner's inches would be moved hereunder approximately 10 feet downstream to Brown's point of diversion, presently in use pursuant to Claimed Existing Water Right No. 151753-76H. (Field Report in Department File.) However, the legal description of said point of diversion would remain unchanged; it is and would remain the NW¼SW¼SE¼ of Section 19, Township 09 North, Range 20 West, Ravalli County, Montana.

8. The proposed changes in point of diversion will not of themselves affect other appropriators on Sharrott Creek.

9. According to Applicant Brown's Application, water appropriated pursuant to Claim No. 151753-76H is currently diverted by means of flume and ditch of 75 miner's inch capacity.

Evidence presented at the hearing, however, shows that, although flume and ditch have been used historically, since the date of filing of the Application said flume and ditch have been replaced by a PVC (polyvinyl chloride) pipeline. (Testimony of Applicants.)

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10. Historically, the irrigation method utilized under Claim No. 151753-76H and Claim No. 111165-76H has been flood irrigation. Applicant Worf has converted his irrigation method from flood irrigation to sprinkler irrigation. Applicant Brown plans to convert to sprinkler irrigation of the place of use described in the claim. (Testimony of Applicant Brown.)

11. Applicant Worf, as receiver of Brown's 20 miner's inches, would convey same from his point of diversion to the place of use utilizing a PVC pipeline of 50 miner's inch capacity, which is presently used to convey water pursuant to Claim No. 111165-76H. This pipeline is also used to convey water to other appropriators. (Testimony of Applicant Worf.)

12. The total amount of acreage irrigated by Brown's 50 miner's inches of first right water would increase from 52 acres to 72 acres under the proposed severance (Brown's 52 acres plus the 20 acres which Worf will irrigate with the water); the total amount of acreage irrigated under Worf's 31.25 miner's inches of eighth right water would increase from 50 acres to 70 acres under the proposed severance (Worfs' 50 acres plus the 20 acres which Brown will irrigate with the eighth-right water). (Testimony of Objector Steele.)

13. Under the water rights claimed by Applicants Worf and Brown, historic irrigation practices, i.e., flood irrigation, generated return flows, such flows ultimately returning to Sharrott Creek by way of the Kootenai Creek ditch (also known as the Number 6 ditch) which crosses Brown's claimed place of use and lies just downhill from Applicant Worf's claimed place of

use. (Testimony of Objector Gilleard.) However, a determination of the amounts of return flow historically reaching Sharrott Creek cannot be made from the record.

14. A change in method of irrigation from flood irrigation to sprinkler irrigation will reduce the return flows. However, the switch to the sprinkler method will not of itself cause a decrease in the volume of water available to the other appropriators because the reduction of return flows is normally compensated by the "turning back" of water at the headgate (due to increased application efficiency). (Generally recognized technical fact. See § 2-4-612(6), MCA.)

15. Although they allege salvage of water by replacement (with PVC pipe) of the flume and ditch systems historically used to serve the rights here addressed, neither Applicant has presented evidence as to the amount of water, if any, thereby salvaged. Neither have the Applicants presented evidence as to the amount of water they allege is salvaged by replacing the flood irrigation systems historically used to serve the rights here addressed with sprinkler irrigation systems.

16. The claimed flows have been diverted yearly from Sharrott Creek by Applicant Worf, Applicant Brown, and Applicant Brown's predecessor in interest, James M. McKinley. There is no evidence that Applicants or that any of their predecessors intended to abandon any portion of the captioned water rights.

17. Neither Applicant Brown nor Applicant Worf has claimed a right to recapture and re-use return flows generated by flood irrigation of his place of use, or presented evidence that would indicate such a right exists.

18. All Objectors who appeared at the hearing have claimed rights to the use of Sharrott Creek water. (Department Records.)

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 4 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 is properly before the Hearing Examiner.

3. Section 85-2-402 MCA (1985) directs the Department to approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria 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. The use proposed in both Applications, irrigation, is a beneficial use. § 85-2-102(2) MCA (1985), see generally Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

5. The proposed means of diversion, construction and operation of the appropriation works in both Applications are adequate.

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6. Applicants have filed claims of existing water right (Finding of Fact 5, 6), which the Department must accept as prima facie proof of their contents until issuance of a final decree. § 85-2-227 MCA (1985).

Although several Objectors allege partial abandonment of Applicant Brown's water right, necessary proof of intent to abandon, Featherman v. Hennessey, 43 Mont. 310, 115 P. 983 (1911); Rodda v. Best, 68 Mont. 205, 217 P. 669 (1923), has not been made. (Finding of Fact 16.) See, e.g., 79 Ranch, Inc. v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983).

Therefore, Applicants' water rights are presumed for the purposes of the hearing to be as stated in the claims of existing water right filed by Applicants.

7. The extent of a water use right acquired by purchase or otherwise is dependent on the extent of the right at the time of acquisition. Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914). A water right does not include the right to recapture return flows[1] unless the original appropriators commenced to recapture the return flows within a reasonable time during the development of the appropriation. Jones v. Warmsprings Irrigation District, 91 P.2d 542 (1939, Oreg.).

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[1] "Return flow . . . is unused water, that has moved through a distribution system and has returned to the source of supply . . . to which the appropriator who releas[ed] it may not have acquired a water right." Doney, "Montana Water Law Handbook", (1981) pp. 20-21. If water is released by an appropriator without intent to recapture, after having been used and having answered his purpose, it is publici juris and subject to appropriation. Woolman v. Garringer, 1 Mont. 535, 545 (1871).

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In the present instance, neither Applicant has alleged, or demonstrated, that his claimed water right includes the right to recapture the return flow, and neither Claim of Existing Right states a claim to such return flow. Further, there is no evidence that Applicants' predecessors ever recaptured or intended to recapture the return flows. (Finding of Fact 17.) Therefore, it is hereby concluded that Applicants have no right to consume the return flows, that such return flows are publici juris, and as such are subject to appropriation by others.

8. Conversion of Applicant Brown's method of use from flood irrigation to sprinkler irrigation will reduce the amount of return flow which has been historically appropriated by the Objectors on Sharrott Creek. (Finding of Fact 14, 18.) However, a subsequent appropriator cannot compel his source to continue the use which produces drainage or return flow. Newton v. Weiler, 87 Mont. 164, 179, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 450, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927). Accordingly, the holder of a claimed existing right who has historically utilized flood irrigation may legally convert such system to sprinkler irrigation whether or not he thereby reduces return flow to a negligible level.

However, a change from flood irrigation to sprinkler irrigation does not, in itself, deprive subsequent appropriators of the supply of water they rely on, because water, which under flood irrigation was non-consumptively used and returned to the

source, need not under sprinkler irrigation be diverted from the source initially.[2]

Thus, because of such inherent compensation to the source, Department approval is not required for a mere change in irrigation method. (See § 85-2-402 and § 85-2-102(5) for changes which do require Department approval.)

9. The prior appropriator does not have the right to consume, to the injury of subsequent appropriators, amounts formerly returned to the source, cf. Featherman, supra at p. 316, for:

> . . . . the right acquired by an appropriator in and to the waters of a natural stream is the right to use a certain quantity for necessary and beneficial purposes . . . and, when such want is supplied, or the use is subserved, all the rest of the creek, and all that returns thereto after such use, is subject to appropriation and use by another for some beneficial purpose. . . . Therefore a subsequent right to use the same water, or so much of it as returns to the creek, and to use the waters of the creek when the first is not using the same, may be acquired.

Creek v. Bozeman Water Works Company, 15 Mont. 121, 129, 38 P. 459 (1894). Thus,

> It has been stated that generally junior appropriators have vested rights in a continuation of stream conditions existing at the time of their appropriation.

Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979).

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[2]The increased application efficiency resulting from the change from flood to sprinkler irrigation eliminates the need to apply the water which formerly became return flows, thus eliminating the need to even divert such water. (Finding of Fact 14.)

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Here, subsequent appropriators have claimed rights to use the waters of Sharrott Creek. (Finding of Fact 18.) Therefore, though Applicant Brown cannot be compelled to continue the use which generated return flows, having ceased the use, he must leave the water, which under flood irrigation generated the return flows, undiverted so that stream conditions remain essentially as they existed at the time of junior appropriations. See generally, In the Matter of the Application for Authorizaton to Change Existing Right No. 9782-c76M by Thomas and Lydia Bladholm, Memorandum to Proposal for Decision, June 22, 1984. In other words, Applicant's right to use the water which generated return flows is a non-consumptive right and may not be made consumptive to the detriment of junior appropriators.

10. The Department can not authorize any change in a water right which operates to enlarge the existing right or create a new right, for to do so would adversely affect appropriators with later priority dates by a posteriori creating another right superior to theirs--a result entirely contrary to the doctrine of prior appropriations. See Quigley v. McIntosh, 110 Mont. 495, 505, 103 P.2d 1067 (1940). Thus, Applications to change a water right must be scrutinized for potential de facto enlargement of the historic right. Accordingly, to protect the rights of other appropriators and to prevent an enlargement of the existing appropriations, the effect of the proposed sever/sell on volumes formerly returned to Sharrott Creek, which under sprinkler irrigation must be left in the creek, need be examined.

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The annual volumes claimed by Worf and Brown reflect the volumes which had to be diverted at the headgate to flood irrigate the place of use (Finding of Fact 10), and thus include in themselves the volume of water which formerly returned to Sharrott Creek. However, under sprinkler irrigation, Applicants have no need to, and may not legally, divert that volume which historically was not consumed but was returned to the stream. Thus, the true measure of the appropriation after conversion to sprinkler irrigation is the volume stated in the claim less the volume historically returned, i.e., the volume historically consumed.

As the subject claims include return volumes which Applicants never had a right to consume, and under sprinkler irrigation have no right even to divert, no change authorization can be granted which allows either Applicant to consume the volumes formerly returned, for to allow consumption of the volumes formerly returned would enlarge Applicants' existing rights.

Applicant Brown wishes to continue full-service irrigation[3] of the 52 acres from which Brown's 20 miner's inches were severed; Worf wishes to continue full-service irrigation of the 50 acres from which Worf's 20 miner's inches were severed.

To accomplish this, Applicant Brown proposes to maintain the right to irrigate his entire 52-acre parcel with the 30 miner's

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[3]The term "full service irrigation" as used here means the productive irrigation in a given year of the entire parcel to which the water right is appurtenant (as opposed to "partial service irrigation" whereby only a portion of the parcel to which the water right is appurtenant is productively irrigated in a given year).

inches of first right water remaining to him; 20 acres of said parcel is to be, in addition, irrigated with the 20 miner's inches of eighth right water received from Worf.

Similarly, Applicant Worf proposes to maintain the right to irrigate his entire 50-acre parcel with the 11.25 miner's inches of eighth right water remaining to him; in addition, 20 acres of said parcel is to be irrigated with the 20 miner's inches of first right water received from Brown.

Thus, the total acreage irrigated under each right would increase after severance, (Finding of Fact 12); and though at first blush, such increases may seem to be mutually counterbalanced so as not to enlarge the rights, upon further consideration it becomes apparent that an increase in such total irrigated acreage could result in consumption of formerly non-consumed volumes, a possibility germane to the question of adverse effect. For instance, in the case of Applicant Brown: although it is true that 20 acres of the 52-acre parcel would have 20 miner's inches of eighth right water appurtenant exclusively to itself, it is also true that when eighth right water is unavailable (due to its inferior priority status), there would remain 30 miner's inches of first right water appurtenant to the entire 52 acres. In such case, in an attempt to adequately irrigate the entire 52-acre parcel (which he has claimed required 50 miner's inches of water up to 154 acre-feet per year to flood irrigate), Applicant Brown could divert and consumptively use (sprinkler irrigation) 30 miner's inches of first right water up to the claimed annual volume remaining to

him after severance i.e., 92.4 acre-feet, even though the expanded consumption would encroach upon that portion of the 92.4 acre-feet which formerly remained unconsumed and thereby generated return flows.

As if in anticipation of this situation, Applicants allege that full-service irrigation of the original places of use can continue because the switch from flood irrigation to sprinkler irrigation and the switch from flume and ditch conveyance to PVC pipe eliminate conveyance and application inefficiencies, thereby creating a saving, or salvage, of water, which can be used to maintain full-service irrigation. However, while salvage is certainly possible, Applicants have presented no factual evidence to support the allegation that water is salvaged by changed delivery and irrigation systems. (Finding of Fact 15.) Even assuming arguendo that there is salvage, the amount of water salvaged cannot be determined from this record.

Absent substantial credible evidence allowing quantification of amounts salvaged, no conclusion can be reached as to whether the salvaged amount is sufficient for continued full-service irrigation of the original place of use. As any shortage could be taken from the historic return volume, which must now remain undiverted, and because lack of quantification renders impossible a determination of when said return volume is being diverted, the possibility of adverse effect to other appropriators exists.[4]

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[4]Of course, consumption of the former return volumes could be prevented if the authorization was conditioned to impose a volume restriction on the Applicants whereby they could together divert only the claimed volume less the volume historically returned to Sharrott Creek. § 85-2-402(7) MCA (1985). Unfortunately, such a condition cannot be imposed because the information which would allow quantification of the former return volume has not been made part of the record. (Finding of Fact 13.)

Thus, as neither Applicant has proven the amount, or even the existence (though in the case of the conveyance changes it may be supposed), of salvaged water, and, as there is no apparent method to administer the severed rights so that continuing full-service irrigation of the original places of use will not adversely affect prior appropriators, Applicant Brown's request to continue full-service irrigation of the entire 52-acre parcel, heretofore irrigated under claimed existing water right No. 151753-76H, after severance of 20 miner's inches therefrom, cannot be countenanced. For the same reasons, Applicant Worf's request to continue full service irrigation of the entire 50-acre parcel heretofore irrigated under claimed existing water right No. 111165-76H, after severance of 20 miner's inches therefrom, cannot be countenanced.

11. Each Applicant has stated he would, if prevented by law from continuing full-service irrigation of the entire parcel irrigated before severance, assent to the reduction of acreage to be irrigated under his remaining right so that no more acreage is irrigated under either Claim No. 151753-76H or Claim No. 111165-76H than has historically been irrigated under the respective claim. To put it another way, Applicants would remove sufficient acreage from irrigation to insure that 52 acres will remain the total amount of acreage irrigated under the 50 miner's inches of first right water and that 50 acres will remain the total amount of acreage irrigated under the 31.25 miner's inches of eighth right water.

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However, even under this modified proposal the salient parameters of the original rights would be altered significantly; most importantly, the amount of acreage to be irrigated with a given portion of the flow rate would be changed, thus creating the potential for utilization of former return volumes to make up any shortage caused by a reduction in flow rate per acre. For example, if Applicant Worf removed from irrigation under the eighth right the 20 acres to be irrigated under the transferred 20 miner's inches of first right water, 11.25 miner's inches would remain with which to irrigate 30 acres, or .375 miner's inch per acre. However, previous to severance Worf's claimed use was 31.25 miner's inches to irrigate 50 acres, or .625 miner's inch per acre. The reduction in flow rate could be, in part, compensated for by lengthening the period of diversion thereby consuming the entire claimed volume remaining to Worf after severance (58.4 acre-feet), including the former return volume which has not been quantified.

Thus, just as the unmodified proposal could not be administered absent quantification of return volume, neither can Applicants' modified proposal be administered to eliminate the risk of adverse affect to other appropriators. In summary, Applicants have failed to demonstrate that the sever/sell will not adversely affect the water rights of other persons, and neither the unmodified nor the modified proposal can be administered so as to eliminate potential adverse effect.

12. Either Applicant, or both, are free to reapply for the grant of the proposed sever/sell of their water rights when sufficient substantial credible evidence has been amassed to meet the burden imposed by § 85-2-402(1) MCA (1985).

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

ORDER

That Application for Sever or Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown be denied without prejudice, and that Application to Sever or Sell Appropriation Water Right No. V111165-76H by William A. and Eva J. Worf be denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (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.

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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 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.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 7 day of July, 1986.

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

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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 July 9, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by William A. Worf & Eva J. Worf, Application to Sever & Sell Appropriation Water Right No. V111165-76H, and Application to Sever & Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown, addressed to each of the following persons or agencies:

1. Joseph E. Brown, 363 Kootenai Cr. Rd., Stevensville, MT 59870
2. Vernett H. Ellis, 186 Silverthorn Dr., Stevensville, MT 59870
3. Charlynn J. Steele, 3800 Salish Trail, Stevensville, MT 59870
4. Dominick L. & Verna I. Ruffatto, Rt. 2, Box 197, Stevensville, MT 59870
5. Baldwin Land & Cattle Co., Carl W. Baldwin, Jr., 3549 Salish Trail, Stevensville, MT 59870
6. Darlene M. & Kay M. Cotton, 3734 Salish Trail, Stevensville, MT 59870
7. William A. & Eva J. Worf, 585 Kootenai Cr. Rd., Stevensville, MT 59870
8. Bruce R. & Patsy M. Nelson, PO Box 416, Stevensville, MT 59870
9. Carl S. & Nancy Scott, PO Box 424, Florence, MT 59833
10. Lonnie T. Ebel, 3720 Salish Trail, Stevensville, MT 59870
11. William T. Gilleard, 3759 Salish Trail, Stevensville, MT 59870
12. Maurice Owen, 463 Timber Trail, Stevensville, MT 59870
13. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
14. Robert Scott, Hearing Examiner (hand-deliver)
15. Gary Fritz, Administrator, Water Resources Division, DNRC (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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

On this 9th day of July, 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

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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.

Ann P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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