BB

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHTS NOS. G120401-41H) FINAL ORDER
AND G120403-41H BY ESTATE OF)
LENA RYEN)

* * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. Timely exceptions were received from the Applicant and from Objectors Howe, Parker, and Brewster. For the reasons stated below, and after having given the exceptions full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the March 12, 1987 Proposal for Decision, and incorporates them herein by reference except as modified herein.

RESPONSE TO EXCEPTIONS

Applicant's Exceptions

The Applicant filed an exception to proposed Authorization Condition E, on the basis that the measuring requirement set forth is not as accurate or convenient as measurement devices suggested by the Applicant.

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The proposed Condition states, in relevant part, that the Applicant "shall install an accurate means of flow measurement of the stream above the point of diversion, in addition to a flow measurement device to measure the amount of water actually diverted through the facility . . . ." The Applicant alleges that installing a measuring device above the point of diversion will make it "nearly impossible" to obtain an accurate measurement, due to the steepness of the terrain.

The Applicant suggests that the Applicant could install "one device to measure the flow over the spillway of the diversion (bypass flow) and also have a device measuring flow through the facility (as proposed)." (Applicant's Exceptions to Proposal for Decision, page 3.) The Applicant further indicates that such measuring devices would be contained within the Applicant's facility, rather than having to be located on Forest Service property above the point of diversion.

A review of Applicant's proposed diversion structure indicates that a sharp-crested weir is to be located in the spillway "notch". (See Applicant's Exhibit 14.) If the design of the weir is such that it can be calibrated to accurately measure the range of flows which the spillway will handle, the proposed measuring device would be adequate to meet the Applicant's requirement to measure creek flow not being diverted through the pipe for the hydropower purposes, since the topography of the proposed dam site is such that not much water can be impounded before it will overflow the spillway. (See Applicant's Exhibit 14.) Therefore, a requirement that the

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Applicant must measure and record both the flows which are diverted for hydropower and the flows which bypass the dam structure should yield an acceptably accurate record of the flow in Ross Creek.

However, the accuracy of flow measurements taken at such a weir will vary with the size of the weir and the amount of the flow; for example, a weir sized to accurately measure high flows may not accurately measure flows in the range of 5 to 6 cfs or less. (Generally recognized technical fact.) Information concerning the accuracy of the Applicant's proposed weir at various flow levels is not available from the record. Therefore, in order to ensure that the flow records required of the Applicant are accurate, the Department must require evidence that the Applicant's measuring devices can accurately measure the entire range of flows which can reasonably be expected to pass over the spillway at the Applicant's diversion facility. To this end, the Department hereby modifies Condition E to state:

> The Applicant shall install an accurate means to measure the flow of water over the spillway of the Applicant's diversion structure, in addition to a flow measurement device to measure the amount of water diverted through the facility, and shall keep a written record of the flows in Ross Creek and of all flows diverted from the creek. The Applicant shall make these records available to the Department upon request.
>
> The Applicant shall submit to the Water Rights Bureau of the Department of Natural Resources and Conservation design information which specifies how various levels of by-pass flows will be measured, and how these flows can be

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accurately measured by the Applicant's proposed measurement devices. The Department may recommend modifications of the measuring devices if such action is deemed necessary to ensure that accurate measurements can be taken.

The Applicant, in cooperation with the appropriate licensing agencies, shall develop and practice methods of recording water measurements which will ensure that the Applicant's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

The Applicant also takes exception to proposed Authorization Condition I, specifically the language which requires the Applicant to "ensure that enough water is bypassed that the full instream flow amount will be maintained the entire length of Ross Creek between the Applicant's point(s) of diversion and place of use."

The Applicant requests that this language be deleted, alleging that the instream flow recommendation made by the Department of Fish, Wildlife, and Parks (DFWP) clearly indicates that the instream flow amount does not have to be maintained the entire length of Ross Creek between the points of diversion and the place of use. However, no formal recommendation by DFWP is part of the record in this matter, nor is there any way to determine exactly what form the FERC requirements on this project will take. Therefore, the Department is not able to frame the permit condition with specificity on the basis of the DFWP recommendations at this stage of the process. However, the

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Department recognizes that the suggested Permit Condition may be drawn too narrowly to accommodate the parameters of whatever instream flow amounts and conditions FERC may finally impose upon the Applicant's project. Therefore, the final paragraph of proposed Condition I is hereby modified to read:

> The amount of carriage water which is not consumed or delayed in returning to Ross Creek by the intervening diversion structures may be utilized to provide a corresponding portion of the required instream flow which the Applicant must bypass; provided, however, that the Applicant must ensure that enough water is bypassed to meet the full instream flow amount required by FERC, as determined by measurements to be made in compliance with FERC specifications.

Additionally, the first sentence of proposed Authorization Condition F is amended to read, "The Applicant shall notify the Department of the amount of by-pass flow, if any, required of the project by other agencies, upon formal receipt of such information." Condition F otherwise remains as specified in the March 12, 1987 Proposal for Decision.

Objectors' Exceptions

Objectors Howe (joined by Objector Parker) filed exceptions to the last paragraph of proposed Conclusion of Law 6; the first, third, and fifth paragraphs of proposed Conclusion of Law 7, and the third paragraph of the proposed Order. "All of these portions of the Proposal for Decision deal with the question of

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the volumes of the water rights, and their period of use." (Exceptions to Proposal for Decision, filed by Objectors Charles and Sarah Howe on April 9, 1987, hereafter referred to as "Objectors' Exceptions"; page 1.)

The crux of the Objectors' exceptions is that the Hearing Examiner should have interpreted the Water Court's answers concerning the parameters of the Applicant's underlying water rights in a manner which restricts the Applicant to part-time use of the rights. The Objectors suggest that these restrictions might be accomplished either by interpreting the Water Court's conclusion that the Applicant's claimed rights may be used "year-round on a continuous basis whenever water is available" (Conclusion of Law 3, Response to Certification) as a "gratuitous statement", or by interpreting the language to mean that the rights may be exercised at any time as long as the total does not exceed eight months. (Objectors' Exceptions, page 3.)

The Department cannot believe that the Objectors are serious in suggesting that the Water Court's language should be dismissed as "gratuitous". The quoted phrase is decretal language, cited by the Water Court as part of the water rights of which the Applicant has ownership and the right of use. The language forms part of the Water Court's Conclusions of Law concerning the parameters of the Applicant's claimed water rights, and thereby part of its Response to Certification; it is not taken out of context of the Response, nor is it dictum. The Department therefore declines to interpret the language as a gratuitous statement.

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The Objectors' second proposed interpretation of the language, that the Conclusions of Law could be made consonant with the Findings of Fact by allowing the Applicant to exercise the water rights in question at any time up to a total diversion period of eight months, is entitled to more serious consideration. The Response to Certification is internally inconsistent, holding that the Applicant's claimed water use rights vested for approximately eight months a year and ten hours per day (Findings of Fact 5 and 6, Conclusion of Law 2; June 24, 1986 Amended Findings of Fact and Conclusions of Law), but holding also that the Applicant is entitled "under Decree #6440" to the use of the water rights "year-round on a continuous basis whenever water is available", as long as the flow amount above 500 m.i. is subordinated to the "upper users" on Ross Creek. (Conclusions of Law 3 and 4; June 24, 1986 Amended Findings of Fact and Conclusions of Law.)

As the Objectors note in their Exceptions, Montana courts have held that an appropriator may not expand the established pattern of use, for example by diverting water during times of the year when the water right previously never was exercised. (See Objectors' Exceptions, page 2. See also Stone, Montana Water Law for the 1980's (1981) at pp. 57-61.) This precedent would seem to indicate that the Applicant should be limited to diverting water for a total of no more than eight months at ten hours a day based on the vested rights, even though the 1923 decree granted continuous use. As noted by the Hearing Examiner in the March 12, 1987 Proposal for Decision, "neither the

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Department record nor the Water Court's Findings and Conclusions support a history of continuous use by the Applicant." (Proposed Conclusion of Law 6.)

Set against these arguments, however, is the fact that the least ambiguous interpretation which may be made of the Water Court's Response to Certification is one which allows the Applicant continuous use of the water rights, subject only to subordination of any flows over 500 m.i. Any other interpretation of the Water Court's Response requires answers to questions which the Water Court logically should have answered if its intent was to limit the parameters of the Applicant's water rights to less flow rate, volume, or a shorter period of use than that claimed by the Applicant.[1]

In the absence of specific time limitations placed on the Applicant's exercise of its decreed water rights, in view of the fact that the Water Court amended its Finding of Fact 5 to state that "the flour mill normally operated 8 to 10 hours a day, and normally operated approximately 8 months during the year;

[1] In example, the Water Court presumably would have specified which eight months comprise the Applicant's period of use if it intended the Applicant to be limited to eight months' use, since the Certification made to the Water Court specifically requested the Water Court to determine the "daily times of use and periods of time during the year when such rights may be exercised." (August 27, 1985 Certification, page 2.) Likewise, it may be presumed that the Water Court would have specified a lesser volume for the Applicant's claimed rights if the Court had determined that the Applicant was not entitled to its full claimed volume on the basis of actual historic use, since the Certification requested that the Water Court specify the maximum volume supported by historic use.

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however, there was evidence of operation in each month of the year and at all hours of the day" (amendments underlined), and most importantly, in view of the fact that the Water Court specified that the Applicant is now the owner of and entitled to the use of the claimed water rights from Ross Creek pursuant to the 1923 decree which grants year-round continuous use of the rights whenever water is available, it is not possible to agree with the Objectors that the "plain import" of the Water Court's decision is that the Applicant's water rights are limited to eight months of use at 10 hours per day.

On the contrary, the Water Court's Conclusion that "the Applicant is not allowed to expand the decreed right to a right to use the water on a continuous basis if the result is to disregard the wording of the decree; '. . . they shall not, at any time, be so used as to deprive any of said upper users of more than 500 inches of the waters of said Ross Creek at any time when such upper users would otherwise have the right to use, and need for the use of, such water'" (Conclusion of Law 9; June 24, 1986 Amended Findings of Fact and Conclusions of Law, emphasis added) clearly suggests that the Applicant is allowed to expand its water right to continuous use if the expansion will not result in the Applicant depriving the upper (above Applicant's original point of diversion) users of more than 500 m.i. of flow when such users have the right to, and need for, the waters in excess of 500 m.i. Since the Applicant's water use, if properly conditioned, will not so deprive the other water users (see March 12, 1987 Proposal for Decision; Conclusions of Law 7 and 11,

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proposed Authorization Conditions H and I), according to the Water Court's determination the Applicant is entitled to continuous use of its water rights.

The record in this matter indicates that allowing the Applicant to divert on a continuous basis will result in an expansion of the Applicant's historic water uses. (See Findings of Fact 5 and 6, Conclusion of Law 2; June 24, 1986 Amended Findings of Fact and Conclusions of Law.) The Water Court acknowledges this in Conclusion of Law 9 when it states that the Applicant "is not allowed to expand the decreed right to a right to use the water on a continuous basis" if the result will be to deprive certain other users of more than 500 m.i. of flow.

However, the issue of whether the Water Court, which has sole jurisdiction over final determinations of existing water rights, believes that the Applicant's vested historic use may be expanded based on the 1923 decree, and the issue of whether the Water Court legally has the authority to expand a vested water use (if an expansion is indeed involved), are not within the province of the Department to determine. Since the Hearing Examiner's conclusion that the Applicant is entitled to utilize its full claimed flow rates and volumes is supported by a reasonable interpretation of the record in this matter, the Department accepts and adopts the Hearing Examiner's Conclusions of Law 6 and 7, and the Proposed Order.

In addition to taking exception to the Hearing Examiner's interpretation of the Water Court's Response, the Objectors also

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except to language in the final paragraph of proposed Conclusion of Law 6 which indicates that the flow rate, rather than the volume, of the Applicant's proposed diversion is the basis of concern for other appropriators. The Objectors' apparent argument is that volume is important because it limits the length of time when the Applicant may exercise its flow rate. The Objectors suggest that the volume granted to the Applicant be determined on the basis of eight months' use at 10 hours per day.

However, as discussed supra and in the March 12, 1987 Proposal for Decision, the Water Court apparently has determined that the Applicant is entitled to appropriate on a continuous basis. Therefore, there is no basis for the Department to grant the Applicant a reduced volume. The volume granted does not exceed the volumes claimed in adjudication and requested for the proposed appropriation in this matter. Since the Water Court found the Applicant to be entitled to its full claimed water use rights and to continuous use, the volume granted to the Applicant correctly specifies a maximum volume based on the Applicant's flow rate used continuously for the entire year.

The Objectors additionally argue that the Department erroneously failed to allow the Objectors an opportunity to submit a transcript of the certification proceeding before the Water Court.

As noted in the Hearing Examiner's March 2, 1987 Memorandum, the Objectors did not make a timely offer of the record. Rather, the Objectors filed a motion which suggested that the Department

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request and produce (pay for) the transcript. The motion stated that it would be "grossly unfair to require the parties to pay for the cost of doing this, when they didn't ask for the opportunity." (Motion to Pay for Transcript, Filed on August 11, 1986 by Objectors Howe, joined by Objector Parker.) Therefore, in light of the parties' failure to timely offer the judicial record or to otherwise timely produce evidence, and their expressed unwillingness to pay for a transcript, the Hearing Examiner closed the administrative record in this matter.

Upon reconsideration of the jurisdictional arguments in this matter, the Department has determined that it would have been beyond the authority of the Hearing Examiner to alter the Water Court's determination concerning the existence and extent of the Applicant's claimed water use rights, since final determinations on the parameters of pre-1973, pre-Water Use Act water rights are solely within the province of the Water Court, as set forth in MCA Title 85, Part 2, Chapter 2 (1979). Therefore, whatever evidence concerning the Applicant's period of use might have been received as the result of reopening the record could not have been used to "second-guess" the Water Court's determination of the parameters of the Applicant's water use rights.

However, reopening of the record by the Hearing Examiner constitutes harmless error in this matter, since no information was submitted for the record; therefore, no party has been harmed.

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The Objectors' final exception to the March 12, 1987 Proposal for Decision states that the phrase "Permit or claimed use right", which appears in the first sentence of the third paragraph of proposed Conclusion of Law 9, should read "water rights". Inasmuch as a review of the Objectors' water rights does not disclose any Beneficial Water Use Permits belonging to the Objectors in this matter, the Department agrees that the Objectors' proposed language is more accurate, and hereby modifies the specified sentence in relevant part to read, ". . . that is, when water is available over and above the Applicant's senior right of 12.5 cfs, and the Objectors are diverting pursuant to the terms of their water rights."

Objector Brewster's Exceptions

Objector Barbara Brewster filed exceptions to the March 12, 1987 Proposal for Decision in this matter, based on the argument that the Montana Water Court had jurisdiction on the issue of adverse effect and entered judgment that the proposed change in point of diversion would adversely affect all of the Objectors' water rights. (See June 24, 1986 Amended Findings of Fact and Conclusions of Law; Conclusion of Law 7.)

There is no apparent basis in the Water Court's Response to Certification for the Water Court's determination that all of the Objectors' water rights would be adversely affected, except in the Court's Conclusion of Law 6 (June 24, 1986 Amended Findings of Fact and Conclusions of Law), which states that "due to

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withdrawing water above the Objectors and returning that water below the Objectors, the use of the water by Ryen in fact becomes consumptive as to the Objectors."

While it is true that the water which the Applicant proposes to divert will become physically unavailable to the Objectors ("consumed" in the sense of not remaining in the stream at the Objectors' points of diversion), the Objectors' water rights will not be adversely affected if the Objectors receive their appropriative water rights and enough carriage water to effectuate their appropriations. The fact that the Applicant's use will become "consumptive" with regard to the Objectors, if indeed this is the basis for the Water Court's determination, in and of itself does not support a determination that the Objectors will be adversely affected. On the contrary, the record indicates that the proposed change will not adversely affect the Objectors' water rights (see March 12, 1987 Proposal for Decision, Conclusion of Law 11), since the status quo of priorities on Ross Creek will remain the same; the difference being that, whereas previously water became legally unavailable if the Applicant called the stream on the basis of the priority system, the Applicant is now able to enforce its senior right by physically removing water.

However, the more important issue concerning the Water Court's determination on adverse affect is the question of whether the Water Court has the jurisdiction to make the determination. The Department hereby reiterates its position that the issue of adverse effect is an ultimate issue upon which

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the Department of Natural Resources and Conservation is required by statute to make a determination pursuant to MCA §85-2-311 and §85-2-402. The fact that the issue arose in a proceeding before the Water Court is not sufficient to confer subject matter jurisdiction in the Water Court.

The apparent argument being made by Objector Brewster is that the act of certification somehow confers jurisdiction in the Water Court to make whatever determinations it chooses. However, a contextual reading of the statutes cited for this proposition indicates that, although the Water Court indeed has jurisdiction over cases which have been sent to a district court for a determination pursuant to MCA §85-2-309, the issues to be determined by the Water Court are those specified by the Department in its certification.

In example, MCA §3-7-224(3) (1985), cited by the Objectors, specifies that the chief water judge may exercise certain powers "as deemed necessary to resolve any factual or legal issue certified pursuant to §85-2-309(2)." The statutory language clearly indicates that the water judge has jurisdiction over those issues which have been certified pursuant to §85-2-309, but it does not grant the judge authority to determine issues which have not been certified.

The Objector emphasizes language in MCA §3-7-501 which states that jurisdiction over determination and interpretation of cases certified to the district court under §85-2-309 is to be exercised through the appropriate water division, and that the water judge for each division shall exercise jurisdiction over all matters certified to the district court under §85-2-309.

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However, the statutes upon which the Objector relies deal with jurisdiction as between district courts and the Water Court once a matter has been certified, not with jurisdiction as between the Department and the Water Court.

The cited statutes do not specify that the Water Court or a water judge may assert jurisdiction over a certification for the purpose of adding, subtracting, or otherwise altering issues which have been certified, but rather they specify that the Water Court has jurisdiction over all matters concerning a case once it has been certified to the district court by the Department.

The "case" which is certified to the Water Court pursuant to MCA §85-2-309 consists of specific issues involving "the adjudication or determination of the water rights at issue" in the Department's administrative hearing. In other words, the issues which the Department may certify to the Water Court are those over which the Water Court exercises jurisdiction in the currently ongoing adjudication; that is, determinations concerning the parameters of existing water rights. Additionally, MCA §85-2-309 gives the Department discretion as to whether it will certify such issues to the Water Court.

In summary, the Hearing Examiner correctly determined that the Department was not bound by the Water Court's Conclusion of Law on the issue of adverse effect. The Department did not certify the issue of adverse effect since determination of this issue is statutorily reserved to the Department pursuant to MCA §85-2-311(1)(b) and §85-2-402(a), nor may the Water Court claim jurisdiction pursuant to MCA §85-2-309 over issues which have not been certified to it.

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Based upon the Findings of Fact and Conclusions of Law and upon any modifications specified herein, and upon all files and records in this matter, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Applications for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H are hereby granted to the Estate of Lena Ryen to change the point of diversion for the specified water rights to two new points of diversion, one in the NE¼NW¼NE¼ of Section 16, and one in the S½SE¼SE¼ of Section 9, all in Township 01 North, Range 06 East, Gallatin County, Montana. The source of water is Ross Creek.

The use of the water rights remains power generation, the period of appropriation remains January 1 through December 31 of each year, the means of diversion remains a headgate structure and pipeline, and the place of use for power generation remains the SE¼NW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana.

The Applicant is hereby authorized to divert 12.5 cfs up to 9047.6 acre-feet of water per year pursuant to Right No. G120401-41H, and 6.25 cfs up to 4523.8 acre-feet of water per year pursuant to Right No. G120403-41H, at the new point(s) of diversion on Ross Creek subject to the following express terms, conditions, restrictions, and limitations:

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A. The Applicant's claimed water rights, and the changes authorized herein in the use of such rights, 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 appropriations by the Applicant to the detriment of any senior appropriator.

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

C. In issuing these Authorizations, the Department does not purport to have the authority to grant the Applicant access to or rights-of-way upon lands not owned by the Applicant, nor does grant of these Authorizations automatically obtain for the Applicant such access or rights-of-way.

D. The Applicant in no event shall withdraw or cause to be withdrawn more water than the amount specified in these Authorizations and allowed under the conditions of the Authorizations. At all times when the water is not required for the Applicant's claimed uses, the Applicant shall allow the water to remain in the source of supply.

E. The Applicant shall install an accurate means to measure the flow of water over the spillway of the Applicant's diversion structure, in addition to a flow measurement device to measure the amount of water diverted through the facility, and shall keep

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a written record of the flows in Ross Creek and of all flows diverted from the creek. The Applicant shall make these records available to the Department on request.

The Applicant shall submit to the Water Rights Bureau of the Department of Natural Resources and Conservation design information which specifies how various levels of by-pass flows will be measured, and how these flows can be accurately measured by the Applicant's proposed measuring devices. The Department may recommend modifications of the measuring devices, if such action is deemed necessary to ensure that accurate measurements can be taken.

The Applicant, in cooperation with the appropriate licensing agencies, shall develop and practice methods of recording water measurements which will ensure that the Applicant's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

F. The Applicant shall notify the Department of the amount of by-pass flow, if any, required of the project by other agencies, upon formal receipt of such information. Any Authorization issued to the Applicant will be amended or notated as necessary, to make the water rights records clear upon their face that the Applicant is not authorized to appropriate the full amounts of water for which change has been authorized when such appropriation would infringe upon any instream flow requirements imposed upon the Applicant's project.

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G. The Applicant is entitled to divert 12.5 cfs pursuant to Water Right No. G120401-41H at all times when diversion of this amount will not infringe upon any instream flow requirement imposed upon the Applicant's hydropower project. To the extent that diversion of 12.5 cfs would infringe upon such instream flow, the Applicant must reduce the flow rate diverted pursuant to this Authorization by whatever amount is necessary to ensure that the full amount of the instream flow is maintained in Ross Creek.

H. The Applicant is entitled to divert 6.25 cfs pursuant to Water Right No. G120403-41H at all times when diversion of this amount in addition to the 12.5 cfs diverted pursuant to Water Right No. G120401-41H will not infringe upon any instream flow requirement imposed upon the Applicant's hydropower project, or upon the utilization of any water right which vested pre-1923 in an appropriator diverting above the Applicant's former point of diversion in the SW¼NE¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana.

To the extent that diversion of Right No. G120403-41H would infringe upon the required instream flow amount, upon such water rights of other appropriators as have pre-1923 priority dates, or upon the carriage water required to effectuate appropriation of such other water rights, the Applicant must reduce the flow rate diverted pursuant to this Authorization by whatever amount is necessary to ensure that the flow amount required to meet these specified needs is maintained in Ross Creek.

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I. At all times when water is required to meet the appropriation needs of appropriators who divert from Ross Creek between the point(s) of diversion herein authorized and the Applicant's place of use, and said appropriators are legally entitled to divert, the Applicant must by-pass past the diversion works carriage water in the amount of 5 cfs.

The amount of carriage water which is not consumed or delayed in returning to Ross Creek by the intervening diversion structures may be utilized to provide a corresponding portion of the required instream flow which the Applicant must bypass; provided, however, that the Applicant must ensure that enough water is bypassed to meet the full instream flow amount required by FERC, as determined by measurements to be made in compliance with FERC specifications.

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 15th day of May, 1987.

Gary Fritz, Administrator
Department of Natural
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Peggy A. Elting, Hearing Examiner
Department of Natural Resources
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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 May 15, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department of Natural Resources and Conservation (DNRC) on the Applications by Estate of Lena Ryen, Application Nos. G120401-41H, and G120403-41H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

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DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

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

On this 15th day of July, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy Lohn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE #

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

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IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHTS NOS. G120401-41H AND)
G120403-41H BY ESTATE OF LENA RYEN)

* * * * * * * * * *

Those Findings of Fact and Conclusions of Law set forth in the [redacted] in this matter which are relevant to the above-entitled Applications are hereby included in this Proposal for Decision by reference.

The Hearing Examiner, upon review of the administrative record and the Response to Certification made by the Water Court, hereby makes additional proposed Findings of Fact and Conclusions of Law, and the Order.

FURTHER STATEMENT OF THE CASE

An Interlocutory Order was issued on the above-specified Applications for Change on March 13, 1985. The Order reserved decision on questions concerning the existence and extent of the underlying water rights proposed to be changed, and the adequacy and water requirements of the Objectors' means of diversion. The Interlocutory Order requested that the parties provide further evidence on these questions.

The parties complied with the request for evidence, but the evidence submitted was inadequate for the Department to be able to determine the issue of adverse effect, as required by

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§ 85-2-402 (1985). Therefore, pursuant to Chapter No. 596, Montana Sessions Law 1985 (now codified at § 85-2-309(2) (1985)), the Department of Natural Resources and Conservation certified the following issues to the district court for decision by the Water Court:

1. Whether the Applicant's claimed use rights exist in their decreed entirety, or have been abandoned;
2. If the claimed use rights exist, what the applicable flow rate and the maximum volume are which are supported by historic use;
3. What are the daily times of use and periods of time during the year when such rights may be exercised;
4. Whether the Objectors' means of diversion are reasonable; and
5. What amount of carriage water is needed in order for the Objectors to utilize their appropriation rights.

On June 9, 1986, the Department received a Response to Certification from Chief Water Judge W.W. Lessley, accompanied by Findings of Fact, Conclusions of Law, and Memorandum. The parties to the Certification were allowed to file responses to the Findings and Conclusions, and on June 24, 1986, Judge Lessley issued an amended Response, with amended Findings of Fact and Conclusions of Law.

The Hearing Examiner issued an August 14, 1986 Notice and Order to Proceed, granting the parties an opportunity to submit evidence on historic use and adverse effect to clarify the Response to Certification received from the Water Court. The parties did not submit any evidence, but submitted briefs containing motions and arguments concerning the Department's use of the Water Court's Response to Certification. Since no further evidence was forthcoming, the Hearing Examiner closed

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the record, responded to the motions, and notified the parties that a Proposal for Decision would be issued. (March 2, 1987.)

The record in this matter now consists of the Department files and records, including the testimony and exhibits presented at the contested case hearing in this matter (see March 13, 1985 Interlocutory Order); and the Water Court's amended Response to Certification, inclusive of the amended Findings of Fact and Conclusions of Law.

The evidence submitted by the parties in response to the March 13, 1985 Interlocutory Order will be left in the record for the limited purpose of proving the parties' compliance with the Hearing Examiner's request for additional evidence; however, since the issues on which evidence was submitted were certified to the Water Court, and all evidence was provided to and made a part of the record and basis for decision in that forum, the substance of the parties' replies was thereby subsumed and is not a part of the Department's basis for decision in this matter.

ADDITIONAL FINDINGS OF FACT

30. The Water Court has determined that Applicant's claimed water rights Nos. 120401-41H and 120403-41H have not been abandoned. See Memorandum and Answer 1 to Certified Questions, June 24, 1986 Response to Certification. See also Findings of Fact 5 through 10, and Conclusion of Law 8. In the Matter of the Application for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H by Estate of Lena Ryen,

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Certification under Chapter No. 596 Montana Session Laws (1985) (In the District Court of the Eighteenth Judicial District of the State of Montana, In and for the County of Gallatin, Water Court, Upper Missouri Division), hereafter referred to as "Response to Certification".

On the certified question of whether the Applicant's claimed use rights exist in their decreed entirety, the Water Court has made an affirmative response. See Answer 1, Response to Certification (June 24, 1986).

31. In response to certified question 2, concerning the flow rate and volume of the Applicant's historic water use, the Water Court has held that the parameters of the right are set out in the 1923 decree on Ross Creek, and in the Findings of Fact, Conclusions of Law, Memorandum, and Judgement adopted by the Water Court.

The 1923 decree on Ross Creek (Decker v. Gowin, Cause No. 6440, judgement entered April 25, 1923 in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Gallatin) specifies that the Applicant's predecessors in interest had a "power right" (for power generation) of 500 m.i. with a priority date of June 1, 1865 (No. 120402-41H, which Applicant intends to retain for power generation for domestic use, and which right therefore is not part of the rights for which a Change Application has been made); a "power right" of 500 m.i. with a priority date of June 1, 1866 (No. 120401-41H) used for a flour mill; and a "power right" of 250 m.i. with a priority date of June 1, 1874

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(No. 120403-41H). No volumes were specified for these rights in the decree.

The Water Court's June 24, 1986 (amended) Findings of Fact reiterate the 1923 decree as to the flow rate of the Applicant's claimed rights (see Finding of Fact 2), and specifically find that "not more than (500) miner's inches of water with a priority date superior to those of the Objectors was ever used in the operation of the flour mill" (Finding of Fact 5), or in the operation of the saw mill (Finding of Fact 6). Finding of Fact 5 specifies that "250 miners inches of water with a priority date inferior to those of the objectors was used." The Findings of Fact do not discuss any volume amount for either right.

The Water Court's June 24, 1986 (amended) Conclusion of Law 3 concludes that the Applicant "is now the owner of and entitled to the use of" 500 m.i. (12.5 cfs) of Ross Creek water with a priority date of June 1, 1866, and 250 m.i. (6.25 cfs) of Ross Creek water with a priority date of June 1, 1874. The Conclusions of Law do not specify a volume amount for either right.

32. In response to certified question 3, concerning the parameters of Applicant's claimed water rights in regard to the periods of use supported by historic use patterns, the Water Court has held that the parameters are set out in the 1923 decree on Ross Creek, and in the Findings of Fact, Conclusions, Memorandum, and Judgement adopted by the Water Court.

The 1923 decree on Ross Creek (citation above) specifies that the 1865 right of 500 m.i. and the 1866 right of 500 m.i.

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"may be used at any time by the owner or owners thereof either separately or jointly, as prior and superior rights" to the rights of all ditches taking out of Ross Creek above the Applicant's present point of diversion for the rights, but that the two rights "shall not, at any time, be so used as to deprive any of said upper users of more than 500 inches of the waters of said Ross Creek at any time when such upper users would otherwise have the right to use, and need for the use of, such water." (Decree, Section 29.)

The decree further specifies that the 1874 right of 250 m.i. "is subordinate to the use of water by all of the ditches now taken out" above the historic point of diversion for the 1866 (flour mill) right. (Decree, Section 28.)

The Water Court's amended Findings of Fact reiterate the 1923 decree language concerning use of the two 500 m.i. rights. (Finding of Fact 3.) The Water Court additionally has found:

> That the flour mill reached its maximum capacity and production sometime around 1879, producing flour and other products for eight months during the year, and lying idle for the remaining four months during the year. The mill normally operated for 10 hours a day during each working day; that the flour mill did not have electricity; the flour mill <u>normally</u> operated 8 to 10 hours a day, and normally operated 8 months during the year; however, there was evidence of operation in each month of the year and at all hours of the day. That after 1879, the production at the mill declined substantially; it changed ownership several times; it burned down in the fall of 1930; it was never rebuilt; that not more than (500) miners inches of water with a priority date superior to those of the objectors was ever used in the operation of the flour mill. 250 miners inches of water with a priority date inferior to those of the objectors was used.
>
> (Finding of Fact 5.)

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The Water Court's Amended Conclusions of Law state:

> That the elements of the water rights claimed in this proceeding were based on actual historic use; that the maximum historical use, shows the water rights claimed by the Applicant vested for use for approximately eight months a year, and ten hours per day in most years. There was evidence of use during each month of the year and all daylight hours. The 1923 Decree provides that the Ryens may use the water "at anytime".
>
> (Conclusion of Law 2.)

The Conclusions repeat the decretal language concerning use of the two 500 m.i. rights, with the notation that each right "may be used year-round on a continuous basis whenever water is available." (Conclusion of Law 3.)

However, on the basis of the decretal language concerning Applicant's use of water at such times as the "upper users" would otherwise have the right and need for the use of such water, the Water Court has concluded that the intent of the 1923 decree "was clearly meant to have a portion of Applicant Ryens' right subordinate" to the water users who historically have diverted from Ross Creek upstream from the Applicant's present point of diversion. (Conclusion of Law 4.)

The Water Court further holds, in Conclusion of Law 9 in the June 24, 1986 Response:

> That the Applicant is not allowed to expand the decreed right to a right to use the water on a continuous basis if the result is to disregard the wording of the decree; ". . . they shall not, at any time, be so used as to deprive any of said upper users of more than 500 inches of the waters of said Ross Creek at any time when such upper users would otherwise have the right to use, and need for the use of, such water.

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33. In response to certified question 4, as to whether the Objectors' means of diversion are reasonable, the Water Court has answered in the affirmative. (See Response to Certification. See also Finding of Fact 11 and Conclusion of Law 10; June 24, 1986 Response to Certification.)

34. In response to certified question 5, which requested the Water Court to determine the amount of carriage water needed in order for the Objectors to be able to utilize their appropriation rights, the Water Court has determined that a flow rate of 5 cfs is the necessary amount of carriage water. (See Response to Certification. See also Finding of Fact 11 and Conclusion of Law 10; June 24, 1986 Response to Certification.)

35. Under the proposed change, the place of use for Appropriation Water Right Nos. G120401-41H and G120403-41H will remain in the SE¼NW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. (See Application.) The point of diversion claimed for the Applicant's 1865 water right for 500 m.i. (No. 120402-41H), which the Applicant intends to retain as it currently exists and which therefore is not the subject of the present Change proceeding, is the NW¼SW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. (See Statement of Claim for Existing Water Right No. 120402.)

A review of USGS aerial maps shows that the proposed place of use of the Applicant's 1866 and 1874 water rights involved in the change proceeding (Nos. G120401-41H and G120403-41H) is upstream on Ross Creek from the point of diversion for the Applicant's other 500 m.i. power right (No. 120402-41H). Since

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the Applicant intends to return the water to the stream at or very near the proposed place of use (see Finding of Fact 27), any water which the Applicant might divert pursuant to the proposed hydropower project will be available to fulfill Applicant's 1865 water use right, and subsequently the rights of downstream appropriators.

Based upon the foregoing additional Findings of Fact, and upon a review of the record in this matter, the Hearing Examiner makes additional proposed Conclusions of Law in the Matter of the Application for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H, and amends those portions of Conclusions of Law 1 through 9 (March 13, 1985 Interlocutory Order) which have been answered or rendered moot by the Water Court's Response to Certification.[1]

PROPOSED CONCLUSIONS OF LAW

Conclusions of Law 1 through 4, as set forth in the March 13, 1985 Interlocutory Order in this matter, are hereby included in the Proposal for Decision by reference, without modification.

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[1] Although an agency normally does not amend Conclusions of Law until Final Order stage (see MCA § 2-4-621(3)), in the present matter an Interlocutory Order was issued which of necessity left several legal issues open-ended for lack of sufficient information. Answers were provided by the Water Court through a certification process. Therefore, the Hearing Examiner has taken the opportunity provided by issuance of Proposal for Decision to restate some of the Conclusions of Law.

The parties in this matter are not injured by the amendments, since they arise out of information provided by the parties themselves in the Water Court forum, and since the parties have a chance to review, comment on, and except to the amended Conclusions of Law at the present stage in this matter.

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5. Because the issue of whether the Applicant's claimed use rights had been abandoned was certified to, and answered by, the Water Court, the Hearing Examiner hereby replaces the final paragraph of Conclusion of Law 5, as set forth in the March 13, 1985 Interlocutory Order, with the following paragraph:

Final determinations concerning water rights which vested prior to 1973 are solely within the province of the Water Court and its adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. (See Preliminary Matters, supra. See also Conclusion of Law 1, June 24, 1986 Response to Certification.) In the present matter, the issue of whether the claimed water use rights in question have been abandoned was certified to the Water Court. The Water Court has made a specific determination that the Applicant's claimed water use rights have not been abandoned. See Finding of Fact 30; June 24, 1986 Response to Certification, Memorandum and Answer 1 to Certified Questions.

(6, 7) The discussion contained in Conclusions of Law 6 and 7, as set forth in the March 13, 1985 Interlocutory Order, have been superseded by the Water Court's response to the certified issues of what the flow rate, volume, and times of use are for the Applicant's claimed use rights. (See Certification, Response to Certification.) Therefore, the Hearing Examiner withdraws Conclusions of Law 6 and 7 as contained in the Interlocutory Order, and makes the following proposed Conclusions in their stead:

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6. The record in this matter supports the flow rate claimed by the Applicant. (See Finding of Fact 31.) The Water Court has determined that the Applicant is entitled to appropriate 500 m.i. (12.5 cfs) pursuant to claimed water right No. 120401-41H, and 250 m.i. (6.25 cfs) pursuant to claimed water right No. 120403-41H. (See Conclusion of Law 3, June 24, 1986 Response to Certification.)

The volumes claimed by the Applicant appear to be calculated on the basis of flow rate times continuous use. Neither the Department record nor the Water Court's Findings and Conclusions support a history of continuous use by the Applicant. (See Response to Certification, Findings of Fact 5 and 6, Conclusion of Law 2: March 13, 1985 Interlocutory Order, Finding of Fact 13; the notation "intermittened" (sic) made by the Applicant under the heading "periods of use" on the SB76 Claims filed on the appropriation water rights in issue.)

However, the Water Court has determined that the Applicant is entitled to use the claimed rights "year-round on a continuous basis whenever water is available" (see Conclusion of Law 3, Response to Certification): it is possible that the Applicant could achieve continuous use, and thereby the entire claimed volume, if sufficient water was available in Ross Creek.

Although a determination of volume by the Water Court might have been useful in setting limits on the Applicant's claimed rights in the event that the Applicant had been found to be entitled to something less than the full claimed flow rates or continuous use, as it stands, the volume cannot be substantiated

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and therefore is not of any use in delineating the parameters of the Applicant's appropriation rights.

In addition, although the Applicant's right to a volume based on continuous use appears tenuous, recognition of the full claimed volume will not adversely affect the Objectors in the present matter. The record indicates that it is the flow rate, rather than the volume, that is of concern to other appropriators from Ross Creek.

7. The record in this matter provides sufficient evidence to support Applicant's claimed use of Appropriation Water Rights Nos. 120401-41H and 120403-41H on a continuous basis.

The Water Court has made a specific determination that the Applicant is entitled to use the water rights in question "year-round on a continuous basis whenever water is available." (Conclusion of Law 3, Response to Certification.) See Finding of Fact 32. However, the right to use the claimed appropriation rights in question is subject to certain limitations: Appropriation Water Right No. G120403-41H is subordinate to the use of water by all of the ditches which were diverting water from Ross Creek above Applicant's historic point of diversion prior to the 1923 decree in Decker v. Gowin (Cause No. 6440), and Appropriation Water Right No. G120401-41H may not be used in addition to Applicant's claimed 1865 right of 500 m.i. (No. G120402-41H) at any time when the users from such ditches had the right to use, and need for the use of, Ross Creek water. (See Finding of Fact 32; Decker v. Gowin; Finding of Fact 3, Conclusions of Law 3 and 4 in the June 24, 1986 Response to Certification.)

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Therefore, based on the priority system, the Applicant is entitled to continuous use of 500 m.i. (12.5 cfs), pursuant to Appropriation Water Right No. G120401-41H, which has a priority date senior to all of the Objectors' priority dates. The Applicant is entitled to "call for the right" (in this diversion situation, by diverting that flow rate before it reaches the Objectors) at all times, and the Objectors are not entitled to demand the use of this water, although the Applicant may have to bypass some portion of this flow if necessary to meet any instream flow conditions which may be imposed on the project.

However, the Applicant may not call for this right and call for 500 m.i. to fill Appropriation Water Right No. 120402-41H if an Objector with a pre-1923 priority date needs, and is entitled to use, the water (e.g., is within the period of use and other parameters of his water right). To the extent necessary to meet the appropriation requirements of Objectors, the Applicant must subordinate rights to the flow in excess of 500 m.i. (12.5 cfs). See Finding of Fact 32. (As a practical matter, this requirement should not affect the Applicant's use of water, since 500 m.i. could be diverted upstream pursuant to right No. 120401, used nonconsumptively, then returned to the creek and made available for diverison pursuant to Applicant's continuing hydropower use under right No. 120402. See Finding of Fact 35.)

The Applicant is also entitled to continuous use of 250 m.i. (6.25 cfs), pursuant to Appropriation Water Right No. 120403-41H. However, this right has been decreed as

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subordinate to the use of water by "all of the ditches now taken out above the said ditch to said flour mill." (Section 28, Cause No. 6440, 1923.) Therefore, to the extent that water is needed to fill a pre-1923 water use right on one of the ditches upstream from the Applicant's historic point of diversion, the Applicant must cease diverting water pursuant to Appropriation Water Right No. 120403-41H.

8. Conclusion of Law 8, as set forth in the March 13, 1985 Interlocutory Order in this matter, required the Objectors to provide further information "in the form of evidence on the reasonableness of their means of diversion and of the amount of carriage water which is necessary to the utilization of their appropriation rights."

The Objectors complied by filing further evidence on these issues. (See file for evidence submitted by Objectors Charles and Sarah Howe on May 31, 1985; and by Objector Barbara Brewster on June 25, 1985.) However, this issue was certified to the Water Court, and this evidence and presumably other evidence in the form of testimony or documents was submitted to the Water Court. Since the issue was decided in the Water Court forum, where all parties had opportunity to exercise their right to cross-examination, the evidence submitted to the Hearing Examiner in response to the Interlocutory Order will be considered superseded.

On the basis of the Water Court's Response on this issue, the Hearing Examiner restates Conclusion of Law 8 as follows:

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The Objectors have met the burden of producing evidence on the issue of injury to their rights, as far as indicating the kinds of injury which might be caused by the proposed project. However, it is also necessary for Objectors in a change proceeding to provide evidence on the scope of their water rights, including the amount of carriage water reasonably needed to effectuate their appropriation. (See Burden of Proof, March 13, 1985 Interlocutory Order.)

The Objectors provided evidence on the scope of their water rights through testimony and by submitting copies of their Statements of Claim for Existing Water Rights. The evidence of their claimed water rights on Ross Creek was not refuted. (But see discussion of Objectors' Exhibit E, page 11 of the March 13, 1985 Interlocutory Order.) It is sufficient to establish the scope of the Objectors' claimed water rights.

The Objectors are also entitled to a reasonable amount of carriage water in order to effectuate their appropriation. That is, they are entitled to enough carriage water to enable them to obtain and utilize their appropriative right, providing that their means of diversion are reasonably efficient. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939); discussion under Preliminary Matters, Burden of Proof (March 13, 1985 Interlocutory Order).

In the present matter, the issues of the reasonableness of the Objectors' means of diversion and of what amount of carriage water the Objectors require in order to effectuate their appropriations were certified to the Water Court. The Water

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Court determined that the Objectors' means of diversion are reasonable (see Finding of Fact 33), and that the Objectors require 5 cfs of carriage water in order to utilize their appropriation rights. (Finding of Fact 34.)

Therefore, once the flow rate of Applicant's diversion has reached 500 m.i. (12.5 cfs) and Applicant's senior appropriation right has been satisfied, the Objectors are entitled to call the Applicant for the amount of their appropriative right plus an additional 5 cfs in carriage water.

Since the Water Court's determination on the issue of carriage water has resulted in a "lump sum" of the carriage water requirements of all of the Objectors, it is not possible to tell from the Response to Certification what amount of water the Applicant must allow past his diversion point to satisfy the carriage water requirements of any given Objector, or Objectors, should less than all of the Objectors be diverting at any given time.

A review of the carriage water information submitted by the Objectors in response to the Interlocutory Order indicates that, even if the evidence was admissible (e.g., there were no problems concerning the lack of cross-examination), it would be impossible to determine the applicable carriage water rights for each ditch and/or Objector from the evidence contained in the Department's record in this matter. Therefore, the parties in this matter must make a determination or agreement on this issue on the basis of records of the proceeding before the Water Court, or other method independent of the Department.

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(9) Conclusion of Law 9, as set forth in the March 13, 1985 Interlocutory Order, has been rendered moot by the Department's receipt of additional information through certification of the specified issues to the Water Court and the Water Court's Response to Certification, and by the incorporation of the Findings of Fact and pertinent portions of the Conclusions of Law contained in the Interlocutory Order in the present Proposal for Decision. Therefore, the Hearing Examiner withdraws Conclusion of Law 9 as contained in the Interlocutory Order, and in its place makes the following additional Conclusion of Law:

9. The record in this matter indicates that an instream flow requirement will be imposed upon the Applicant's proposed hydropower project by FERC requirements. (See Finding of Fact 23.) However, as of the time of the hearing in this matter, the Montana Department of Fish, Wildlife, and Parks, the state agency which makes recommendations in the FERC process in regard to mitigation measures to be taken on FERC-licensed project or project exemptions, had not made any studies on Ross Creek and was not prepared to estimate what the instream flow recommendation might be. (Finding of Fact 23.)

Therefore, since the Department record in this matter does not contain evidence of the specific instream flow which will be imposed upon the Applicant, the Change Authorization in this matter must of necessity utilize general terms in framing those Authorization conditions which discuss the instream flow requirement which may be imposed.

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In addition to bypassing water to meet FERC-imposed instream flow requirements, Applicant will be required to bypass water to meet the Objectors' appropriative needs and carriage water requirements at all times when the Objectors are entitled to use of their claimed water rights; that is, when water is available over and above Applicant's senior right of 12.5 cfs, and the Objectors are diverting pursuant to the terms of their Permit or claimed use right. (See Findings of Fact 15, 17, 18, and 19. As noted above, the Applicant's right of 6.25 cfs is subordinate to all of the Objectors' water use rights which vested prior to the 1923 decree and which have been diverted from a pre-1973 ditch located upstream from the Applicant's point of diversion.)

The record indicates that some of the 5 cfs of carriage water needed to effectuate the Objectors' appropriations is not diverted, but is required to be present in the stream to provide "head" so that water will enter the various ditches, or is diverted but immediately returned to the stream with no noticeable lapse of time. (See e.g., Finding of Fact 19.) To the extent that the carriage water for all intents and purposes stays in Ross Creek, the Applicant is entitled to "credit" his bypass flow amounts. In example, if 2 cfs of the Objectors' carriage water is needed only to provide the needed water depth to allow water to enter Objectors' diversion structures, and is not diverted to the detriment of instream flow needs, the 2 cfs should be applicable to the instream flow requirement imposed upon the Applicant's project by FERC.

10. Conclusion of Law 10, as set forth in the March 13, 1985 Interlocutory Order in this matter, is hereby included in the Proposal for Decision by reference, without modification.

11. The record in this matter supports a determination that the Applicant's proposed change will not adversely affect the rights of other persons. See MCA §85-2-402(2).

There is no evidence to suggest that, if the Change Authorization in this matter is conditioned to protect the Objectors' appropriative water rights and carriage water needs, the Objectors will be adversely affected by the Applicant's proposed change in point of diversion.

Upon first review of the Applicant's proposed hydropower project, Applicant's plan to divert a large percentage of the flow of Ross Creek into a penstock which will bypass the Objectors' points of diversion would appear to portend problems for the Objectors in their exercise of appropriative water rights. However, a review of the record indicates that the proposed change will not alter the status quo of the appropriators' water use rights on Ross Creek.

As a practical matter, of course, the present situation is much more convenient for the Objectors. Their points of diversion (apart from Mr. Hastings') are upstream from the Applicant, and they are able to divert the flow of Ross Creek subject only to a call by the Applicant for 500 m.i. (see Finding of Fact 32), or to a call by a senior appropriator downstream from the Applicant. Under the proposed changes, the Applicant would be diverting above the points of diversion for

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all Objectors, and undoubtedly will be attempting to divert as much water as possible as often as possible to ensure the hydropower project's viability.

However, the priority system remains in place. Each party retains its position in the order of priority, and may call junior uses and must defer to senior uses as before. What has altered is that under the proposed changes, the Objectors will have to call the Applicant for water, rather than vice versa.

Having to call for water is a fact of life under the Western appropriation system. The mere shifting of responsibility of calling for water does not in itself constitute adverse effect. To hold otherwise would forever bar any new uses of water unless the applicant could prove that he was downstream from all senior users on the drainage. Such a result, of course, is unsupported by caselaw or by statute. (See, e.g., §85-2-101(3) MCA.)

Therefore, the issue of adverse effect to the Objectors in this matter must be resolved on the basis of a determination as to whether the Objectors will actually, physically be deprived of water under the proposed change. The record indicates that, with adequate conditions imposed on the Applicant's use of water, the Objectors will be able to obtain and utilize their appropriation rights.

The Applicant will be able to divert 500 m.i. (12.5 cfs) without deference to the Objectors, as long as any instream flow imposed on the hydropower project has been fulfilled. This water will be removed from the stream above the Objectors,

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whereas previously it would have remained in the creek to a point below all of the Objectors. However, the Applicant has always been entitled to receive this amount (see Finding of Fact 31), and the Objectors have not been able (legally) to divert it. Therefore, moving this right to a diversion point above the Objectors will adversely affect them only to the extent that this flow has been available as carriage water for their own rights. If any change authorization which is granted to the Applicant protects the 5 cfs of carriage water which the Water Court has determined to be necessary in order for the Objectors to effectuate their diversions, no harm will accrue to the Objectors.

Likewise, moving the diversion point of Applicant's junior (1874) right will not harm the Objectors, who can "call" this right, if carriage water is available so that their appropriative rights can be utilized. The only ways in which the Objectors could be adversely affected if the point(s) of diversion are granted as applied for are if the Applicant refuses to respond to a call by an Objector for the water, or if the water will not make it to an Objector even though the Applicant releases it.

The first possibility, that the Applicant will not abide by change authorization conditions and restrictions, is not a sufficient basis for the Department to deny a change authorization, based as it would be on a presumption of future bad faith on the part of the Applicant. The Department obviously cannot base decisions on the hypothetical chance of wrongdoing by the Applicant, but must assume that the

Applicant's water rights will be utilized in accordance with the terms and restrictions placed upon them. If they are not, the affected parties must present their case in the proper forum.

The second possibility, that water will not reach the Objectors even if the Applicant releases it, or that it will not reach them in time to be available when it is needed, would be sufficient basis to find adverse effect to the Objectors. However, nothing in the record in this matter indicates that this problem will arise.

The Objectors did not allege, or present evidence to indicate, that water will not reach the Objectors if it is released or bypassed by the Applicant at the proposed point(s) of diversion. Indeed, there is some evidence to indicate that Ross Creek is a gaining, rather than a losing, stream. (See Finding of Fact 10.)

There also is no evidence in the record to suggest that "lag time" between the time water is released by the Applicant and the time when the Objector calling for the water receives it is a matter of concern in the present situation. The Objectors voiced this question as a concern, but did not present evidence or testimony to establish that any significant amount of time would elapse between an Objector's call and the time when water released by the Applicant would reach the Objector's diversion ditch. The fact that the Applicant can release water from the diversion structure almost instantaneously upon demand (see Finding of Fact 27), the short distances involved, and the rapid fall of the Ross Creek channel all indicate that no lag time sufficient to constitute adverse effect is involved.

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WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, and those Findings and Conclusions contained in the March 13, 1985 Interlocutory Order in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Rights Nos. G120401-41H and G120403-41H is hereby granted to the Estate of Lena Ryen to change the point of diversion for the specified water rights to two new points of diversion, one in the NE¼NW¼NE¼ of Section 16, and one in the S½SE¼SE¼ of Section 9, all in Township 01 North, Range 06 East, Gallatin County, Montana. The source of water is Ross Creek.

The use of the water rights remains power generation, the period of appropriation remains January 1 through December 31 of each year, the means of diversion remains a headgate structure and pipeline, and the place of use for power generation remains the SE¼NW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana.

The Applicant is hereby authorized to divert 12.5 cfs up to 9047.6 acre-feet of water per year pursuant to Right No. G120401-41H, and 6.25 cfs up to 4523.8 acre-feet of water per year pursuant to Right No. G120403-41H, at the new point(s) of diversion on Ross Creek subject to the following express terms, conditions, restrictions, and limitations:

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A. The Applicant's claimed water rights, and the changes authorized herein in the use of such rights, 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 appropriations by the Applicant to the detriment of any senior appropriator.

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

C. In issuing this Authorization, the Department does not purport to have the authority to grant the Applicant access to or rights-of-way upon lands not owned by the Applicant, nor does grant of this Authorization automatically obtain for the Applicant such access or rights-of-way.

D. The Applicant in no event shall withdraw or cause to be withdrawn more water than the amount specified in the Authorization and allowed under the conditions of Authorization. At all times when the water is not required for the Applicant's claimed uses, the Applicant shall allow the water to remain in the source of supply.

E. The Applicant shall install an accurate means of flow measurement of the stream above the point of diversion, in addition to a flow measurement device to measure the amount of water actually diverted through the facility, and shall keep a

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written record of the flows in Ross Creek and of all flows diverted from the creek. The Applicant shall make these records available to the Department upon request.

The Applicant, in cooperation with other licensing agencies, shall develop and practice methods of recording water measurement which will ensure that the Applicant's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

F. The Applicant shall notify the Department of the amount of by-pass flow, if any, required of the project by other agencies, upon receipt of such information. Any Authorization issued to the Applicant will be amended or notated as necessary, to make the water rights records clear upon their face that the Applicant is not authorized to appropriate the full amounts of water for which change has been authorized when such appropriation would infringe upon any instream flow requirements imposed upon the Applicant's project.

G. The Applicant is entitled to divert 12.5 cfs pursuant to Water Right No. G120401-41H at all times when diversion of this amount will not infringe upon any instream flow requirement imposed upon the Applicant's hydropower project. To the extent that diversion of 12.5 cfs would infringe upon such instream flow, the Applicant must reduce the flow rate diverted pursuant to this Authorization by whatever amount is necessary to ensure that the full amount of the instream flow is maintained in Ross Creek.

CASE #

H. The Applicant is entitled to divert 6.25 cfs pursuant to Water Right No. G120403-41H at all times when diversion of this amount in addition to the 12.5 cfs diverted pursuant to Water Right No. G120401-41H will not infringe upon any instream flow requirement imposed upon the Applicant's hydropower project, or upon the utilization of any water right which vested pre-1923 in an appropriator diverting above the Applicant's former point of diversion in the SW¼NE¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana.

To the extent that diversion of Right No. G120403-41H would infringe upon the required instream flow amount, upon such water rights of other appropriators as have pre-1923 priority dates, or upon the carriage water required to effectuate appropriation of such other water rights, the Applicant must reduce the flow rate diverted pursuant to this Authorization by whatever amount is necessary to ensure that the flow amount required to meet these specified needs is maintained in Ross Creek.

I. At all times when water is required to meet the appropriation needs of appropriators who divert from Ross Creek between the point(s) of diversion herein authorized and the Applicant's place of use, and said appropriators are legally entitled to divert, the Applicant must by-pass past the diversion works carriage water in the amount of 5 cfs.

The amount of carriage water which is not consumed or delayed in returning to Ross Creek by the intervening diversion structures may be utilized to provide a corresponding portion of the required instream flow which the Applicant must bypass;

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provided, however, that the Applicant must ensure that enough water is bypassed that the full instream flow amount will be maintained the entire length of Ross Creek between the Applicant's point(s) of diversion and place of use.

DONE this 12th day of March, 1987.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Change Authorization, 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 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and

CASE #

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. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

CASE #

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 March 12, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an Order by the Department of Natural Resources and Conservation on the Applications by Estate of Lena Ryen, Application Nos. G 120401-41H, and G 120403-41H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

Estate of Lena Ryen
c/o Clark Ryen
7960 Springhill Community Rd.,
Belgrade, MT 59714

Anna Marie Bakken
Box 447
Bozeman, MT 59715

Lyle Ryen
8680 Walker Rd.
Belgrade, MT 59714

Wayne Ryen
209 So. 6th
Bozeman, MT 59715

David C. Moon
Moore, Rice, O'Connell & Refling
P.O. Box 1288
Bozeman, MT 59771-1288

Llos F. & Leona Parker
8081 Springhill Community Rd.
Belgrade, MT 59714

Sarah J. Zimmer, Attorney
Box 1330
Bozeman, MT 59715

Barbara Brewster
RFD 1 Box 201
Brattleboro, VT 05301

Charles & Sarah Howe
8360 Springhill Community Rd.
Belgrade, MT 59714

Ted Doney, Attorney
Box 1185
Helena, MT 59624

Kenneth L. Hasting
3416 Valle Verde Dr.
Napa, CA 94558

Scott Compton, Manager
Water Rights Bureau
Field Office,
Bozeman, MT
(inter-departmental mail)

Gary Fritz
Administrator
Water Resources Division
(hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

CASE #

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

On this 12th day of March, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy Kohn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE #

BB
AGE

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR)
CHANGE OF APPROPRIATION WATER RIGHTS)
NOS. G 120401-41H AND G 120403-41H)
BY ESTATE OF LENA RYEN)

* * * * * * * * * *

The Hearing Examiner, having reviewed the parties' responses to the Department's Notice and Order to Proceed, makes the following determinations:

The Motion in Limine, made by Objectors Howe and Objector Parker, is hereby denied.

The issue of adverse affect was not certified to the Water Court, nor is it an issue which may be determined through certification, since it is an ultimate issue upon which the Department is statutorily required to make a determination pursuant to § 85-2-311 and § 85-2-402, MCA. As the Applicant's August 22, 1986 response notes, consent of the parties to argue the issue (assuming arguendo that the parties before the Water Court did in fact consent to determine the issue of adverse effect in that forum) is not sufficient to confer subject matter jurisdiction in the Water Court.

The Objectors' argument that the issue of adverse effect already has been determined "as a matter of law", pursuant to the 1923 decree, also is unpersuasive. A review of the decretal

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language indicates that the limiting clauses in the decree will apply to the Applicant's use of the decreed water rights, regardless of the point of diversion used by the Applicant.

Assuming that the Objectors' point is that the status quo, wherein the Objectors presently have "first chance" at the flow of Ross Creek over and above the Applicant's senior 500 m.i., will be altered if the Applicant is in a physical location to have first chance at those flows, the question becomes a factual one of whether the Applicant can effectuate the proposed change without causing adverse effect. There is no absolute prohibition as a "matter of law" on a change such as the Applicant's proposed change, but rather a determination must be made based on the facts in the present case.

The Motion to Pay for Transcript, made by Objectors Howe and Objector Parker, is hereby denied.

The Hearing Examiner gave the parties in this matter an opportunity to submit further information on the issue of historic patterns of use of the Applicant's water right, and of adverse effect. The July 21, 1986 Notice and Order to Proceed stated that information from the record made in certification would be accepted, <u>if</u> a timely offer of the record was made by a party in this matter.

Objectors Howe and Objector Parker did not make a timely offer of the record. Rather, they countered with a Motion to Pay for Transcript, which in effect suggested that the Department should be responsible for introducing further information into

CASE #

the administrative record by requesting, and paying for, a complete transcript of the Water Court proceedings. However, the Department is not responsible for procuring evidence for the benefit of the parties, nor for financing the production of such evidence.

The Hearing Examiner hereby notifies the parties that the administrative record in this matter is closed. A decision will be made on the basis of the information now in the record.

The Hearing Examiner requested further information on the issue of historic use of the Applicant's claimed water rights, for the purpose of clarifying the determination made by the Water Court on this issue in certification. The information was not elicited for the purpose of altering the Water Court's findings and conclusions on the issue, as the Applicant alleges, but rather was intended to be used as a frame of reference so that the responses made by the Water Court to certified questions could be more clearly interpreted in terms of the context of the proceeding before the Water Court.[1]

In reference to the submission of further information on the issue of adverse effect, as stated above and in the July 21 Notice and Order to Proceed, the Department has determined that

[1]The Applicant argues that the Department record has been closed, and therefore that the Department may not accept information pursuant to the July 21, 1986 Notice and Order to Proceed. Assuming, without admitting, that the administrative record was closed to such submissions of evidence, neither the Applicant nor any party has been affected by the request for additional information, since no further information was submitted for the record.

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its statutory duties require it to make findings of fact and conclusions of law based on the administrative record. The Hearing Examiner gave the parties an opportunity to submit further information on the issue to ensure they had submitted all the evidence they intended to provide. (See the demand for information made in the March 13, 1985 Interlocutory Order in this matter.)

None of the parties in this matter submitted further information for inclusion in the record, in response to the Hearing Examiner's July 21, 1986 Notice and Order to Proceed. Therefore, the Hearing Examiner deems the matter submitted and the record closed. A Proposal for Decision will be issued based on the evidence now contained in the Department file, the record of the hearing in this matter, the information submitted for inclusion in response to the March 31, 1985 Interlocutory Order, and the Amended Findings of Fact and Conclusions of Law made by the Water Court in response to the Certification in this matter.

DONE this 2nd day of March, 1987.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE #

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 March 2, 1987, she deposited in the United States mail, first class postage prepaid, an Order by the Department on the Applications by Estate of Lena Ryen, Application Nos. G 120401-41H, and G 120403-41H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

Estate of Lena Ryen
c/o Clark Ryen
7960 Springhill Community Rd.,
Belgrade, MT 59714

Anna Marie Bakken
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Lyle Ryen
8680 Walker Rd.
Belgrade, MT 59714

Wayne Ryen
209 So. 6th
Bozeman, MT 59715

David C. Moon
Moore, Rice, O'Connell & Refling
P.O. Box 1288
Bozeman, MT 59771-1288

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Sarah J. Zimmer, Attorney
Box 1330
Bozeman, MT 59715

Barbara Brewster
RFD 1 Box 201
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Charles & Sarah Howe
8360 Springhill Community Rd.
Belgrade, MT 59714

Ted Doney, Attorney
Box 1185
Helena, MT 59624

Kenneth L. Hasting
3416 Valle Verde Dr.
Napa, CA 94558

Scott Compton, Manager
Water Rights Bureau
Field Office,
Bozeman, MT
(inter-departmental mail)

Gary Fritz
Administrator
Water Resources Division
(hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

CASE #

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

On this 2ND day of MARCH, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Jim P. Gilman

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

CASE #

B3

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHTS NOS. G 120401-41H AND)
G 120403-41H BY ESTATE OF LENA RYEN)

NOTICE AND ORDER
TO PROCEED

* * * * * * * * * *

Pursuant to Chapter No. 596, Montana Session Laws 1985 (now codified at § 85-2-309(2), MCA (1985)), the Montana Department of Natural Resources and Conservation certified specified issues in the above-entitled matter to the district court for determination and subsequent remand to the Department.

On June 2, 1986, a Response to Certification was filed in the State of Montana Water Courts, which the Department of Natural Resources and Conservation (the "Department") received on June 5, 1986. The Department then received Amended Findings of Fact and Conclusions of Law, dated June 24, 1986. Based upon the Response and amendments thereto, the Department hereby notifies the parties in this matter that the matter will proceed as follows:

1. In making any necessary determinations concerning the Applicant's period of use for the water rights in question, the Department will follow the parameters set forth by the Water Court in its response to certification. However, in view of the fact that the Water Court has determined that the historic use of the rights was not continuous but vested for approximately eight months a year and ten hours a day, (see, e.g., Findings of Fact 5

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and 6 and Conclusion of Law 2 in the Response to Certification and the Amended Findings of Fact and Conclusions of Law), the Department requires more specific information concerning the historic pattern of use.

Therefore, the Department will allow for the production of information concerning the months of the year and the hours of the day during which the water rights in question historically have been used. If this information is present in the record made in Certification, the Department will take administrative notice of the relevant portions of the judicial record, if a timely offer of the record is made by a party in this matter.

2. Section 85-2-311(b), MCA (1985) requires the Department to determine the question of adverse effect prior to the issuance of a permit. Certification under § 85-2-309(2), MCA (1985) does not contemplate certification of any ultimate issues to be determined by the Department pursuant to §§ 85-2-311 - 402, MCA (1985). Nevertheless, Conclusion of Law 7, in the Findings of Fact and Conclusions of Law which are part of the Water Court's Response to Certification, makes a determination of the issue of adverse effect; an issue which was not certified to the Court. (See August 27, 1985 Certification; June 3, 1986 Response to Certification; and June 24, 1986 Amended Findings of Fact and Conclusions of Law.)

Although the Court has made a determination outside the scope of the issues certified to it, the Department has determined that its statutory duties require that the Department make its findings and conclusions of law based on the administrative record.

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Therefore, the Department will base its decision on an independent review of the administrative record.

In making the determination on adverse effect, the Department will take administrative notice of any information on adverse effect which may be contained in the judicial record, if an offer of the record is made by a party in this matter.

If any party to this matter intends to provide further evidence in this matter, by offer of judicial record or otherwise, the party shall do so by the filing of an appropriate motion with the Hearings Examiner prior to August 25, 1986. If no motions are made, the record will be deemed closed and a decision will be made on the administrative record before the Department.

DONE this 21st day of July, 1986.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

CASE #

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 21, 1986, she deposited in the United States mail, certified, postage prepaid, a Notice And Order to Proceed, an order by the Department In the Matter of the Application for Change of Appropriation Water Rights Nos. G 120401-41H and G 120403-41H by Estate of Lena Ryen, addressed to each of the following persons or agencies:

1. David C. Moon, Moore, Rice, O'Connell & Refling, P.O. Box 1288, Bozeman, MT 59771-1288
2. Estate of Lena Ryen, c/o Clark Ryen, 7960 Springhill Community Rd., Belgrade, MT 59714
3. Donald Ryen, 8380 Walker Rd., Belgrade, MT 59714
4. Anna Marie Bakken, Box 447, Bozeman, MT 59715
5. Sarah Zimmer, P.O. Box 1330, Bozeman, MT 59715
6. Llos F. & Leona Parker, 8081 Springhill Community Rd., Belgrade, MT 59714
7. Barbara Brewster, 8685 Forswall Rd., Belgrade, MT 59714
   Second address: RFD 1 Box 201 Brattleboro, VT 05301
8. Suzanne Nellen, P.O. Box 1412, Bozeman, MT 59715
9. Charles & Sarah Howe, 8360 Springhill Community Rd., Belgrade, MT 59714
10. Ted Doney, Box 1185, Helena, MT 59624
11. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
12. Gary Fritz, Administrator, Water Resources Division (hand-deliver)
13. Hon. W.W. Lessley, Chief Water Judge, P.O. Box 879, Bozeman, MT 59715

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Sally Martinez

CASE #

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

On this 21st 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 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.

Judy Lohn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE #

sp. for a change must make threshhold showing of the existence of the underlying rt. pp 19-20

... must show historic use pattern, to ensure that use is not being enlarged under guise of a change. p 21

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

sp. failed to show historic use pattern, Dept. can't grant change w/o more info pp 62, 63

4. Obj. must show reasonableness of means of diversion, p. 64

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 49632-s41H AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G 120401-41H AND G 120403-41H BY ESTATE OF LENA RYEN	PROPOSAL FOR DECISION ON APPLICATION FOR BENEFICIAL WATER USE NO. 49632-S41H AND INTERLOCUTORY ORDER IN APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NOS. G120401-41H AND G120403-41H

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on May 31 and June 1, 1984, in Bozeman, Montana.

Clark M. Ryen, one of the Applicants in this matter, appeared personally and by and through counsel, David C. Moon.

Objector Llos Parker appeared personally and by and through counsel, Donald A. Nash.

Objectors Charles and Sarah Howe appeared personally and by and through counsel, Ted J. Doney.

Objector Barbara Brewster appeared by and through counsel, Philip Davis.

Objector Kenneth L. Hasting appeared personally.

Dale Miller, hydrologist with Inter-Fluve, Inc., appeared as witness for the Applicant.

Paul Kinshella, consulting engineer with Sanderson, Stewart, and Gaston, appeared as a witness for the Applicant.

CASE #

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 49632-s41H AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G 120401-41H AND G 120403-41H BY ESTATE OF LENA RYEN	))))))	PROPOSAL FOR DECISION ON APPLICATION FOR BENEFICIAL WATER USE NO. 49632-S41H AND [redacted] NOS. [redacted]

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on May 31 and June 1, 1984, in Bozeman, Montana.

Clark M. Ryen, one of the Applicants in this matter, appeared personally and by and through counsel, David C. Moon.

Objector Llos Parker appeared personally and by and through counsel, Donald A. Nash.

Objectors Charles and Sarah Howe appeared personally and by and through counsel, Ted J. Doney.

Objector Barbara Brewster appeared by and through counsel, Philip Davis.

Objector Kenneth L. Hasting appeared personally.

Dale Miller, hydrologist with Inter-Fluve, Inc., appeared as witness for the Applicant.

Paul Kinshella, consulting engineer with Sanderson, Stewart, and Gaston, appeared as a witness for the Applicant.

CASE #

Patricia Gibson appeared as a witness for Objector Llos Parker.

Greg Morris appeared as a witness for Barbara Brewster.

Fred Nelson, fisheries biologist for the Montana Department of Fish, Wildlife, and Parks, attended the hearing in this matter and was called to testify by Ted J. Doney.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On December 2, 1982, the Applicant filed an Application for Beneficial Water Use Permit, seeking to appropriate 25 cubic feet per second ("cfs") up to 18,094 acre-feet per year from Ross Creek for non-consumptive use for power generation at a point in the SE¼NW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. The water was to be diverted in the S½SW¼ of Section 10, Township 01 North, Range 06 East, Gallatin County, Montana, by means of a pipeline, for year-round use.

On December 21, 1982, Jan Mack of the Bozeman Water Rights Bureau Field Office made a site visit to the proposed project area and wrote a report for the file, dated December 23, 1982.

On January 20, 1983, the Applicant requested that the flow rate applied for be reduced from 25 cfs to 11.25 cfs, and that the volume applied for be reduced from 18,094 acre-feet per year to 8,142.84 acre-feet.

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On January 27, 1983, the Applicant also filed two Applications for Change of Appropriation Water Rights, seeking changes in use of claimed water rights W120401-41H with a priority date of June 1, 1866, and W120403-41H with a priority date of June 1, 1874, from Ross Creek. The Applications requested changing the point of diversion of the two claimed water rights from the SW¼NE¼NW¼ of Section 16 to the S½SW¼ of Section 10, all in Township 01 North, Range 06 East, Gallatin County, Montana. The use remains power generation, the place of use remains the SE¼NW¼NW¼ of Section 16, and the period of appropriation remains January 1 through December 31 of each year. The amount of water appropriated under both claimed water rights remains the same in terms of cfs amounts, although the acre-foot amounts for the claims were amended slightly downward; from 9,125 acre-feet to 9,047.6 acre-feet on W120401-41H, and from 4,562 acre-feet to 4,523.8 acre-feet on W120403-41H.

The pertinent portions of the Applications were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on March 9, 16, and 23, 1983.

Timely objections were filed to Application No. 49632-s41H, G120401-41H, and G120403-41H on Ross Creek by J.K. and Mary L. Maroney, Leona and Llos Parker, and Barbara A. Brewster. The Montana Department of Fish, Wildlife, and Parks submitted a "letter of concern" for inclusion in the record.

On July 21, 1983, the Department received a request from the Applicant to amend the proposed point of diversion on the Applications from the previously designated legal discription of

CASE #

the S½SW¼ of Section 10, Township 01 North, Range 06 East, to two points of diversion; one on the Applicant's land in the NE¼NW¼NE¼ of Section 16, and one on Forest Service property in the S½SE¼SE¼ of Section 9, all in Township 01 North, Range 06 East, Gallatin County, Montana.

The pertinent portions of the amended Applications were republished in the Bozeman Daily Chronicle on August 31, 1983 and September 7, 1983.

Additional timely objections to the three Applications were filed by Charles and Sarah Howe, successors in interest to J.K. and Mary Maroney. Kenneth L. Hasting filed timely objections to the two Applications for Change.

Mr. and Mrs. Parker objected to the Applications on the basis that they would lose control over the water, since the proposed new points of diversion are above the Parkers' point of diversion, and the point of return for the flow is below it, and therefore the flow at the Parker point of diversion will be diminished. Barbara Brewster objected on the same basis, noting also that, if the permits are granted, expensive construction may be necessary to enable the Objectors to obtain their water use rights from the diminished creek. Mr. and Mrs. Maroney also objected to the Applications on the basis that they will be adversely affected if their point of diversion is bypassed, and noted that one of the claimed rights which the Applicant proposes to change is junior to the Maroney water use right. Kenneth

CASE #

Hasting objected to the Applications for Change because of concerns about the effect of the proposed project on the quality of his downstream domestic (drinking) water.

The Montana Department of Fish, Wildlife and Parks submitted a letter stating their concern that "the project will have the capacity to divert the entire stream flow of Ross Creek during much of the year, thereby jeopardizing the rainbow trout population in the section of stream between the proposed diversion sites and powerhouse outlet", and stating that any FERC license or license objection will carry a stipulation guaranteeing that a year-round minimum stream flow will be maintained.

A March 26, 1984 Field Report was prepared by Scott Compton for inclusion in the Department's contested case file in this matter, documenting stream measurements taken on March 23, 1984 at the Howe point of diversion on Ross Creek. Mr. Compton submitted additional flow measurements taken on Ross Creek on May 2 and May 30, 1984, at the hearing in this matter.

EXHIBITS

The Applicant, Estate of Lena Ryen, submitted sixteen exhibits in support of the Applications in the above-entitled matter.

CASE #

Applicant's Exhibit 1 is an ASCS aerial photograph of Ross Creek, labelled with proposed points of diversion and place of use, Applicant's present points of diversion, and with some of Objectors' points of diversion. It also contains marks made by witnesses at the hearing.

Applicant's Exhibit 2 is a photograph of the Howe point of diversion.

Applicant's Exhibit 3 is a photograph of the Parker/Brewster/Ryen point of diversion (also known as the Lee/Parker/Ryen ditch).

Applicant's Exhibit 4 is a graph depicting comparative discharge amounts (in cfs) of Ross Creek and Middle Cottonwood Creek from October, 1950 to September, 1951.

Applicant's Exhibit 5 is a graph like Exhibit 4, but showing the discharge amounts for the period from October, 1951 through September, 1952.

Applicant's Exhibit 6 is a graph like Exhibits 4 and 5, but showing the discharge amounts for the period from October, 1952 through September, 1953.

No Applicant's Exhibit 7 was offered or accepted.

Applicant's Exhibit 8 is a graph depicting daily precipitation amounts recorded at station "Bozeman 12 NE" for the period of October, 1951 through September, 1952. The data was put together by the United States Department of Commerce, in a publication entitled "Climatological Data of Montana" issued monthly.

CASE #

Applicant's Exhibit 9 is a graph like Exhibit 8, but showing daily precipitation amounts for October, 1952 through September, 1953.

Applicant's Exhibit 10 is a graph depicting comparative water surface and ground surface elevations at the Howe point of diversion.

Applicant's Exhibit 11 is a graph depicting comparative water surface and ground surface elevations at the Parker/Brewster/Ryen point of diversion.

Applicant's Exhibit 12 is a U.S.G.S. map of the Bridger Mountain Range, marked at the hearing with locations of recording stations for precipitation and snowpack.

Applicant's Exhibit 13 is a map developed by William J. McMannis, "Geology of the Bridger Range, Montana" (1952 dissertation, Princeton University), Plate I.

Applicant's Exhibit 14 is a blueprint of the Applicant's proposed "Ross Creek Diversion System" prepared by the engineering firm of Sanderson, Stewart, and Gaston; the blueprint shows the proposed layout of the diversion structures and cross-sections of such structures.

Applicant's Exhibit 15 is a photocopy of U.S. Dept. of Interior gaging station data on Ross Creek for the period of June, 1951 through September, 1953.

No Applicant's Exhibit 16 was offered or accepted.

Applicant's Exhibit 17 is a chart of "snowpack as snow water equivalency in inches" for snowpack-recording stations New World, Hood Meadow, and Devil's Slide, for the period of January through May in 1951, 1952, and 1953.

CASE #

Applicant's Exhibit 18 is a chart of precipitation at recording station "Bozeman 12 NE" for 1951, 1952, and 1953. It also shows monthly precipitation averages for 1951 to 1972.

Applicant's Exhibits 1-12, 14, and 15 were accepted into the record without objection.

Objection to Applicant's Exhibit 13 was made on the basis that, since Ross Creek is incorrectly identified on the map as "Potter's Gulch", there possibly might be more inaccuracies and the exhibit therefore does not have probative value.

Objection to Applicant's Exhibit 17 was made on the basis that the snowpack-recording stations which are used are located in the Hyalite Mountain Range, not in the Bridger Range where Ross Creek is located, and that therefore the data is not comparable.

Objection was made to Applicant's Exhibit 18 on the basis that it is irrelevant.

The objections to these exhibits, in all three instances, go to the weight and credibility of the evidence, not to the admissibility of the evidence. As stipulated on the record in this matter, the statutory rules of evidence do not apply in this contested case water rights hearing. § 85-2-121 MCA (1983). Rather, the applicable rules of evidence, which the parties agreed to, is that the Hearing Examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

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Therefore, all of the evidentiary objections to the three exhibits have been overruled, although the exhibits have been given limited weight and reach.

Applicant's Exhibit 13 tends to corroborate testimony by Applicant's witness Dale Miller as to the probable reason for Ross Creek flow patterns (see Applicant's Exhibits 4, 5, 6, and Finding of Fact 9, infra), and is admitted into the record for that limited purpose.

Applicant's Exhibit 17 is duplicative of information available in other, more clearly relevant forms (Applicant's Exhibits 8, 9, 12, 18; testimony by Dale Miller and Clark Ryen); at most, it gives a slight amount of corroboration to the other exhibits, and has been given correspondingly little weight.

Applicant's Exhibit 18 adds probative value to witness evaluation of 1951, 1952, and 1953 as being "average years" in regard to precipitation patterns in the last 30 years; it tends to show that the years for which gaging records on Ross Creek are available are neither part of a low flow regimen, nor were the flows exceptionally high.

Objectors submitted nine exhibits in support of their objections to the Applications in this matter.

Objectors' Exhibit A is a photocopy of Statement of Claim for Existing Water Rights (hereafter, "SB76 Claim") No. 01682 for Irrigation, by Llos and Leona Parker. Attached are the maps, an affidavit, and a certified copy of a page from the 1923 Decree on Ross Creek.

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Objectors' Exhibit A1 is a photocopy of portions of the 1923 decree of water rights in Ross Creek.

Objectors' Exhibit B was not offered for the record.

Objectors' Exhibit C is a photocopy of SB76 Claim No. 115553 for Irrigation, by J.K. Maroney. Attached are a map, an affidavit, and a certified copy of a page from the 1923 Decree on Ross Creek.

Objectors' Exhibit D is a photocopy of SB76 Claim No. 115554 for Irrigation, by J.K. Maroney, with the same attachments as Exhibit C.

Objectors' Exhibit E is a photocopy of SB76 Claim No. 115555 for Irrigation, J.K. Maroney, with the same attachments as Exhibit C.

No Objectors' Exhibit F was offered or accepted.

Objectors' Exhibit G is a photocopy of SB76 Claim No. 136564 for Irrigation, by Barbara Brewster. Attached is a map.

Objectors' Exhibit H is a photocopy of SB76 Claim No. 136566 for Irrigation, by Barbara Brewster. Attached are a map and certified copies of three pages from the 1923 Decree on Ross Creek.

Objectors' Exhibit I is a photocopy of SB76 Claim No. 136569 for Stockwater, by Barbara Brewster, with the same attachments as Exhibit H.

Objectors' Exhibit J is an A.S.C.S. aerial photograph of Section 16, Township 01 North, Range 06 East, showing area of Howe property.

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Objectors' Exhibits A-D and G-I were accepted into the record without objection.

Objection was made to Objectors' Exhibit E on the basis that the SB76 Claim for Existing Water Rights is based on decreed water rights in Jones Canyon Creek, not in Ross Creek.

Objection was made to Objectors' Exhibit J on the basis that the evidence presented therein is "redundant".

Objectors' Exhibit E is not inadmissible on the basis that the claimed water right is in Jones Canyon Creek, rather than in Ross Creek proper. If the water claimed in this particular document was subject to the use priorities in Ross Creek, and could be "called" by the Applicant, as senior appropriator, for use in the proposed project, the Jones Canyon Creek right would be relevant evidence. However, a U.S.G.S. map of the area (Applicant's Exhibit 12) indicates that "Jones Creek" enters Ross Creek below Applicant's points of diversion and point of return. Therefore, Objector's Exhibit E is irrelevant because the rights it represents are not affected by Applicant's proposed project: it has been excluded on such grounds.

The Objection to Objectors' Exhibit J goes to the weight and credibility of the evidence, not to its admissibility. The Exhibit was introduced to show the tillable acreage for which the Objectors have claimed water rights. As such, it adds some corroborative weight to the Objectors' claimed water uses and their claim of resultant injury if the proposed project is completed, and has been admitted for that limited purpose.

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The Department offered three exhibits for admission into the record.

Department Exhibit 1 is a report of flow measurements taken on Ross Creek by DNRC personnel on May 30, 1984.

Department Exhibit 2 is a report of flow measurements taken on Ross Creek by DNRC personnel on March 23, 1984.

Department Exhibit 3 is a report of flow measurements taken on Ross Creek by DNRC personnel on May 2, 1984.

Department Exhibits 1-3 were accepted into the record without objection.

Upon request of counsel for the parties, the record in this matter was left open for submission of post-hearing briefs which were limited to discussion of matters raised on the record at the hearing.

Additional documents submitted by the Applicant in this matter are:

1. Applicant's initial post-hearing brief, received July 2, 1984.
2. Applicant's reply brief, received July 16, 1984.

Additional documents submitted by the Objectors in this matter are:

1. "Parker Brief in Support of Objections to Ryen Application", received July 2, 1984.
2. "Post-Hearing Brief of Objectors Howe", received July 2, 1984.
3. Reply brief of Objectors Howe, received July 16, 1984.

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PRELIMINARY MATTERS

A. Objections to Testimony

During the hearing in this matter, objections were made to certain questions or lines of questioning. Three objections were sustained at the time they were made: counsel for the Applicant's objections (1) to a question directed to Applicant's witness Paul Kinshella, concerning the viability of moving the project's point of use upstream from the Objectors' points of diversion; (2) to a question directed to Fred Nelson of Fish, Wildlife and Parks (FWP), concerning the amount of water that FWP might recommend as the minimum instream flow in Ross Creek, and (3) to questioning Objector Howe about his own hydropower plans[1].

These rulings are hereby affirmed. The questions directed to Mr. Kinshella and Mr. Nelson could have elicited only speculation on the part of these witnesses.

[1] Objector Charles Howe testified that he has applied for an exemption from Federal Energy Regulatory Commission, (hereafter, "FERC") which would enable him to use the water for both hydro-generation of power and for irrigation, and that therefore his proposed water use would be "the best and highest use of the water". While the legislature has declared that it is Montana's water use policy to encourage the wise use of the state's water resources for "the maximum benefit" (MCA 85-2-101(3)), it nevertheless remains true that water is allocated strictly on a priority date basis, wherein any water use which falls within the definition of a "beneficial use" takes its place on the ladder of priorities without regard to the type of use it represents. Montana does not have a water use system wherein different types of uses are prioritized, with, for example, municipal uses being given priority over irrigation, and irrigation over industrial uses.

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In regard to the possibility that Mr. Howe's Application to the Federal Energy Regulatory Commission (FERC) for an exemption for his own planned hydropower uses could render a decision in the present matter moot, the response can only be that the possibility cannot affect the Department's decision in this matter. The Applicant is not required to complete the FERC process before obtaining a state water use permit or change. The Department has a statutorily-mandated duty to act on applications, (see MCA § 85-2-311; "...the department shall issue a permit", § 85-2-402; "...the department shall approve the proposed change.") which is not forestalled by possible future events. Mr. Howe's future plans are not "uses or developments for which a permit has been issued or for which water has been reserved", nor are they a choate water right which will be adversely affected. If, indeed, FERC should give the Howe application for an exemption priority over the Applicant's application for a license, the Applicant's project will not be developed, any water for which a permit as been issued will not be used for "the beneficial use contemplated in the permit", and the permit will lapse pro tanto. (See MCA § 85-2-314).

Although FERC cases such as First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946) and its progeny suggest that federal jurisdiction may supercede state jurisdiction over many aspects of hydropower project licensing and permit procedures, state agencies cannot be expected to base their actions on hypotheses

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about future decisions to be made at the federal level, nor is there any basis for staying the state action in the absence of federal pre-emption.

In addition to the objections discussed above, two objections were made which were overruled, subject to further determination: (1) counsel for the Applicant objected to questions directed to the Applicant regarding the economic feasibility of his proposed project, and (2) to questions directed to Objector Llos Parker concerning historic use of the Applicant's claimed water use rights for hydropower. The questions and the witnesses' responses to them were allowed into the record pending a determination of the material's admissibility, to be set forth here in the Proposal for Decision.

The current statutory criteria require a review of the economic feasibility of a project only if the appropriation is for 10,000 or more acre-feet per year or 15 or more cubic feet per second. § 85-2-311(2) MCA (1983). However, such a review is not required in this matter. The Department is not applying the criteria of the current statute to applications where the priority date precedes the effective date of the legislation; House Bill 908, effective April 29, 1983. The priority dates of the Applications in this matter precede the effective date. However, even if the Department were to apply the current statutory criteria, the criteria are applied to new appropriations only; as noted in footnote 3, infra, the new appropriation portion of the Applicant's project is not large enough to trigger the additional statutory criteria.

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To a certain extent, the economic feasibility of a project may play a part in determining that the use for which water will be appropriated is beneficial, since evidence which indicates that the proposed project is so blatantly infeasible that completion and operation of the project is unlikely tends to show that the water will not be put to a beneficial use. However, no such clearcut evidence is present in this matter. Absent such evidence, the Department is not in a position to find in the negative on beneficial use.[2]

Objection was made to allowing Objector Llos Parker to testify about the historic use of the Applicant's claimed hydropower use rights from personal knowledge of the flour mill and saw mill operations which formerly utilized the claimed rights, on the basis that making a determination about "old

[2] As the Department has previously noted, "Any contrary readings of the statutory criteria would lead the Department far afield in the evaluation of an application for a permit. Such theories would require administrative determinations of whether the prospective economic benefits to be derived from the use of the water would successfully amortize the capital investment representated (sic) by the diversion works themselves, coupled with all costs of maintenance and repair... Moreover, such determination would have to be exercised prospectively ... The Applicant cannot be charged with the duty of establishing the price of hay ten years hence. The Department, likewise, can find no authority pursuant to the Water Use Act to dictate to prospective appropriators how and when they are to spend their monies." In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, September 30, 1981 at 19-20. From the standpoint of monetary feasibility, the economic marketplace provides the most efficient check: the capital costs associated with the water use projects will discourage all but those projects which have a reasonable chance to make a profit.

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rights" constitutes an adjudication and is therefore outside the scope of a Department permit hearing. The testimony was admitted into the record, pending a further determination of its admissibility.

It is true that final determinations concerning water rights which vested prior to 1973 is solely within the province of the water court and its adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. However, as the Department has previously stated:

> Determining the character of an existing right for the purposes of implementing the change statute has nothing to do with such a determination for purposes of adjudicating that right. The character of the proceedings are fundamentally of different orientations. A finding of no extant water right pursuant to a change proceeding merely determines that an applicant has not shown himself to be entitled to a change pursuant to the statutory provisions detailing the method and manner of making such changes. In the Matter of the Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates Proposal for Decision, August 25, 1981.

A decision made for purposes of allowing the Department to proceed with a determination on whether a proposed change in water use will adversely affect other persons does not reach the res judicata level of finality such as is obtained in the

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adjudication process. See Meadow Lake, supra, United States v. District Court of Fourth Judicial District, 121 Utah 18, 242 P.2d 774 (1952).

The adjudication process is designed to give finality to determinations of existing rights and of priorities, in order to provide a framework for subsequent regulation of the state's water resources. MCA § 85-2-101(2), § 85-2-234(2). Determinations made in the change process do not carry the equivalent weight of finality. A change approval can be modified or revoked pursuant to MCA § 85-2-402(5), or it can be reduced pursuant to the adjudication process: "If the Department should authorize the change of a water right for a greater quantity of water than is subsequently recognized in the adjudication process, the change inevitably must be pro tanto reduced in conformity with the decree." Meadow Lakes, supra. The change could be eliminated completely if the water right involved subsequently is not recognized in the adjudication process.

Since a decision on an application for change does not carry the weight of finality on determinations of ownership, and since an appropriator does not obtain any rights through a change approval that are not contingent upon determination of ownership by the adjudication process, the Department is not usurping the water court's jurisdiction by making a preliminary administrative finding which enables the Department to perform its mandated function of authorizing or denying applications for change in water rights.

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It has been stated with reference to the authority of the state government, "...No powers will be implied other than those necessary for effective exercise and discharge of powers and duties expressly conferred." State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338 (1936). See also Guillot v. State Highway Commission, 102 Mont. 149 (1936).

Conversely, however, the Department does have the implied powers necessary for its "effective exercise and discharge of the powers and duties expressly conferred." Id. since the Department is charged with a statutory duty to administer the Water Use Act and has been delegated the power to issue change approvals, it follows that the Department is empowered to make such initial determinations on water rights as are needed to allow it to reach the decision required by MCA § 85-2-402. See In the Matter of the Application for Change of Appropriation Water Rights No. G-05081 and G-05083 by Neil W. Moldenhauer, Final Order, March 20, 1984.

One of the determinations that the Department must make in change proceedings is the existence of the right for which the application for change has been made.

> Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructory interest only, and accords the appropriator no privileges by ways of ownership of the

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> corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some specified purpose. See Holstrom Land Co., Inc. v. Ward Paper Box Co., 36 St. Rep. 1403, _____ Mont. _____; _____ P.2d _____ (1979). A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings. Meadowlakes, supra, at 56.

To hold otherwise would allow any holder of a purported water right to circumvent the permitting process for new uses by utilizing change proceedings to enlarge the amount of water that actually had been used, or even to initiate a use that had never existed except on paper. See Holmstrom, 185 Mont. 409, 605 P.2d 1060 (1979), 79 Ranch v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983).

In the present matter, the Applicant must make a threshold showing of the existence of the water use right that he wishes to change. See City of Bozeman, infra. Since a water right is usufructuary, that is, based upon the actual use of the water rather than upon any "paper right" claim, evidence relating to the use of the claimed water right is relevant. Thus, the Llos Parker testimony about past use of Applicant's claimed water right is relevant and admissible, and it will remain in the record.

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B. Historic Use

In conjunction with the requirement that the underlying water use right must be shown to exist before it can be changed, the Applicant must also show the extent and pattern of the past use of the water, i.e., its "historic use", to ensure that the use is not being enlarged under the guise of a "change". The doctrine of historic use differs from the question of the existence of the underlying right only in the scope of the scrutiny.

Numerous Montana cases embody the concept that a water right is defined by the actual use of the water, rather than by the amount claimed by, or even decreed to, the water right holder. See Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914), Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935), Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), 79 Ranch v. Pitsch, supra. Such caselaw indicates that uses of water which result in an increased consumption amount to a new appropriation, rather than a change. See, Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911).

The historic use pattern of a given water right defines not only the quantity of water which the holder of the right will be accorded, but also the time frame during which the right may be exercised. For example, an appropriator who changed his water use from mining to irrigation was held to be restricted to using the water in the spring and fall seasons, when the water had been used for mining. Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909). In Galiger, supra, the appropriator likewise was

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restricted to using his changed use in conformity with the pattern of use he originally had established. See also Beaverhead, supra. An applicant for change of an appropriation water right is not entitled to create a greater demand on the source of supply, at any given time, than existed as a consequence of his previous usage of water.

As noted in Beaverhead, a contested application for change implicates two central values of western water law: a water right holder's ability to change the use of the underlying interest, in order to effectuate new and more productive uses of water, and the right of other appropriators to be protected from any adverse effects of such changes, so that their own uses of the water resource may continue unhindered. (Beaverhead, at 1).

> The doctrine of historic use, although speaking to enlargements of use, is nothing more than a backhanded way of describing other appropriators' rights to maintenance of the stream conditions. That is to say, enlargements of use are significant precisely because they change the stream conditions to the detriment of junior appropriators. See Quigley v. McIntosh ...Because of the scarcity of water in the arid west, the doctrine of appropriation accords property interests in such stream conditions in order to provide security for the development of water... (Citations omitted). Beaverhead, supra, at 17-18.

Water use statutes and case-law indicate that appropriators' rights to maintenance of the stream conditions as of the time of their respective appropriations does not extend to the right to maintain the exact physical conditions which occurred at the time. (E.g., MCA § 85-2-401 clearly contemplates "changes by

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later appropriators in the condition of water occurrence...if the prior appropriator can reasonably exercise his water right under the changed conditions.") Rather, an appropriator has a vested right to maintenance of those stream conditions which are necessary to allow him to make use of his appropriation. See generally, Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974), In re Moldenhauer, supra. To go beyond that would be to allow an appropriator to play "dog in the manger" by blocking beneficial uses by others; a result clearly not intended by case-law or statute. See MCA § 85-2-101(3), § 85-2-308, § 85-2-401, § 85-2-402. See generally, Miles v. Butte Electric and Power Company, 32 Mont. 45 (1904). Therefore, the test should be whether or not the proposed change increases the burden on the stream to the point that it is more difficult for other appropriators to obtain and utilize their appropriations.

The seminal Montana case on "reasonable means of diversion" is State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). Therein, the court found that reasonable efficiency is all that is required of a means of diversion, not absolute efficiency, and that an appropriator may employ the means most suitable in view of the existing physical conditions and the circumstances of the case. The court added the proviso that the means of diversion must not be unnecessarily wasteful, but that parties who utilized "usual and ordinary means of diverting water" would not be required to substitute another, more efficient means of diversion. Crowley at 103. "...There is a vanishing point at which the possible waste of water would be

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more than overcome by the waste incidental to the abandonment of reasonably efficient diversion systems and the establishment of diversion systems whose expense is neither warranted nor permitted by the benefit to be derived from the water". Crowley at 97-98.

The determination of whether "the methods adopted for diversion are reasonable and economical" must be made on a case by case basis. Crowley at 103.

C. Burden of Proof

Historically (before the advent of the Montana Water Use Act), the burden of proof in change proceedings was on the objector. See Holmstrom Land Co. v. Meagher County Newland Creek Water Dist., 36 St. Rep. 1403, 605 P.2d 1060 (1979); "The burden is on the party claiming to be prejudiced by such change to allege and prove the facts". Lokowich v. City of Helena, 46 Mont. 575, 129 P., 1063 (1913).

However, in response to the changes wrought in water right processes by the advent of the Montana Water Use Act, the Department has recently redefined the allocation of the burden of proof in cases where a change of water right is involved. See In the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H, Proposal for Decision, June 4, 1984 (Final Order issued January 9, 1985), In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A, 36295-c41A,

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36296-c41A, 36297-c41A, 36298-c41A 36299-c41A, 36300-c41A and 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985.

To summarize the lengthy discussion contained in these Proposals, "the applicant for a change of water right bears the burden of production on the specifics of his intended change and on the existence of the water right that is the subject matter of the change. The burden of production is discharged when the evidence and all reasonable inferences therefrom, viewed in a light most favorable to the applicant, is sufficient to allow a reasonable mind to conclude that the ultimate fact exists". City of Bozeman, supra, Addendum A. In addition, the applicant bears the burden of persuasion on all relevant and material issues, the standard being the preponderance ("more likely than not") test. See MCA § 26-1-403.

The objectors to an application for change bear the burden of production on the questions of the scope and character of their existing rights and on the issue of injury to their rights: the latter burden extends to the kind and character of adverse effect upon which the objection has been made, although not to the specific amount or measure of such adverse effect. "Much of this information will be peculiarly within the province of the objector, and it is not to be expected that the legislature intended an applicant to bear the burden of production thereon." (Citations omitted). City of Bozeman, supra, Addendum A.

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The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Orders.

Findings of Fact

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Applicant in this matter is the Estate of Lena Ryen, an informal organization comprised of heirs of Lena Ryen and their heirs. Real parties in interest presently include Clark Ryen, Anna Marie Bakken, Lyle Ryen, and Wayne Ryen.

"The Applicant" is used herein to refer to the estate, or to Clark Ryen as the estate's representative in this matter.

3. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on December 2, 1982 at 9:00 a.m. The Applications for Change of Appropriation Water Rights were duly filed with the Department on January 27, 1983 at 10:00 a.m. and 10:01 a.m.

4. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

5. The Applicant intends to use the water for power generation, which is a beneficial use. M.C.A. § 85-2-102(2).

6. The source of supply for the proposed appropriation is Ross Creek, a tributary of the Gallatin River.

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7. Available data on flow rates in Ross Creek consists of measurements made at a U.S. Department of Interior gaging station on Ross Creek between June, 1951 and September, 1953, three readings taken in spring, 1984, by Department personnel, two readings taken by Applicant's witness Dale Miller, and testimony of the parties in this matter.

8. The hydrographs prepared by Dale Miller on the basis of the available flow measurements (Applicant's Exhibits 4, 5, and 6) indicate that the flow rate pattern of Ross Creek is characterized by a pattern of "moderated discharge"; there is a gradual buildup of flow after low flow in April, high flow is sustained for about three months, then the flow gradually decreases.

Mr. Miller testified that such a flow pattern is atypical for a high mountain stream. For comparative purposes, he plotted Middle Cottonwood Creek flow data on the hydrographs, since researchers have described Middle Cottonwood as a creek which is typical of the west slope of the Bridger Mountains. The flow pattern for Middle Cottonwood shows a dramatic high flow period of 15 to 30 days during spring runoff, then an abrupt decline to a very low flow rate for the rest of the year.

Testimony in this matter substantiates the flow pattern indicated by the Exhibits: Ross Creek flow apparently is characterized by a dependable year-round base flow which increases and decreases gradually, rather than peaking for a short period of time and then decreasing drastically. (Testimony of Clark Ryen, Fred Nelson).

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9. It is more likely than not that the water source for Ross Creek is a storage aquifer which receives water from other, more permeable, aquifers outside the immediate drainage basin, and releases it at a steady rate. This would account for the moderated pattern of flow, the absence of storm "peaks" in flow, the clearness of Ross Creek water even during spring runoff, and the large volume of the flow in comparison to the relatively small drainage basin. (Testimony of Clark Ryen, Dale Miller; Applicants' Exhibits 4, 5, 6).

10. Flow measurements taken in 1951-1953 at a U.S.G.S. gaging station located at a point on Ross Creek below all parties' points of diversion show that the flow of Ross Creek ranged from a low flow of 9 cfs in February/March of 1952 and 1953 to a high flow of 34 cfs in July, 1953. (Applicant's Exhibits 4, 5, 6).

The measurements show monthly flows (averaged over the 2½ year test period) of approximately 11 cfs in January, 9.5 cfs in February, 10 cfs in March, 11.5 cfs in April, 15 cfs in May, 25 cfs in June, 20 cfs in July, 25 cfs in August, 20 cfs in September, 15 cfs in October, 14 cfs in November, and 12.5 cfs in December.

Testimony indicated that measurements at the U.S.G.S gaging station would be higher than measurements taken at any point above the gaging site, since Ross Creek is a gaining stream. (Testimony of Clark Ryen, Dale Miller). However, measurements taken at the site also would already be depleted by any appropriations being made above that point by the Applicant and the Objectors.

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Measurements taken by DNRC Bozeman Water Rights Bureau Field Office personnel show a flow of 13.49 cfs at a point approximately 20 feet upstream from Objector Howe's point of diversion on March 23, 1984. Measurements taken at the Howe diversion on May 2, 1984 show a flow of 16.26 cfs, and May 30, 1984 measurements above Howe's diversion show a flow of 31.95 cfs.

Field office measurements taken at other points on May 2, 1984 show a flow of 11.53 cfs at Applicant's proposed upper diversion point on Forest Service land, and of 14.4 cfs at the proposed lower point of diversion. May 30, 1984 flows were measured at 23.38 cfs at the proposed upper diversion point and at 32.73 at the proposed lower diversion point.

11. Testimony at the hearing tends to indicate that flows in Ross Creek have been higher in recent years (testimony of Clark Ryen, Dale Miller, Llos Parker), possibly as a result of the 1959 earthquake (testimony of Llos Parker). Clark Ryen testified that low flow is above 12 cfs in most recent years and around 10 cfs in dry years, that high flow averages from 36 up to 40 cfs, and that the overall average flow is higher than 15 cfs and often is over 20 cfs.

12. The Applicant has applied for changes of appropriative rights totalling 18.75 cfs; 12.5 cfs on the basis of a claimed 1866 right, and 6.25 on the basis of a claimed 1874 right. Clark Ryen has filed SB76 Claims for both of these rights, claiming continuous use of these amounts for hydropower on the basis of historical use and a 1923 decree on Ross Creek. The 1923 decree

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gives a flow rate of 500 miner's inches (12.5 cfs) for the 1866 claimed right, and of 250 miner's inches (6.25 cfs) for the 1874 claimed right, but does not give a total volume for either right from which it would be possible to determine the period of use for the rights.

Both of the hydropower rights were originally used to run a flour mill, which burned down in 1930. Subsequently, the water was used to generate power for a lumber mill. The lumber mill remained in operation until the 1950's (testimony of Llos Parker), or 1960 (testimony of Clark Ryen). Ice destroyed the flume in 1960, but the belt remained in place for several years, and on occasion was used to cut lumber, utilizing the small amount of water which was still running through (testimony of Clark Ryen).

Clark Ryen testified that it was always his intention to rebuild the flume, and that he had purchased materials to do so, but had decided to try for more power generation rather than repairing the existing facility.

The Applicant's 1866 claimed right is senior to all of the Objectors' water use rights. The Applicant's 1874 right is junior to all of the Objectors' claimed rights except a 1917 claimed irrigation right (Brewster) and a 1935 claimed domestic right (Hasting).

13. Llos Parker testified that the sawmill was operated in the spring, and in the summer when logs were brought in, but that he does not remember the sawmill ever being operated in the winter.

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14. In addition to applying for changes of the two claimed appropriation water rights, the Applicant has applied for 11.25 cfs of new use.

15. Objector Kenneth Hasting has filed an SB76 Claim for 2 gpm up to .20 acre-feet per year for year-round domestic use, with a claimed priority date of 1935. He has also filed an SB76 Claim for 12.5 cfs up to .50 acre-feet per year for year-round stockwater use, with the same priority date.

Mr. Hasting stated that his water is diverted from Ross Creek approximately 300 feet below the proposed powerhouse site. He testified that he is concerned about the effects that the proposed project might have on the quality of his water; that running the water through the power generation system can cause additional aeration and nitrogenation of the water, which in turn can have an affect on the microbe count in the water and therefore on its healthfulness.

Mr. Hasting testified that he is also worried about increased sedimentation caused by the project and the road which will service it. He stated that a previous road which was built along the same area about 1960 became impassable after five years, due to sloughing and washout along the road.

16. The diversion points of all of the Objectors, other than Kenneth Hasting, are located between the proposed points of diversion and the proposed place of use, and will be bypassed by the penstock which is to carry the Applicant's diverted water.

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17. Objector Barbara Brewster has filed two SB76 Claims for irrigation; a claimed 1917 filed appropriation right for 53.5 miner's inches (1.34 cfs) up to 267.5 acre-feet of water per year to be used from May 1 to November 1 of each year, and a claimed 1869 decreed right for 33 1/3 miner's inches (.83 cfs) up to 600 acre-feet per year for use from May 1 to October 1 of each year. In addition, Barbara Brewster has filed an SB76 Claim for 33 1/3 miner's inches (.83 cfs) up to 3.02 acre-feet of water per year for stockwatering year-round, with a claimed 1869 priority date. (Objectors' Exhibits G, H, I).

Greg Morris, Barbara Brewster's son-in-law, appeared as a witness for Barbara Brewster at the hearing. He testified that the Brewster diversion is made by means of a ditch referred to at hearing as the "Parker-Lee-Ryen ditch" or the "Parker-Brewster-Ryen ditch". Mr. Morris testified that a dike constructed of rocks diverts a portion of the creek. The objectors take their portion of the water and return the rest to the stream. (Applicant's Exhibit 3). The measuring device consists of a "certain size box", with headgate boards which are set at certain depths to determine the amount of water going through. The headgate, which is similar in design to that used at the Howe ditch and to the one on Ryen's "old diversion", was replaced last summer. The "Parker-Brewster-Ryen" ditch was rebuilt because it had been destroyed by erosion and "vandalism". Mr. Morris stated that he did not have personal knowledge of when the ditch had been used last for irrigation.

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Mr. Morris testified that, as of the time of the hearing, the Parker-Brewster-Ryen ditch was filled in by sloughing-off from the Ryen road and by a tree which had been downed by the sloughing.

He also testified that in order to allow the objectors to divert their water rights, a new diversion, possibly a pipe, probably would have to be built upstream from the present point of diversion, if the only water which remained in the creek was the amount of the Objectors' water use rights and no carriage water was allowed.

18. Objector Llos Parker has filed an SB76 Claim for 100 miner's inches (2.5 cfs) up to 693.18 acre-feet per year for irrigation between May 1 and September 20 of each year, with a claimed 1869 priority date. (Objectors' Exhibits A, A1). Mr. Parker testified that this right and flood rights out of Dry Creek were used for flood and sprinkler irrigation of approximately 90 acres of tillable land out of 195 total acres, that the Parker-Brewster-Ryen ditch used to be able to carry the 100-inch right, and that no two parties would irrigate out of the ditch at the same time.

Patricia L. Gibson, daughter of Llos Parker, testified that water from Ross Creek is also used for domestic and "lawn and garden" uses at the Parker place. There is no quantification of the Parker domestic use in the record. Department records do not show that a SB76 claim has been filed, or a Beneficial Water Use Permit issued, for the domestic use. However, a permit would not appear on a historic domestic use, and the use is among the

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exceptions to the SB76 Calim requirements. See MCA § 85-2-212. Using the Water Court standards of a maximum flow of 40 gpm for domestic uses, plus an incremental amount for lawn and garden, the Parker domestic use in all probability does not exceed 60 gpm or 1/7 to 1/8 cfs. The water is diverted from Ross Creek by means of a diversion "structure" consisting of an old washing machine tub set in the creek and covered with window screening to filter out the sand. A 2" plastic pipe is laid from the diversion point to the house. The diversion point is approximately one mile from the house and upstream from it, because the creek is much lower than the house site at the point closest to the house.

Mrs. Gibson testified that they are afraid sedimentation from construction of the proposed project will block the pipe or damage the Parker plumbing. She stated that her father and Clark Pyen had discussed putting in a well at the Parker's to provide domestic water. She stated also that they are concerned about the effect that road dust and possible slough-offs from the road might have on the quality of water in Ross Creek.

19. Objectors Charles and Sarah Howe are successors in interest to J.K. and Mary Maroney, who filed three SB76 Claims for irrigation; a claim for 75 miner's inches (1.88 cfs) up to 300 acre-feet per year for use June 1 to September 15 of each year, claimed priority date 1871; another claim for 75 miner's inches (1.88 cfs) up to 300 acre-feet per year for use June 1 to September 15, with a claimed priority date of 1873; and a claim for 25 miner's inches (.62 cfs) up to 100 acre-feet per year for use June 1 to September 15, with a claimed priority date of

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1888. The SB76 Claim with the claimed 1888 priority date is accompanied by a decree which states that the source of 1888 portion of the rights is "Jones Canyon Creek," a tributary of Ross Creek". A U.S.G.S. map of the area shows Jones Creek entering Ross Creek below the Applicant's proposed points of diversion. (Applicant's Exhibit 12). As previously discussed, the latter claim is irrelevant in this matter. Each of the three SB76 Claims carries the notation that 10 miner's inches (.25 cfs) are used year-round for domestic and stock purposes.

In a 1981 affidavit accompanying the SB76 Claims, J.K. Maroney stated, in part, "Typically, for the last 30 years, I have irrigated two main fields, one about 23 acres, and another about 30 acres, for pasture. I turn the water out about the first of June or as soon as the snow goes. Usually I take the full ditch, about 175 mm, between the water in the diversion east of the main irrigation ditch and one or the other of the two main irrigation diversions. On pasture we try to keep the water moving all summer to keep the pasture up. When it is dry, we have to run both the upper and lower ditches, so the whole head has to be available. Since we have been on the place we have only grown occasional grain, when pasture needs revitalizing. With sprinklers, the whole place could be irrigated (150 out of 418)."

Charles Howe, present owner of the Maroney property and successor in interest to the Maroney water rights, testified that he presently flood irrigates through a system of a main ditch and laterals. The Howes have three points of diversion; an "upper

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ditch" located approximately half-way between Applicant's upper proposed point of diversion and the point of use, a "middle ditch" located approximately 30 feet above the Parker-Brewster-Ryen ditch, and a "lower ditch" located just below the proposed powerhouse site. Mr. Howe testified that they need all three ditches to irrigate different parts of the ranch. They are raising barley and hay, and have leased out pasture for 30 head of cattle.

Mr. Howe stated that the upper and lower ditches are fully useable, but that the middle ditch is obstructed by a landslide caused by washout of the upper ditch, and that he has not been allowed to get in through Ryen land with equipment to clear the ditch; he testified that he is concerned that Mr. Ryen will not cooperate with the Objectors on the use of Ross Creek.

Mr. Howe reconstructed the upper ditch to handle the "full water right" of 150 miner's inches (3.75 cfs) out of Ross Creek. The headgate is located around the corner from an outside curve to protect it from floods, and consists of a diversion box described as an "adjustable submerged orifice headgate". The headgate requires carriage water in addition to the use amount in order to force the water to be diverted into the ditch. The extra water is returned to the creek at the headgate structure.

Mr. Howe testified that, if the proposed project is constructed, he will have to rebuild his diversion to take the minimum water necessary to divert his water right. He also expressed concern that there would be a "lag time" between the

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time that he called for his water right and the time that he received it, caused by the necessity of requesting the Applicant to let the water bypass his point of diversion and the time it would take to effect the increased flow at the Howe ditch. An additional concern expressed by Mr. Howe is that construction and operation of the proposed project will cause sedimentation to block the pipe which Howes have laid as a "closed system" for domestic and stock water.

Mr. Howe stated that he has applied to FERC for an exemption allowing him to install a hydropower project. The project would be used for creating power to run a sprinkler irrigation system.

20. Scott Compton, Field Manager for the Bozeman Water Rights Bureau Field Office, testified that rough flow measurements can be taken with a diversion structure such as the Howes', if the headgate is calibrated; the Parker-Brewster-Ryen diversion structure is similar to Howes', but does not currently have an adjustment to raise the gate. He stated that weirs and Parshall Flumes are more accurate in measuring flow, and do not require a head of water in order to divert the desired amount, but that these diversion methods are also more expensive.

In response to a question concerning the common practice in Ross Creek for measuring water, Mr. Compton stated that prior to the recent installation of the headgates, the common practice had been no measurement of water.

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21. Clark Ryen stated that the Objectors currently divert more water than they need in order to have carriage water to get their diversion amounts into their ditches; that alternatively the Objectors could do away with their need for carriage water by installing a pipe in the stream.

Dale Miller, witness for the Applicant, stated that the Objectors could divert their water use amounts without any excess water in the stream if they created an impoundment, with rocks or a log, that raised the water level enough to send water into the Objectors' ditches. He stated that a log placed across the stream could be notched to allow any water above the amount of the diversion to flow through.

Mr. Miller testified that the cost of such a diversion could be a few hundred to a thousand dollars, depending on the need for heavy equipment, and that .30 to .50 cfs could be lost to the stream through loss in "dead water" and water forced downward into the creek bottom by the log.

22. In January, U.S.G.S. flows indicate an approximate average Ross Creek flow of 11 cfs, while demand consists of .5 cfs stockwater (Howe) plus .83 cfs of stockwater (Brewster) plus 2 gpm of domestic (Hasting) and approximately 60 gpm domestic by Llos Parker, for a total demand by Objectors of just over 1.33 cfs. In February, average flow is approximately 9.5 cfs, while Objectors' water uses are the same as in January. In March, the average flow is 10 cfs; the Objectors' water uses are identical to January and February. In April, average flow is approximately 11.5 cfs, while Objectors' uses are the same as in the preceding three months.

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In May the approximate average flow in Ross Creek is 15 cfs, while Objectors' uses are the 1.33 cfs described, plus an additional 4.67 cfs in irrigation uses (2.5 cfs by Parker, 2.17 cfs by Brewster) for a total use of 6 cfs. In June, the flow in Ross Creek averages approximately 23 cfs: the Objectors' uses repeat the May figures with the addition of 3.76 cfs irrigation (Howe) for a total of 9.76 cfs. Flow in Ross Creek averages approximately 26 cfs in July and 25 cfs in August, while the Objectors' water uses remain at 9.76. In September, the flow in Ross Creek averages approximately 20 cfs; uses are 9.76 cfs for the first half of the month. On September 16 the Howe irrigation period ceases, and on September 21 the Parker irrigation period ceases: after September 21, the Objectors' uses total 3.5 cfs.

In October, the approximate average flow in Ross Creek is 15 cfs, while Objectors' water uses are 3.5 cfs. In November, Ross Creek flow averages about 15 cfs. The Brewster irrigation period ends as of November 1, so Objectors' uses in November total 1.33 cfs (.5 cfs stockwater for Howe, .83 cfs stockwater for Brewster, and 2 pgm for Hasting domestic use). The Objectors' uses remain the same in December, while the average flow in Ross Creek declines to approximately 12.5 cfs.

The water use totals listed for the Objectors are slightly low, since domestic uses by Llos Parker and Kenneth Hasting have not been factored into the flow rates. However, the Hasting flow rate is less than 1/200 of a cfs (see Finding of Fact 15), and the Parker domestic use probably does not exceed a flow rate of

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1/8 to 1/7 cfs (see Finding of Fact 18). Additionally, when using the flow data for purposes of comparing the supply to Applicant's and Objectors' water use demands, the Hasting flow rate does not need to be factored in, since it is taken out of the stream below the Applicant's proposed point of return. (The Howe claimed right from Jones Canyon Creek also has been excluded from the Objectors' water use totals).

The approximate flow rates in Ross Creek based on the U.S.G.S. data can be considered as base flows, since testimony and recent flow measurements indicate that the flows have increased in recent years. (Testimony of Clark Ryen, Department Exhibits 1-3).

23. Fred Nelson, fisheries biologist with the MDFWP, stated that federal law allows his Department to make recommendations in regard to mitigation measures to be taken on a FERC-licensed project or project exemption. Such recommendations include evaluation of existing fish populations within a project area, and determination of minimum instream flows.

Mr. Nelson testified that no studies had been conducted on Ross Creek in regard to the Ryens' FERC application as of the time of the water rights hearing, but that a March, 1983 preliminary analysis based on electrofishing in the area of the proposed place of use showed that Ross Creek does support a fish population, and that the MDFWP will be making some kind of instream flow recommendation.

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Mr. Nelson stated that he had "no idea whatsoever" as to what the instream flow recommendation might be, and that his Department's usual recommendations concerning withdrawals on mountain streams would not be applicable, since Ross Creek is not a typical high mountain stream.

24. Two points of diversion have been proposed for the Applicant's project. The upper point of diversion is located in S½SE¼SE¼ of Section 9, Township 1 North, Range 6 East, on Forest Service property. Clark Ryen testified that he had not applied to the Forest Service for a special use permit for the proposed diversion site, but that he understood that it would not be a problem. He further testified that he plans to replace the old stream crossing with a culvert for the road which would be built, and that he has applied to the Forest Service for a special use permit for the road and the Forest Service has approved the proposed road location.

The lower proposed point of diversion is located in the NE¼NW¼NE¼ of Section 16, Township 1 North, Range 6 East, on Ryen property. In documents included in the Applications, Clark Ryen stated that "at this diversion point on our own land we get a measurement of a higher volume of water than any other place on stream above point of use". (Letter to DNRC, dated July 14, 1983).

The upper proposed point of diversion would yield approximately 480 feet of fall from diversion to place of use; the lower proposed point of diversion would yield approximately 310 feet of fall.

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The Applicant proposes to use both points of diversion, but would only be utilizing one point of diversion at a time. (Testimony of Paul Kinshella).

25. Both proposed points of diversion are located above all of the Objectors' points of diversion, while the proposed place of use and point of return for Applicant's flow is below all of the Objectors' points of diversion apart from the Howe lower ditch and the Hasting point of diversion.

26. The historic use rights for which Applications for Change have been made were diverted below all of the Objectors' points of diversion, apart from those of Hasting and the Howe lower ditch, and the water was returned to the creek within 400-500 feet of the point of diversion.

27. The Applicant's proposed diversion structures each consists of a 10-foot high concrete structure across the entire width of Ross Creek, creating a reservoir of approximately .30 to .50 acre in size. The diversion structure would have a 12-foot wide spillway placed 2 feet from the top of the structure and would include a measuring device to measure bypass flow. The spillway would include a 3-foot wide notch 6" lower than the rest of the spillway to allow for spills at lower water levels. The spillway would be able to handle flows in excess of 100 cfs. (Testimony of Paul Kinshella).

The water level sensor would be connected to a needle valve located at the power house. The sensor would transmit water level information to the power house, where the valve could be

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en or closed; if closed, pressure would increase back up the line and allow less water into the penstock and more water over the spillway.

The penstock (pipeline) would be located about 6 feet below the top of the diversion structure, low enough to prevent air from getting into the pipe. (Testimony of Clark Ryen). It is important to keep the penstock full and air out of the line in order to minimize head loss. (Testimony of Clark Ryen, Paul Kinshella). A consistent spill over the structure would ensure pressure on the water entering the intake. (Testimony of Clark Ryen).

The penstock would be 30 inches in diameter, since preliminary studies indicate that a 30 inch pipe will minimize head losses at about 1% of the total head (velocity which is converted into pressure). (Testimony of Paul Kinshella). The intake structure would include a bar screen to catch debris, and a sluiceway with sufficient gradient to allow smaller sediment to settle on the concrete apron to be sluiced away, so that materials will not build up to block the intake, located approximately 2½ feet above the sluiceway. (Testimony of Clark Ryen, Paul Kinshella).

At the intake, water would enter the penstock and would remain enclosed, building up head, the entire length of diversion to the power house. The penstock would be equipped with a surge arrest valve to eliminate the chances of a water surge ("hammer") creating intense, destructive levels of pressure within the system.

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Clark Ryen testified that he does not intend to utilize the hydropower plant which is currently in operation; the present plant would be retained at its site, with the same water uses and priority date, for personal use. The hydropower project relevant to the Applications in this matter would be housed in a completely new power plant with new equipment, including electronic gauging devices and controls which would make it possible to control relative diversion rates and spill rates at the diversion structures.

Once the water reached the power house, it would be aimed at high velocity through a nozzle directed at a Pelton-Wheel Turbine. The water then would free-fall off the wheel onto a wide tailrace with a gentle slant down into the creek channel. (Testimony of Paul Kinshella).

Two separate Pelton Wheels might be utilized, one to handle low flows and one to handle high flows, since a wheel which is designed to peak in efficiency at a lower flow will lose efficiency with higher flows, and vice versa. (Testimony of Paul Kinshella, Clark Ryen). The wheels would be set above flood level. (Testimony of Paul Kinshella).

Paul Kinshella testified that most of the water velocity would be spent in producing energy, and that a wide tailrace and a gradual angle of re-entry into the creek would minimize turbulence and erosion. In addition that there would be no heat gain. In regard to possible water quality problems, Mr. Kinshella testified that water would have less debris than if it remained in the natural creek channel, and that there would be no

aeration or nitrogenation of the water at the intake, but there might possibly be some at the Pelton Wheel. No additional sedimentation to the creek should occur during the construction phase of the project; the creek's flow would be bypassed around the construction site in a pipe, which would be left in place to allow for future maintenance on the diversion structure. (Testimony of Clark Ryen, Paul Kinshella).

Applicant applied to FERC for a preliminary permit for the proposed project in June, 1983.

28. Clark Ryen testified that he does not want to dewater the creek; that it is to his benefit to have water constantly spilling over the diversion structure, since this would ensure that the penstock remains underwater and doesn't have air entering the line, and would help to maintain pressure on the water feeding into the penstock.

Mr. Ryen testified that he would allow sufficient bypass flow to satisfy the other water uses in the stream and whatever instream flow requirement is imposed through the FERC licensing procedure in response to the MDFWP recommendation. He stated that the Objectors should be able to get their claimed use amounts, although they might not receive the same carriage water, and that he doesn't think the Objectors will be adversely affected even though the stream will be lower. Mr. Ryen testified that there is a good fall at the Howe point of diversion and that there shouldn't be a problem getting water

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into the ditch, since a pipe or a wood or rock structure could be installed. He also testified that he believes the Parker-Brewster-Ryen ditch will still be able to divert water.

Clark Ryen additionally stated that he has never cut off junior appropriators, even though his 1866 right for 500 miner's inches (12½ cfs) is the oldest priority on Ross Creek.

29. Clark Ryen testified that the probable cost of the project is in the range of half a million dollars. He intends to sell the generated power to Montana Power under the federal mandatory "buy-back" regulations, and has contacted Montana Power personnel concerning buy-back. No contract had been entered as of the hearing in this matter. Testimony indicates that a 9.5 cfs average flow for the project is needed to recover the capital investment, at current interest rates and power buy-back rates. (Testimony of Paul Kinshella).

Clark Ryen testified that, since the high flow in Ross Creek coincides with the irrigation season, his senior right of 12½ cfs should be available year-round for the project, unless instream flow requirements required cutting back the flow during the low flow period in the winter. Additional flow amounts should be available during periods of high flow when irrigation is not taking place. (Testimony of Clark Ryen, Dale Miller). Paul Kinshella testified that the project might not be feasible if the Applicant couldn't divert any flows during the winter and could divert only part of the requested amount during the summer.

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Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following Proposed Conclusions of Law in the Matter of Application for Beneficial Water Use No. 49632-s41H:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.

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

3. The Department must issue a permit in an application for new appropriation if the applicant proves by substantial credible evidence:[3]

[3] Although the water quantity involved in this matter totals 30 cfs and over 21,714 acre-feet per year, 18.75 cfs up to 13,571.4 acre-feet of this amount is the result of change applications which fall under different statutory criteria, M.C.A. § 85-2-402, and thereby under a different burden of proof. Therefore, the Applicant's burden of proof on the new appropriation portion of his project is "substantial credible evidence", rather than "clear and convincing evidence". MCA § 85-2-311 (1983).

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(a) there are unappropriated waters in the source of supply:
(i) at times when the water can be put to the use proposed by the applicant,
(ii) in the amount the applicant seeks to appropriate; and
(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
(b) the water rights of a prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial one;
(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The use proposed by the Applicant, the generation of power, is a beneficial use of water. MCA § 85-2-102(2).

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

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

The Applicant has provided sufficient information to indicate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. He has introduced specific information concerning the proposed type of turbine and turbine operation, length and diameter of the pipeline, project location, and intake structure. Exhibits and testimony introduced by the Applicant indicate that time, money, and expertise have been involved in developing the proposed layout of the project, they are sufficient to meet the threshold requisite of "adequate".

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7. The evidence does not show that other water uses will be adversely affected by changes in water quality pursuant to the proposed use. Water quality should not be materially affected by activities related to the proposed use if the Applicant acts in accordance with specifications imposed by other authorizing agencies.

The Objectors' concerns about the potential impacts the proposed project might have on the water quality of the creek have been noted. Kenneth Hasting, Patricia Gibson, and Charles Howe expressed concern about the possibility of increased sedimentation in Ross Creek as a result of construction on the proposed project, and also as a result of slough-off from the road leading to the project. (See Findings of Fact 15, 17). Kenneth Hasting also expressed concern about increased nitrogenation and aeration of the water above the point of diversion for his domestic uses.

Clark Ryen and Paul Kinshella testified that Ross Creek will be bypassed around the construction site in a pipe so that no additional sedimentation will occur. (See Applicant's Exhibit 14). Once the diversion structure is in place, no additional sedimentation should occur as a result of the construction.

Testimony indicates that sloughing problems are a real concern in the drainage. (Testimony of Kenneth Hasting, Patricia Gibson, Charles Howe and Greg Morris on erosion to ditches and roads in the area). It appears possible that Applicant's road to the proposed project could increase the sedimentation in Ross Creek through sloughing and washouts. However, pursuant to the applicable statute, Department jurisdiction over the construction

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and maintenance of the road appears to be tenuous. The proper authorities with jurisdiction over this aspect of the proposed project are the Soil Conservation Service (Title 75, Chapter 7, Part 1, MCA), and the Water Quality Bureau. (Under the Water Quality Act, Title 75, Chapter 5, Part 6, MCA 1983, the Department of Health and Environmental Sciences can require mitigating action by any party who pollutes any state waters; pollution includes changes in turbidity of the waters. See MCA § 75-5-103, 75-5-601 et seq.). The Applicant testified that he has applied for, and received, SCS approval of his proposed road crossings.

Kenneth Hasting's additional concern about possible aeration and nitrogenation of the water also appears to be a problem which cannot be properly handled in the present forum. This is not to be construed as saying that the Department will not take degradation of water quality into consideration: these specific characteristics of any given water right which need to be maintained in order to ensure that the appropriator may make beneficial use of his water right will vary according to the use for which the water is being appropriated. An appropriator who is using water for domestic purposes needs to maintain a higher water quality standard than an appropriator who is using water for irrigation. In order for the domestic appropriator to reasonably exercise his water right, the element of "quality" must be protected to the extent that the water will still be satisfactory for domestic purposes. See Atchison v. Peterson, 87 U.S. 507 (1874); In the Matter of the Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch.

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However, the record in this matter shows only that Mr. Hasting testifed that aeration and nitrogenation of water have an effect on the water's "microbe count", and thereby on its healthfulness, and that Paul Kinshella testified that there might possibly be a "small amount" of aeration and nitrogenation of the water at the Pelton Wheel. (Findings of Fact 15, 27.)

This paucity of evidence does not allow a specific permit condition to be tailored, nor can a permit be denied on the basis of a nebulous chance that operation of the project may result in aeration and nitrogenation of Ross Creek to the point that its waters cannot reasonably be used for domestic purposes. Rather, such concerns must be dealt with, when and if they occur, through the Water Quality Act or through modification of the permit (See MCA § 85-2-314). However, it is obviously to the advantage of an applicant for a water use permit to forestall any problems that the proposed project might result in, in order to avoid expenses, delays, and possible litigation at future points in time.

8. There is substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant pursuant to MCA § 85-2-311.

Although a comparison of filed and decreed water use rights with the available U.S.G.S. flow data suggests that no water is available for a new appropriation, the Applicant has testified that flows in Ross Creek have been substantially higher in recent years, with high flows up to 36 to 40 cfs. (Finding of Fact 11.)

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Mr. Ryen has had several decades of experience with Ross Creek flows, and is familiar with the creek's flow patterns. His testimony is entitled to great weight. See, e.g., Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939), In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, September 30, 1981. Additionally, his testimony is substantiated by the testimony of other witnesses. (See Finding of Fact 11).

Flow rates in the quantity testified to by the Applicant will meet the Applicant's and Objectors' existing water use requirements and still provide water for further appropriations from the source of supply.

9. Water measurement data on the source of supply, in conjunction with testimony concerning flow rates, indicates that the full amount of the requested new appropriation is not available during low flow periods, even with the recent increase in flow. Additionally, the full amount requested may not be available if flows in Ross Creek decline to former levels. However, the Applicant can make beneficial use of whatever amount of water is available to increment his power generation. (See Finding of Fact 27).

"An applicant is entitled to complete an appropriation of whatever waters that are in fact unappropriated, and which may be diverted without injury to other appropriators. A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature, until such time as that

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permittee actually applies the waters countenanced by the permit to beneficial use. See MCA 85-2-312(2) (1979), MCA 85-2-315 (1979)". Monforton, supra, at 19.

10. The water rights of a prior appropriator will not be adversely affected by the granting of a Beneficial Water Use Permit. The water rights of the Objectors in this matter will not be affected by the granting of a new appropriation: such an appropriation would be junior to all of the Objectors' uses. As senior appropriators, the Objectors are entitled to "call" the water represented by any new use permit which might be granted, whenever they need it to fulfill their appropriative rights.

Concern was expressed over possible "lag time" between a call for the water and the arrival of the water at the Objector's point of diversion. (See Finding of Fact 19). However, the distance involved can be measured in thousands of feet, rather than in miles. (See Applicant's Exhibit 1). This, in conjunction with the fact that flow is to be controlled electronically and therefore can be released almost instantaneously (See Finding of Fact 27), indicates that no substantial "lag time" should occur. The possibility raised by Objector Howe, that the Applicant will not cooperate with the Objectors, is not within the Department's purview; the Department cannot assume bad faith on the part of the Applicant. See generally, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

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Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following Proposed Order in the Matter of Application for Beneficial Water Use Permit No. 49632-s41H:

PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 49632-s41H is hereby granted to the Estate of Lena Ryen to appropriate 11.25 cfs up to 8,142.84 acre-feet per annum, for non-consumptive use for power generation between January 1 and December 31 of each year. The priority date for this Permit shall be December 2, 1982 at 9:00 a.m.

The points of diversion for this appropriation are the NE¼NW¼NE¼ of Section 16, Township 01 North, Range 06 East, and the S½SE¼SE¼ of Section 09, Township 01 North, Range 06 East, all in Gallatin County, Montana. The place of use is the SE¼NW¼NW¼ of Section 16, Township 01 North, Range 06 East, Gallatin County, Montana. The source of supply is surface water from Ross Creek, to be diverted by means of a Federal Energy Regulatory Commission (FERC) - licensed diversion structure, and to be returned to the creek at the point of use specified above.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

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A. The water rights evidenced by this Permit 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 appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of the Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall in no event withdraw or cause to be withdrawn more water than the amount specified in the Permit. At all times when the water is not reasonably required for the specified purpose, the Permittee shall allow the waters to remain in the source of supply.

D. The Permittee shall install an accurate means of flow measurement of the stream above the point of diversion, in addition to a flow measurement device to measure the amount of water actually diverted through the facility, and shall keep a written record of the flows in Ross Creek and of all flows diverted from the creek. The Permittee shall make these records available to the Department upon request.

The Permittee shall cooperate with other licensing agencies in determining methods and records of measurement which will ensure that the Permittee's compliance with by-pass flow or other requirements imposed by such agencies can be accurately determined.

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E. The Permittee shall notify the Department of the amount of by-pass flow, if any, required of his project, upon his receipt of such information. Any Permit issued to the Permittee will be amended or notated, as necessary, to make the water rights records clear upon their face that the Permittee is not authorized to appropriate the full amounts of water granted by the Permit when such appropriations would infringe upon the instream flow requirements.

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 (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

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APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G 120401-41H AND G 120403-41H

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following Proposed Conclusions of Law in the Application for Change of Appropriation Rights Nos. G 120401-41H and G 120403-41H:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto, whether present at the hearing or not.

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

3. The Department must issue a permit in an Application for Change of Appropriation Water Right if it determines that the proposed change will not adversely affect the rights of other persons. MCA § 85-2-402(2).

4. The evidence does not show that other water uses will be adversely affected by changes in water quality pursuant to the proposed use. Water quality should not be materially affected by activities related to the proposed use if the Applicant acts in accordance with specifications imposed by other authorizing agencies.

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The Objectors' concerns about the potential impacts the proposed project might have on the water quality of the creek have been noted. Kenneth Hasting, Patricia Gibson, and Charles Howe expressed concern about the possibility of increased sedimentation in Ross Creek as a result of construction on the proposed project, and also as a result of slough-off from the road leading to the project. (See Findings of Fact 15, 17). Kenneth Hasting also expressed concern about increased nitrogenation and aeration of the water above the point of diversion for his domestic uses.

Clark Ryen and Paul Kinshella testified that Ross Creek will be bypassed around the construction site in a pipe so that no additional sedimentation will occur. (See Applicant's Exhibit 14). Once the diversion structure is in place, no additional sedimentation should occur as a result of the construction.

Testimony indicates that sloughing problems are a real concern in the drainage. (Testimony of Kenneth Hasting, Patricia Gibson, Charles Howe and Greg Morris on erosion to ditches and roads in the area). It appears possible that Applicant's road to the proposed project could increase the sedimentation in Ross Creek through sloughing and washouts. However, pursuant to the applicable statute, Department jurisdiction over the construction and maintenance of the road appears to be tenuous. The proper authorities with jurisdiction over this aspect of the proposed project are the Soil Conservation Service (Title 75, Chapter 7;, Part 1, MCA), and the Water Quality Bureau. (Under the Water Quality Act, Title 75,

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Chapter 5, Part 6, MCA 1983, the Department of Health and Environmental Sciences can require mitigating action by any party who pollutes any state waters; pollution includes changes in turbidity of the waters. See MCA § 75-5-103, 75-5-601 et seq.). The Applicant testified that he has applied for, and received, SCS approval of his proposed road crossings.

Kenneth Hasting's additional concern about possible aeration and nitrogenation of the water also appears to be a problem which cannot be properly handled in the present forum. This is not to be construed as saying that the Department will not take degradation of water quality into consideration: these specific characteristics of any given water right which need to be maintained in order to ensure that the appropriator may make beneficial use of his water right will vary according to the use for which the water is being appropriated. An appropriator who is using water for domestic purposes needs to maintain a higher water quality standard than an appropriator who is using water for irrigation. In order for the domestic appropriator to reasonably exercise his water right, the element of "quality" must be protected to the extent that the water will still be satisfactory for domestic purposes. See Atchison v. Peterson, 87 U.S. 507 (1874); In the Matter of the Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch.

However, the record in this matter shows only that Mr. Hasting testifed that aeration and nitrogenation of water have an effect on the water's "microbe count", and thereby on its

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healthfulness, and that Paul Kinshella testified that there might possibly be a "small amount" of aeration and nitrogenation of the water at the Pelton Wheel. (Findings of Fact 15, 27.)

This paucity of evidence does not allow a specific permit condition to be tailored, nor can a change authorization be denied on the basis of a nebulous chance that operation of the project may result in aeration and nitrogenation of Ross Creek to the point that its waters cannot reasonably be used for domestic purposes. Rather, such concerns must be dealt with, when and if they occur, through the Water Quality Act or through modification of the change approval (See MCA § 85-2-402(5). However, it is obviously to the advantage of an applicant for a change of water use authorization to forestall any problems that the proposed project might result in, in order to avoid expenses, delays, and possible litigation at future points in time.

5. The Applicant has met the burden of production on the issue of the existence of the underlying water rights for which the applications for change have been made. (As discussed in Preliminary Matters, supra, the Department cannot grant a change authorization unless it has enough evidence to make a preliminary finding that the underlying right exists). In the present matter, the Applicant has offered probative evidence in the form of testimony about use of the water rights by his father and himself, and through the 1922 decree on Ross Creek (Cause No. 6640, Gallatin County, Montana) and SB76 Claims for the uses. The evidence indicates that the claimed historic uses are usufructuary, rather than "paper", rights.

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The Objectors pursued lines of questioning at the hearing in this matter concerning possible abandonment of the claimed historic uses. (See, e.g., the discussion on the objection to Llos Parker's testimony, Preliminary Matters, supra). However, the Applicant's testimony in this matter makes it clear that there was no intent to abandon.

While the recent case of 79 Ranch, Inc. v. Pitsch, supra, indicates that a lengthy period of nonuse will raise a rebuttable presumption of abandonment, the court did not specify the extent of nonuse which would trigger the presumption. The evidence in the present matter shows a period of nonuse of about 20 to 25 years (see Finding of Fact 12), in comparison with the forty years of continuous nonuse in Pitsch. In addition, the Applicant testified that he had purchased materials to repair the diversion structure so that use could be resumed; that repairs had not been completed only because they were exploring the possibility that the water could be applied to the generation of commercial power. (But see Pitsch, "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope". At 985.)

Although a Departmental decision on abandonment does not reach the level of finality (see Preliminary Matters, supra) as a legal matter, it does have the effect of ending Departmental action on an Application for Change, since a change authorization must be denied if the existence of the underlying right has not

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been proven. However, it is not necessary at the present time for the Department to reach a final (for Departmental purposes) decision on abandonment; the question of whether or not the claimed historic rights have been abandoned will of necessity be enfolded in any determination on the parameters of the historic use. (See Conclusion of Law 7, infra).

6. The Applicant has not presented adequate evidence to support his claimed historic uses from Ross Creek, in terms either of water quantities or periods of use.

The Applicant has filed SB76 claims for a constant, year-round flow rate of 12.5 cfs, based on a decreed 1866 right, and a constant, year-round flow rate of 6.25 cfs, based on a decreed 1874 right. However, there is no evidence in the record to support a year-round water right. The only testimony on periods of use of the rights in question was testimony by an Objector that the water had been utilized for its intended purpose (hydropower for a saw mill) in the spring and occasionally in the summer; his testimony was not rebutted by the Applicant. (See Finding of Fact 13). In addition, the Applicant made the notation "intermittened" (sic) under the heading "period(s) of use" on both of the SB76 Claim forms.

There also is no evidence in the record to support the quantity of water which the Applicant has claimed. The flow rates which are claimed for the two rights were decreed to the Applicant's predecessor in interest in a 1922 decree on Ross Creek (Cause No. 6640, Gallatin County, Montana), but no volume

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(total quantity) measurements were assigned. The volumes claimed in the SB76 claims appear to be calculations based on continuous use of the claimed flow rates on a 24-hour a day, 365 days a year basis. The record in this matter lacks not only evidence that full-time use was made of the water, but also evidence that the full flow rates were utilized on a consistent basis.

7. The two applications for change cannot be granted unless the Department is provided with evidence that defines the underlying historic uses in terms of water quantities and periods of use.

An applicant is not entitled to change what he does not possess, nor to expand his uses while maintaining a priority date based on historic use. (See, Preliminary Matters, supra). However, these results can be avoided only if the parameters of the historic use are known. The record in the present matter is devoid of evidence concerning the claimed historic uses.

In the absence of sufficient information to delineate the Applicant's historic use, the Applications for Change must be denied. (A change application, if denied, simply leaves the Applicant with the same right to use water that he had before applying to the Department for a change authorization. Although it may not be worthwhile, due to the change of circumstances, to continue to exercise the rights as they existed prior to the Applicant's application for change, such a situation is not the result of Departmental action in the matter, but rather is the result of the Applicant's failure to meet his burden of proof).

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See Moldenhauer, supra, In the Matter of the Application for Beneficial Water Use Permit No.51282-s410 by Ben Lund Farms, Inc., Final Order, January 21, 1985.

8. The Objectors in this matter also must provide further information, in the form of evidence on the reasonableness of their means of diversion and of the amount of carriage water which is necessary to the utilization of their appropriation rights.

The Objectors have met the burden of producing evidence on the issue of injury to their rights, as far as indicating the kinds of injury which might be caused by the proposed project. However, they have not produced evidence as to their requirements for carriage water beyond a general allegation of need.

Appropriators are entitled to a reasonable amount of carriage water in order to effectuate their appropriation. See State ex rel. Crowley, supra. However, the Objectors must meet the burden of providing evidence on the scope of their right. (See Burden of Proof, supra.

9. Apart from those findings of fact and conclusions of law which can be made only if the Department receives additional information from the Applicant and the Objectors in this matter (see Conclusions of Law 6, 7, 8), all Findings of Fact and Conclusions of Law necessary to a decision on the Applications for Change have been made. The Findings of Fact and Conclusions of Law contained in this Interlocutory Order will be incorporated in any Proposal for Decision which is issued in this matter.

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10. The parties in this matter have had a full and fair opportunity to be heard. They are estopped from raising issues which they failed to raise at the hearing in this matter. Furthermore, the parties are collaterally estopped from submitting further evidence on those issues which have been raised and considered, and upon which Findings of Fact and Conclusions of Law already have been made.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner issues the following Interlocutory Order in the Matter of Application for Change of Appropriation Water Rights Nos. G 120401-41H and G 120403-41H:

INTERLOCUTORY ORDER

The Applicant, if he wishes to continue with his Applications for Change, must submit written evidence documenting the historic use patterns of the water uses for which the Applications have been made. The evidence must be sufficient to allow Findings of Fact and Conclusions of Law to be made on the questions of when, and in what quantities, the water historically has been used.

The Objectors must submit written evidence on the reasonableness of their means of diversion, and the exact flow rates which they require in order to obtain their appropriation amounts.

The evidence may take the form of public records, other verifiable written documents, and affidavits by parties and other persons.

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Any evidence which is submitted to the Department in response to this Order must be filed with the Hearing Examiner (32 S. Ewing, Helena, MT 59620) within 45 days after the Order is served upon the party.

After the time period for filing evidence has expired, the Hearing Examiner will take any further action necessary to protect the due process rights of the parties before issuing a Proposal for Decision in this matter.

DONE this [redacted] day of March, 1985.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

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AFFIDAVIT OF SERVICE
MAILING

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on [redacted] 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Estate of Lena Ryen, Application No. 49632-s41H, for an Application for Beneficial Water Use Permit, and Application No. G 120401-41H, for an Application for Change of Appropriation Water Right addressed to each of the following persons or agencies:

1. Estate of Lena Ryen, c/o of Clark Ryen, 7960 Springhill Community Rd., Belgrade, MT 59714
2. Anna Marie Bakken, Box 447, Bozeman, MT 59715
3. Lyle Ryen, 8680 Walker Rd, Belgrade, MT 59714
4. Wayne Ryen, 209 So. 6th, Bozeman, MT 59715
5. David C. Moon, Moore, Rice, O'Connell & Refling, P.O. Box 1288, Bozeman, MT 59771-1288
6. Llos F. & Leona Parker, 8081 Springhill Community Road, Belgrade, MT 59714
7. Donald A. Nash, Attorney, Box 1330, Bozeman, MT 59715
8. Barbara Brewster, RFD 1 Box 201, Brattleboro, VT 05301
9. Philip Davis, 109 E. Main St., Bozeman, MT 59715
10. Charles & Sarah Howe, 8360 Springhill Community Rd., Belgrade, MT 59714
11. Ted Doney, Box 1185, Helena, MT 59624
12. Kenneth L. Hasting, 3416 Valle Verde Dr., Napa, CA 94558
13. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
14. Peggy A. Elting, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

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

On this 13th day of March, 1985, 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.

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BB only

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. G121037-01-41I AND APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 69113-s41I BY MONTANA TUNNELS MINING, INC.	))))))	ORDER

* * * * * * * * * * *

All objections to the above-captioned Applications having been withdrawn, the hearing scheduled for December 13, 1988 is hereby vacated, and the Application files remanded to the Department of Natural Resources and Conservation, Water Rights Bureau Processing Unit for such other and further consideration as applications without objection receive.

Dated this 12 day of December, 1988.

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 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 Order was served upon all parties of record by certified mail, return receipt requested, at their address this 12th day of December, 1988, as follows:

Montana Tunnels Mining, Inc.
P.O. Box 176
Jefferson City, MT 59638

Montana Department of
Fish, Wildlife & Parks
Liter Spence
1420 East 6th Avenue
Helena, MT 59620

The Montana Power Co.
40 East Broadway
Butte, MT 59701

Michael E. Zimmerman
40 East Broadway
Butte, MT 59701

Ted Doney
Doney & Thorson
314 N. Last Chance Gulch
Helena, MT 59601

Pamela Bompart
P.O. Box 67
Jefferson City, MT 59638

Virginia Bompart
P.O. Box 4325
Helena, MT 59604

Irene V. LaBare
Legal Secretary

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