

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION ) FINAL ORDER  
WATER RIGHT NO. G128519-76H BY )  
ROBERT E. AND ALICE E. THOFT )

\* \* \* \* \*

Oral Argument on exceptions to the Proposal for Decision in this matter was held before the Assistant Administrator of the Water Resources Division on Saturday, January 31, 1987, at the American Legion Hall near Stevensville, Montana. On behalf of the Applicants, attorney Ted Doney presented exceptions to the Proposal for Decision of October 15, 1986, and the Notice and Supplemental Proposal of November 12, 1986. Also appearing and presenting their exceptions to the Proposal and Supplemental Proposal were Objectors George Farrell, Joseph Warren, Vernon Woolsey, Elmer Severson, Ellen Little, Alda Bailey, Roy Stenman, Thomas Jones, and Jay Meyer. The parties' exceptions will be addressed in Part II of this Order.

I. FINDINGS AND CONCLUSIONS

On March 3, 1987, the Department issued an Order Allowing Applicant to Reopen the Record. The Order allowed the Applicant to suggest alternatives to proposed condition 6, which required the Applicant to take out of production 80 irrigated acres at the

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old place of use of Right No. W128519-76H, to compensate for the 80 acres at the new place of use. See Notice and Supplemental Proposal, p. 2. The purpose of Condition 6 was to limit the Applicant's remaining water rights at the old place of use to their historic levels and thereby prevent adverse effect upon the water rights of others as a result of this change. See § 85-2-402(2)(a), MCA. The March 3 Order allowed the Applicant to propose an alternative restriction on the remaining rights at the old place of use, or to present evidence showing that those rights are already sufficiently regulated to prevent any increased burden on other appropriators as a result of this change.

On March 18 the Department received the Applicant's Affidavit and Proposal to the Department. In his affidavit the Applicant stated that it was physically impossible to expand the remaining rights at the old place of use, because those rights had historically been used continuously throughout the irrigation season. The Applicant proposed providing the Department with records of the court-appointed water commissioner showing diversions of water from Burnt Fork for the past two years and for a limited number of years in the future, so the Department could verify that the remaining rights were being restricted to their historical levels. The Applicant also proposed that the Irrigation District ditch rider be instructed to limit the Applicant to the same amount of water that he has been receiving in the past from the District.

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On April 1 the Department received the Objectors' response to the Applicant's proposal. The Objectors cited to water commissioner's records to rebut the Applicant's claim that he had always used his water rights continuously throughout the irrigation season. The Objectors also noted that the amount of water available for Sunset District Users varies during the irrigation season. Attached to the response were statements from nine Sunset District water users who objected to allowing water historically used within the District to be moved to land outside it. The Objectors asserted that moving the place of use would alter runoff patterns, and would have a detrimental effect on others' water rights. The response also repeated the Objectors' claim that the district court has exclusive jurisdiction over water use in the Burnt Fork, and dismissed as lacking merit or substance the Applicant's offer to instruct the District ditch walker to limit the Applicant's water to historical levels. The Objectors also expressed concern that measuring the Applicant's 40 inch right at his pump will require the District to absorb the losses incurred in carrying the water approximately a mile from its Burnt Fork diversion. Finally, the Objectors questioned why the hearing officer and final decisionmaker were changed after the proposal for decision was issued and questioned the Department's legal authority to reopen the record in this case.

On March 30 the Department sent written questions to the Applicant concerning his March 19 Proposal. On April 14 the Applicant submitted answers to the Department's questions and to one of the responses of the Objectors. Pursuant to the

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Department's March 3 Order, the record in this case is now closed, and the Assistant Administrator can issue the Department's final decision.<sup>1</sup>

In response to the Objectors' question about the legality of reopening the record, the Department takes the position that it has the power to reopen the record in contested cases in proper circumstances. Reopening the record is limited, but not prohibited, by the Department rule prohibiting rehearing proceedings except as required by statute. See ARM 36.12.231. To avoid a prohibited "rehearing", any new evidence should either be newly discovered evidence that a party could not, with reasonable diligence, have discovered and produced at the hearing, or evidence which for other justifiable reason was not adduced at the hearing, and which the Department finds essential to its determination of a case.

Here, the record was reopened to take evidence concerning the scope and nature of the Applicant's remaining rights at the old place of use of Water Right Number W128519-76H. Due to the Applicant's good faith belief and contention that the remaining

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<sup>1</sup>Contrary to the Objectors' April 1 Response, the Hearing Examiner in this case has not been removed or changed. The Administrator of the Water Resources division, not the Hearing Examiner, has always had final decision making responsibility in this case. The January 8 Department Order substituting the final decisionmaker simply appointed the Assistant Administrator as final decisionmaker. The appointment was necessary because of conflicts with the Administrator's schedule.

rights were not reviewable by the Department, this evidence was not presented at the hearing. However, the Department has determined that the remaining rights are properly reviewable (see Part II of this Order), and that evidence concerning them is essential to a determination of whether alternatives to proposed condition 6 are feasible. The only new evidence that the Department has considered is that which relates to this issue.

As to evidence submitted in response to the March 3 Order, the Assistant Administrator is the finder of fact. As to all other factual matters, the Assistant Administrator is limited to reviewing, pursuant to § 2-4-621(3), MCA, the findings of fact of the Hearing Examiner in the Proposal and Supplemental Proposal.

#### FINDINGS OF FACT

All of the Findings of Fact of the Hearing Examiner in this matter are adopted and incorporated in this Order by reference. The Assistant Administrator makes the following additional findings of fact, based upon evidence submitted in response to the Department's March 3 Order:

17. Two ditches serve the 365-acre old place of use of Right No. W128519-76H. These are the Sunset-Baker and Sunset-Hiline ditches, which divert from Burnt Fork Creek. Diversions from the creek into these ditches is regulated exclusively by the court-appointed water commissioner for Burnt Fork Creek.

18. Lateral diversions from the Sunset-Baker and Sunset-Hiline ditches are regulated exclusively by the Sunset

Irrigation District ditch walker. The ditch walker regulates both District and non-District diversions from these ditches.

19. Besides the Applicant, other members of the Sunset Irrigation District, and Thoft Ranch Co., no other water users are served by the Sunset-Baker and Sunset-Hiline ditches. Thus, the Applicant's two "Fort Rights" are the only non-District water rights served by these ditches on the Sunset Bench.

Based on these findings and the Findings of the Hearings Examiner, the Department makes the following:

#### CONCLUSIONS OF LAW

All of the Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in this Order by reference, except that Proposed Conclusion of Law 9 is modified to read as follows:

9. The proposed use will not adversely affect the water rights of other persons, if the change authorization is properly conditioned.

The evidence indicates that no significant return flows have been historically generated by Applicant's use. Further, the record contains no reference to filed claims of existing right to use of runoff which does not return to the source. The evidence also indicates that Applicant's full appropriation has been delivered to him and used annually as claimed. (Finding of Fact 11.) Thus, no alteration in the pattern or results of use can be reasonably expected after the change is made.

Further, no allegation has been made that diversion by use of Headgate No. 1 will affect other users on the source in any way. Thus, no adverse effect can reasonably be anticipated resulting from increased diversions from Headgate No. 1.

Regarding the acreage now supplementally irrigated (365 acres) with the right to be changed, Applicant has shown consistent historic use of, and thus need for, the 40 miner's inches he seeks to change. Thus, it follows that full service irrigation of the old place of use, from which 40 miner's inches has been severed, will not be possible. Unless the Applicant's remaining rights at the old place of use are regulated, there is a possibility that those rights could inadvertently be expanded beyond their historical levels, resulting in continuing full service irrigation at the old place of use. Such expansion could adversely affect the water rights of other persons, in contravention of §85-2-402(2)(a), MCA.

However, evidence submitted in response to the Department's March 3 Order indicates that the Applicant's remaining rights at the old place of use are sufficiently regulated to prevent adverse effects on others resulting from this change. The remaining rights consist of Sunset Irrigation District water. A court-appointed water commissioner controls the diversions of this water from Burnt Fork Creek, while a District ditch walker controls lateral diversions from the ditches to the 365 acre old place of use. So long as the water commissioner and ditch walker are informed that the Applicant's remaining rights may not exceed their historical levels, the Department concludes that this

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change can be approved without having to quantify in this proceeding the precise historical extent of the Applicant's remaining water rights.

Because the Applicant's remaining rights are District water, and because there are no other non-District water users served by these ditches, the Department assumes that the District can and will determine what adjustments are needed to preserve District equilibrium when the Applicant's 40-inch right is used outside the District. Although deferring in this case to the District to regulate the Applicant's remaining rights, the Department does not retreat from its general assertion of jurisdiction to review, and even to condition in an appropriate case, the Applicant's use of water rights besides those expressly made the subject of the change application. See Part II of this Order.

The parties have suggested that the Department calculate the Applicant's conveyance losses incurred by diverting his 40-inch right from Burnt Fork Creek and through a ditch approximately a mile to his sprinkler pump. Absent more specific data in the record, the Department is unable to make such a calculation. Accordingly, the Final Order simply approves this change for 40 inches as measured at the point of diversion on Burnt Fork Creek. The Applicant shall divert from the ditch only that portion of the 40-inch right remaining after his proportion of conveyance losses, as determined between himself and the District, has been deducted.

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## II. RESPONSE TO EXCEPTIONS

Applicant's Exceptions. At the January 31 Oral Argument Hearing the Applicant presented several exceptions to the Hearings Examiner's Proposal and Supplemental Proposal. The Applicant's exceptions all relate to the propriety of proposed condition 6, which required the Applicant to identify each year a particular 80-acre tract at the old place of use of Right No. W128519-76H that would not be irrigated by the remaining appurtenant rights. The Applicant excepted to this condition on two grounds. First, he argued that the Department lacks jurisdiction to place restrictions on any water rights besides those expressly made the subject of the change. Second, the Applicant argues that there is no evidence in this case that the Applicant's water use would be expanded at the old place of use. The Department first will address the jurisdictional issue.

Given this Order's modification of Proposed Conclusion of Law 9, the requirement of condition 6 that 80 acres be left dry every year is no longer necessary. However, the Applicant's exception goes to the Department's power even to review the rights supplemental to Right No. W128519-76H. There are two reasons that the Department must be able to assert jurisdiction, in changes involving one of several supplemental rights, over the entire "supplemental package".

In the first place, it is logically impossible to sever and move one supplemental right without reviewing the others. Moving a supplemental right is closely analogous to partition of

undivided interests in property. In partition, undivided interests must be divided, in order to identify one or more and sever them. Similarly, because supplemental rights are commingled and are all appurtenant to the same place of use, they cannot be separated without a kind of partitioning. All the rights must be reviewed together in order to identify one and sever it. Without jurisdiction to review the supplemental rights together, the Department could not administer a place of use change for one of the rights.

Second, as provided by §85-2-402(2)(a), a change applicant has the burden to prove that the proposed use will not adversely affect the water rights of other persons. When a change involves moving one of several supplemental rights, a unique possibility of adverse effect arises. Although one water right is removed, other water rights remain at the old place of use, and irrigation could continue there as before through expansion of the remaining rights. Unless the remaining rights are quantified or regulated in some way, expansion could occur despite the best intentions of the Applicant. Administering the change without adverse effect on others is difficult because there is no identifiable acreage going out of production at the old place of use, as occurs when a non-supplemental right is moved.

Thus, in changes that involve moving a supplemental right, the Department has a statutory duty to review, and if necessary to restrict, use of the remaining rights to ensure that they will not be expanded to the detriment of other water users. Contrary to the Applicant's contention, the Department's jurisdiction to

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review the remaining rights does not depend on their being formally submitted for review in the change application. If that were so, the Applicant could dictate the scope of the Department's review of possible adverse effects. Such a result would vitiate the Department's role under the Water Use Act.

Applicant also argues that, because his remaining rights were Sunset Irrigation District water, any restrictions on those rights are unlawful because the District was not a party to this proceeding. This argument misconstrues the nature of the Hearings Examiner's Proposal. The Proposal imposed conditions, not on the District's rights, but on the Applicant's power to use those rights. This distinction is subtle but significant. Condition 6 imposed a personal obligation on the Applicant to not use his District water on a designated acreage each year. The effect of condition 6 was in personam, rather than in rem.<sup>2</sup> The Proposal did not purport to strip the dry acreage of "title" to water, nor to formally change the place of use for the District rights, since this is not the forum to formally reallocate District water.

Because condition 6 is not adopted in this Final Order, the Department need not comprehensively address the Applicant's argument that condition 6 would lead to abandonment of part of the District's water rights. Nevertheless it should be clear

<sup>2</sup>The intent of the condition was to require Applicant to "fallow", rotate, or otherwise leave unirrigated, 80 acres in any given year. Rotation is a common farming practice that does not result in abandonment of the water right appurtenant to the unirrigated acreage.

that, given the in personam nature of the proposed condition, no abandonment of District rights would have resulted. As before, the District water would have remained appurtenant to the full 365 acres at the old place of use. Also, under both the Proposal and the Final Order, the only "restriction" on the Applicant is that he not exceed his historic use of District water. By definition, abandonment could only result if the District's water rights were diminished in some way.

The second ground on which the Applicant excepted to the Proposal for Decision was that there is no evidence in the record that the remaining rights at the old place of use would be or even might be expanded. This argument lacks merit, for two reasons.

First, the Applicant has the initial burden of production to show that the proposed change will not increase the burden on the source, thereby amounting pro tanto to a new appropriation. Section 85-2-402(2)(a), MCA; Featherman v Hennessy, 43 Mont. 310, 115 P. 983 (1911); Toohey v Campbell, 24 Mont. 13, 60 P. 396 (1900); In the Matter of the Application for Change of Appropriation Water Rights Nos. 26719-C76LJ and 26727-C76LJ by Meadow Lake Country Club Estates, Final Order, October 6, 1981. Thus, even if the record contained no evidence concerning future use of water rights at the old place of use, the Hearings Examiner's restriction of the remaining rights to historical levels would be justified, because the Applicant failed to meet his burden to show that those rights would not, or could not, be expanded.

Here, however, there is evidence in the record that the proposed change could result in the expansion of the rights remaining at the old place of use. The change as proposed would create 80 acres of new irrigated land on the Sunset Bench, without taking any acreage out of production at the old place of use. Although there was testimony that the old place of use would receive only "partial service" irrigation (transcript at p. 71), the undeniable result of the change as proposed would be to add to the acres irrigated on the Sunset Bench. See Testimony of Objectors, Transcript pp. 48, 51, 55. The testimony of some Objectors indicates that acreage cannot be added in this watershed without injuring other appropriators. Proposal for Decision at p. 3. The Amended and Updated Burnt Fork Decree of 1979 (Applicant's Exhibit 3) bears this out by restricting the addition or even the relocation of irrigated acres. Decree at p. 16; Proposal for Decision at p.8.<sup>3</sup>

Thus, there is substantial evidence in the record that the proposed addition of 80 acres on the Sunset Bench might expand the burden on the Burnt Fork to the detriment of other appropriators. In view of the testimony that the Applicant's Right No. W128519-76H was already fully utilized and could not be

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<sup>3</sup>The DNRC recognizes that the Applicant has challenged the legal validity of the 1979 Decree. Nevertheless the Decree, regardless of its validity, provides some evidence that a number of the water users on the Burnt Fork consider that source as fully appropriated during the normal irrigation season.

expanded, and because there was no evidence in the record of the original hearing that the remaining rights were not susceptible of expansion, the available evidence suggested that the Applicant's remaining water rights at the old place of use could be expanded in order to service the additional acreage. This evidence justified the Hearings Examiner's imposing the condition prohibiting any increase in irrigated acreage.

In conclusion, the Hearings Examiner's imposing a condition on the Applicant's use of his remaining water rights at the old place of use was both within the DNRC's statutory authority and based upon the competent substantial evidence present in the record prior to its re-opening.

Objectors' Exceptions. In their written exceptions and oral arguments, the Objectors reiterated their argument that, pursuant to the 1979 Amended Burnt Fork Decree, the district court is the proper forum to approve the Applicant's proposed change. The Objectors argue that the Hearing Examiner failed to resolve the conflict between the Department's and court's authority, and that the Department's change approval is contrary to the court decree.

The Department has adopted the Hearing Examiner's analysis of this issue. The Examiner ruled that the Department has clear authority, under the Water Use Act, to process this change application. Having found this, the Examiner properly took no position concerning the validity of the amended court decree. Indeed, as the Objectors note, this contested case proceeding is not the forum to resolve a jurisdictional conflict in the Burnt Fork.

The Objectors also argued that the Hearing Examiner made an incomplete record of the hearing, since the tape recorder was turned off several times for discussions off the record. However, the Department finds no error in this, because the Examiner's findings and conclusions are based solely on the existing record. Moreover, if the Objectors wanted a point raised in off-record discussions to be made part of the record, such point could have been repeated on the record.

Finally, the Objectors request that the Department require a legal description of the Applicant's acres to be taken out of production each year. Since the Department has not adopted condition 6, this exception need not be addressed.

WHEREFORE, based upon the foregoing, and the evidence in the record herein, the Department makes the following

ORDER

Application for Change of Appropriation Water Right No. W128519-76H by Robert E. and Alice E. Thoft is hereby granted to change Claimed Water Right No. W128519-76H as follows: Claimed Water Right No. W128519-76H, priority date July 1, 1852, claiming use of 40 miner's inches up to 301.67 acre-feet per year of water from Burnt Fork Creek for irrigation use between May 1 and October 1, inclusive, of each year, upon 365 acres located in Township 8 North, Range 19 West, Ravalli County, Montana; the

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claimed points of diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, both in Township 8 North, Range 19 West, Ravalli County, Montana; the claimed places of use in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 (40 acres), NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (40 acres), SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (15 acres), N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 7 (20 acres), N $\frac{1}{2}$ NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 7 (20 acres), NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10 (40 acres), NW $\frac{1}{4}$  of Section 8 (130 acres), and S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 7 (60 acres), all in Township 8 North, Range 19 West, Ravalli County, Montana, is hereby changed to use of 40 miner's inches up to 301.67 acre-feet per year of water, as measured at the point of diversion from Burnt Fork Creek, for irrigation use between May 1 and October 1, inclusive of each year, upon 80 acres located in the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 9, Township 8 North, Range 19 West, Ravalli County, Montana.

The point of diversion is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 19 West, Ravalli County, Montana.

The priority date is July 1, 1852.

This Change Authorization is granted subject to the following express conditions:

1. This Change Authorization is subject to any final determination of existing water rights, as provided by Montana Law.
2. The issuance of this Change Authorization by the Department shall not reduce liability for damages caused by Appropriator's actions pursuant to this Change, nor does the Department in

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issuing the Change Authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of the existing right as changed hereunder.

3. The Appropriator shall not divert more water than is reasonably required for the purposes described herein, and shall in no event divert more than 40 miner's inches from the source of supply. At all times when the water is not reasonably required for these purposes, Appropriator shall cause and otherwise allow the waters to remain in the drainage for use by other appropriators.

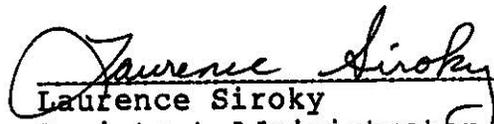
4. The Appropriator shall divert from the ditch only that portion of the 40-inch right remaining after his proportion of conveyance losses, as determined between himself and the District, has been deducted.

5. This Change Authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The meter shall be installed at the point of diversion from the District ditch. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

NOTICE

The Department's Final Order may be appealed in accordance with §85-2-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate district court within thirty (30) days after service of the final order.

DATED this 28 day of May, 1987.

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

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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 29, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department of Natural Resources & Conservation (DNRC) on the Application for Change of Appropriation Water Right No. G128519-76H by Robert E. & Alice E. Thoft, addressed to each of the following persons or agencies:

Robert E. & Alice E. Thoft  
5120 So. Burnt Fork Rd.  
Stevensville, MT 59870

Donald F. & Janet I. Park  
1410 Middle Burnt Fork Rd.  
Stevensville, MT 59870

Ted J. Doney, Attorney  
PO Box 1185  
Helena, MT 59624-1185

Ellen H. Little  
365 Higgins Ln.  
Stevensville, MT 59870

E. Gardner Brownlee  
Retired Chief Dist. Ct. Judge  
17474 Highway 93 South  
Florence, MT 59833

Alda Bailey  
702 College St.  
Stevensville, MT 59870

Larry Persson, Attorney  
PO Box 111  
Hamilton, MT 59840

Dayle H. Franks  
2619 B. St.  
Forest Grove, OR 97116

Vernon Woolsey  
1008 Middle Burnt Fork Rd.  
Stevensville, MT 59870

Herman W. & Roy F. Stenman  
1003 Middle Burnt Fork Rd.  
Stevensville, MT 59870

Joseph & Theola Warren  
790 No. Burnt Fork Rd.  
Stevensville, MT 59870

George E. Farrell  
1241 Middle Burnt Fork Rd.  
Stevensville, MT 59870

Jay Meyer  
3678 Lower Burnt Fork School Rd.  
Stevensville, MT 59870

Elmer D. Severson  
480 Middle Fork Rd.  
Stevensville, MT 59870

Thomas G. Jones  
1680 Middle Burnt Fork Rd.  
Stevensville, MT 59870

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

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However, to meet the District Court's concern, the Hearing Examiner proposes Condition No. 6:

Applicant is required each year to describe, in writing and with particularity, exactly which 80 acres of the 365 acres formerly supplementally irrigated will not that year be irrigated (as required to under Condition No. 5 supra), and to file copies of such description with the Department and the Clerk of District Court of the Fourth Judicial District in and for Ravalli County prior to May 1 of that year. This condition applies whether or not Applicant changes the description from that of the previous year.

Be further advised that Condition No. 5 restricts Applicant from utilizing any of the water rights, which are presently appurtenant to the 365 acre tract, on the 80 acres to be removed from irrigation. However, if Applicant, in the future acquires more contract water or other water rights appurtenant to the 365 acre-tract, sufficient to compensate for all or a portion of the 40 miner's inches hereby severed, such rights may be utilized.

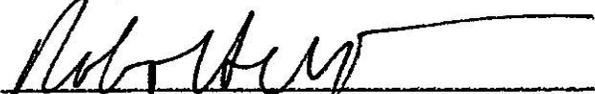
In anticipation of this possibility, the Hearing Examiner proposes Condition No. 7:

If Applicant acquires contract water or other water rights for use on the 365 acres specified in Condition No. 5, but which are not as of the date of this order appurtenant thereto, he must notify the Department and Clerk of District Court as to the amount of water acquired and the acreage it will serve, by affidavit filed with said entities prior to putting same water to use. Thereupon, the Department will, if it is satisfied that the additional water acquired will reasonably serve the amount of acreage stated in the affidavit, modify Permit Conditions 5 and 6 to reflect the availability of additional water by increasing the amount of acreage which may be irrigated pursuant hereto.

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Parties have 20 days from the date of mailing of this Notice and Supplemental Proposal to file comments or exceptions relating to this Supplemental Proposal.

DONE this 12 day of November, 1986.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

**CASE # 128519**

RECEIVED

OCT 28 1986

E. GARDNER BROWNLEE  
RETIRED CHIEF DISTRICT COURT JUDGE

17474 Highway 93 South  
Florence, MT 59833  
273-0241

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION

October 26, 1986

Mr. Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301

Re: Robert E and Alice E. Thoft

Dear Mr. Scott:

I have studied a copy of your proposal for decision and would like to ask that you modify it for the following reasons.

I have been appointed by the Supreme Court to handle the distribution of all decreed water in Ravalli County and some in Missoula County. This was done at the request of the 4th Judicial District Judges.

In performing that task it is necessary that I advise the Court appoint water commissioners. In doing that I would have a problem with your proposal for decision.

In 1979 I signed a new decree for the Burnt Fork. It was our intention to comply with the new Water Use Law. The three criteria mentioned on page 9 of your proposal were the ones we used in attempting to bring order out of the exchanges of water that had been done in the Burnt Fork watershed. I agree with you that the prohibition against further exchanges mentioned in the decree was not any attempt to deny proper exchanges but instructions to the water users not to do so without proper application to the proper authorities and approval.

The modification I think I will need as presiding District Judge is one where the specific rights being transferred are set forth and the land that no longer will be entitled to water is also set forth. I feel this is necessary because if water is then used on that land I will be required to instruct the water commissioner to stop the flow and give it to the next person in line entitled to water. I also believe it would be best if you would set out that use is to be by a sprinkler system. That would permit 40 inches to be used on 80 acres otherwise the custom is 1 inch per acre.

Sincerely,

*E. Gardner Brownlee*

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AFFIDAVIT OF SERVICE  
MAILING

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

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 13, 1986, she deposited in the United States mail, first class postage prepaid, a NOTICE AND SUPPLEMENTAL PROPOSAL, an order by the Department on the Application by Robert E. and Alice E. Thoft, Application No. G128519-76H, an Application for Change of Appropriation Water Right addressed to:

1. E. Gardner Brownlee, Retired Chief District Court Judge, 17474 Highway 93 South, Florence, MT 59833
- 2: Ted J. Doney, Attorney for Applicant Thoft, P.O. Box 1185, Helena, MT 59624-1185
3. Robert E. & Alice E. Thoft, 5120 S. Burnt Fork Road, Stevensville, MT 59870
4. Larry Persson, Attorney;, P.O. Box 111, Hamilton, MT 59840
5. Vernon Woolsey, 1008 Mid Burnt Fork Road, Stevensville, MT 59870
6. Joseph B. and Theola M. Warren, 790 N. Burnt Fork Road, Stevensville, MT 59870
7. Jay Meyer, 3678 Lower Burnt Fork School Road, Stevensville, MT 59870
8. Thomas G. Jones, 1680 Mid Burnt Fork Road, Stevensville, MT 59870
9. Donald F. and Janet I. Park, 1410 Middle Burnt Fork Road, Stevensville, MT 59870
10. Ellen H. Little, 365 Higgins Lane, Stevensville, MT 59870
11. Alda Bailey, 702 College Street, Stevensville, MT 59870
12. Dayle H. Franks, 2619 B. Street, Forest Grove, OR 97116
13. Herman W. and Roy F. Stenman, 1003 Middle Burnt Fork Road, Stevensville, MT 59870
14. George E. Farrell, 1241 Middle Burnt Fork, Stevensville, MT 59870
15. Elmer D. Severson, 480 Middle Fork Road, Stevensville, MT 59870
16. Michael P. McLane, Manager, Water Rights Bureau Field Office, P.O. Box 5004 Missoula, MT 59806 (via inter-departmental mail)
17. Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation, 1520 E. 6th Avenue, Helena, MT 59620 (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

CASE # 128519

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

On this 13<sup>th</sup> day of November, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

*Jim Gilman*

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

**CASE # 128519**

Alice  
Thoft

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. G 128519-76H BY )  
ROBERT E. AND ALICE E. THOFT )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-captioned matter was held on April 28, 1986 in Missoula, Montana.

Appearances

Applicant Robert E. and Alice E. Thoft appeared by and through Ted J. Doney, attorney at law, and Larry Persson, attorney at law.

Applicant Robert E. Thoft appeared in person.

Paul O'Leary, former president, present secretary and director of the Sunset Ditch Irrigation District and member of the Burnt Fork Commission, appeared as a witness for Applicant.

E.G. Patterson, ditch rider, appeared as a witness for Applicant.

Objector George E. Farrell appeared pro se.

Objector Thomas G. Jones appeared pro se.

Objector Elmer D. Severson appeared pro se.

**CASE # 128519**

Objector Joseph B. and Theola M. Warren appeared pro se.

Objector Vernon Woolsey appeared pro se.

Objectors Jay Meyer, Donald F. and Janet I. Park, Alda Bailey, Dayle H. Franks, Herman W. and Roy F. Stenman did not appear at the hearing either in person or through legal representation.

Jean H. Ellison attended as an interested landowner.

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

#### STATEMENT OF THE CASE

Pursuant to the provisions of Title 85, Chapter 2, Part 2 MCA (1979), Applicant has claimed an existing water right in and to 40 miner's inches of the water of Burnt Fork Creek for irrigation purposes. The claimed water has allegedly been used to supplement other water in irrigating 365 acres of Applicant's property.

Applicant now seeks to change the place of use denominated in said claim. Applicant desires hereby to remove said 40 miner's inches from supplemental irrigation of the claimed 365 acres, and instead utilize those 40 miner's inches as the sole source for full-service irrigation of 80 acres which have not been previously irrigated.

The waters of the Burnt Fork watershed were first decreed in 1905. In 1979, an amended and updated decree was filed with the Clerk of District Court of the Fourth Judicial District of the State of Montana, in and for Ravalli County, wherein presiding District Judge E. Gardner Brownlee ordered, inter alia, that the waters represented by decreed right could not be transferred to or used upon any lands other than those lands to which the waters are decreed, except by special order of the District Court.

All Objectors herein base their objections in part upon the purported effect of the amended decree. They assert that the existence of the decree has solved many of the problems, relating to management of the watershed, which were rampant previous to its issuance; they further assert that a grant of Applicant's request for change by the DNRC would run afoul of said decree, and would be illegal; and finally they fear that the precedent created by such a grant would encourage others to seek to change their rights through methods other than those prescribed in the amended decree, thus destroying the amended decree's value and effectiveness in controlling the water allocations on Burnt Fork Creek resulting in a reduction in the amount of water available to them.

Objectors Woolsey, Warren and Severson also assert that Burnt Fork Creek is overappropriated, and object on the grounds that the proposed change would increase the amount of land to be irrigated under Thofts' decreed right.

Exhibits

The Applicant submitted three exhibits in support of the Application.

Applicant's Exhibit 1 is a topographic map entitled "Sunset Irrigation District as compiled October 26, 1981 to reflect district boundaries," purportedly prepared by L.M. Powell, professional land surveyor.

Applicant's Exhibit 1 was admitted without objection.

Applicant's Exhibit 2 consists of 16 photocopied pages of Statement of Claim for Existing Water Rights No. 128519, and addenda thereto.

Applicant's Exhibit 2 was admitted without objection.

Applicant's Exhibit 3 is a court certified copy of a document entitled "Amended and Updated Decree of Distribution of the Waters of the Burnt Fork Watershed, Ravalli County, Montana," to which is attached a one page photocopy of a map apparently showing points of diversion of the rights therein decreed.

Said document was entered for the convenience of the Hearing Examiner and not with any admission of validity.

Applicant's Exhibit 3 was admitted without objection.

No Objector submitted any exhibits in support of his position.

The Department submitted two exhibits for the record.

Department Exhibit 1 consists of two handwritten pages entitled "Bob Thoft - 90" Fort Water from Water Sheets in Courthouse," purportedly compiled by Paul O'Leary to reflect waters delivered to Applicant by the Burnt Fork Water Commissioner between 1978 and 1985.

Department Exhibit 1 was admitted without objection.

Department Exhibit 2 is a file amassed by Mike McLane containing a copy of the amended Burnt Fork Decree, excerpts of the original Burnt Fork Decree, pleadings made prior to the original Burnt Fork Decree, copies of pages out of the Bitterroot Valley Soil Survey pertaining to the soil of the Thoft property, a Field Report (with photos) prepared by Mike McLane, and correspondence sent and received by Department from Applicant and Objectors.

Department Exhibit 2 was received into evidence without objection.

The Department file in this matter was introduced, whereupon Applicant objected to an allegedly prejudicial hand-written note directed to the Hearing Examiner from Department personnel. Applicant's objection was sustained and said note was stricken from the file. Subsequently, there being no other objection to its admission, the Department file was made part of the record.

#### FINDINGS OF FACT

1. The Application in this matter was regularly filed with the Department on April 18, 1985 at 4:00 p.m.

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

3. The pertinent facts of the Application were published in the Ravalli Republic on November 20 and November 27, 1985.

4. The Applicant has duly filed a Statement of Claim for Existing Water Right No. 128519, claiming 40 miners inches up to 301.67 acre-feet per year of water from Burnt Fork Creek for irrigation use between May 1 and October 1 of each year, upon 365 acres located in Township 8 North, Range 19 West, Ravalli County, Montana. The claimed priority date is July 1, 1852. The claimed points of diversion are the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14 (referred to as Headgate No. 1) and SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11 (referred to as Headgate No. 3), both in Township 8 North, Range 19 West, Ravalli County, Montana. The claimed places of use are the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 (40 acres), NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (40 acres), SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (15 acres), N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 7 (20 acres), N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 7 (20 acres), NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10 (40 acres), NW $\frac{1}{4}$  of Section 8 (130 acres), and S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 7 (60 acres), all in Township 8 North, Range 19 West, Ravalli County, Montana.

5. Burnt Fork Creek is a tributary of the Bitterroot River.

6. Applicant has used the claimed 40 miner's inches to supplement other irrigation waters upon the entire 365 acres claimed as the place of use. (Testimony of Robert Thoft.)

7. Applicant seeks hereby to sever the claimed 40 miner's inches from the 365 acres where it is presently used for supplemental sprinkler irrigation, and transfer same for irrigation use on a separate parcel of land, to wit: 80 acres

located in the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 9, Township 8 North, Range 19 West, Ravalli County, Montana. Applicant wishes to full-service irrigate said 80 acres with the transferred 40 miner's inches, using no other source of water. (Application, testimony of Robert Thoft.)

8. Applicant plans to divert 40 miner's inches of water from Burnt Fork Creek into the Hiline Ditch at Burnt Fork Creek Headgate No. 1 (located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 19 West, Ravalli County, Montana). Said water would subsequently be pumped from the Hiline Ditch near the northeast corner of the proposed place of use and thence would be piped to the proposed place of use. The method of use would be sprinkler irrigation by means of 64 sprinkler heads on a wheel line.

9. Applicant proposes to install a flow meter in the pipeline near its departure from the Hiline Ditch. Access to said flow meter would be available to the ditch rider. (Testimony of Robert Thoft.)

10. The proposed means of diversion, construction and operation of the appropriation works are reasonable and customary in the area of use.

11. Applicant has continuously used the 40 miner's inches he seeks to change hereunder throughout the period of appropriation claimed. There is no evidence apparent from the face of the record that Applicant's claimed water right has ever been abandoned or partially abandoned. (Department Exhibit 1, testimony of Robert Thoft.)

12. Runoff from irrigation of the claimed present place of use enters the Baker Ditch, its lateral, or the Bitterroot Irrigation District Canal. There is no evidence of significant return flow to Burnt Fork Creek resulting from historic use of the right as claimed. (Testimony of Mike McLane, Robert Thoft.)

13. The waters of Burnt Fork Creek were first decreed in 1905. In 1979, an amended and updated decree was filed with the Clerk of District Court of the Ninth Judicial District of the State of Montana, in and for Ravalli County, wherein presiding District Judge E. Gardner Brownlee found that the 40 miner's inches (herein sought to be transferred) were presently owned by Thoft Ranch and were "to be used upon Thoft Ranch." The District Judge also ordered, inter alia, that the waters represented by decreed right could not be transferred, or used upon lands other than lands to which the water was decreed, except by special order of the District Court. (Applicant Exhibit 3.)

14. A final decree within the meaning of § 85-2-234 MCA (1985) has not yet been issued for the drainage basin containing the Burnt Fork Creek watershed. (Department Records.)

15. District Court approval of the proposed change has not been obtained.

16. There are no planned uses or developments for which a permit has been issued or for which water has been reserved apparent from the face of the record.

Based on the foregoing Proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they appeared at the hearing or not. Title 85, Chapter 2, Part 3, MCA (1985).

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

3. Section 85-2-402 MCA (1985) directs the Department to approve the change if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use.

4. Those Objectors who failed to appear at the hearing in this matter, in person or by representation, are in default. Administrative Rule of Montana 36.12.208.

5. No final decree pursuant to Title 85, Chapter 2, Part 2, MCA (1985) has been issued for the Burnt Fork Watershed. However, a claim of existing right filed in accordance with § 85-2-221 MCA (1985) constitutes prima facie proof of its content until the issuance of a final decree. § 85-2-227 MCA (1985).

Applicant has presented such a duly filed claim as prima facie proof that he owns an existing right in and to the use of waters as therein described, which use Applicant now seeks to change. Said prima facie proof has not been overcome either by evidence tending to defeat the claim or by evidence that the claimed right has been abandoned or partially abandoned. Therefore, for the purpose of this proceeding, Applicant's right is presumed to be as claimed.

6. The proposed use, irrigation, is a beneficial use. Section 85-2-102(2) MCA (1985). See generally, Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

7. The proposed means of diversion, construction and operation of the appropriate works are adequate. (Finding of Fact 10.)

8. Objectors argue that the portion of the amended and updated decree which forbids the transfer to or use upon any other lands of water rights therein enunciated, except where the court determines upon petition and notice that other users will not be harmed, somehow prevents the Department from authorizing such change. Assuming that the decree was properly entered,<sup>1</sup> it may be conjectured that there are two theories under which such an argument could be advanced: (a) that such provision deprives the Department of jurisdiction to hear the case; or, (b) that lack of court approval ipso facto requires a finding of adverse affect to other appropriators.

<sup>1</sup> For the purposes of this proceeding, it will not be necessary to decide whether a District Court has a right under Montana law to amend and update a decree upon its own motion.

(a) The decree cannot and does not deprive the Department of jurisdiction to decide whether to authorize the change.

Section 85-2-402(1) MCA (1985) states, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department, or, if applicable, the legislature." This language is unequivocal; in cases (such as this one) where legislative approval is not necessary, the Department must approve the change prior to severance of a water right from the land to which it is appurtenant. See Castillo v. Kunneman, 197 Mont. 190, 642 P.2d 1019 (1982).

The legislature has specifically vested the Department with original jurisdiction to authorize or deny a change in appropriation right. The order of a District Court can not be interpreted to deprive the Department of such without also being interpreted to exercise a power properly belonging to the legislature. As legislation by the judicial branch is clearly unconstitutional, such interpretation of the Court order is untenable. See Constitution of the State of Montana, Art. III, § 1 (1972).

(b) The argument that court approval (presumably based on a determination of no harm to other users) is a necessary prerequisite to proof of § 85-2-402(2)(a) MCA (1985) has no basis in law.

Section 85-2-402(2) MCA (1985) states that the Department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that certain specific

criteria are met. (See Conclusion of Law 3.) In other words, the Department may deny a change authorization only if such criteria are not proved met.

Substantial credible evidence includes any reliable probative evidence which tends to prove compliance with the enunciated criteria. Thus, the existence or nonexistence of court approval may be used as evidence on the issue of harm to other users. However, its lack is not fatal to an application, nor should it be, for that interpretation would make the decision of the Department wholly dependent upon that of the court, an entity which may base its decision on criteria different than those enumerated in § 85-2-402(2) MCA (1985). In essence, such a conclusive presumption would unconstitutionally place control of executive discretion in the judiciary. See Peterson v. Livestock Commission, 120 Mont. 140, 181 P.2d 152 (1947).

In this instance, lack of court approval may be due to lack of application to, and/or final decision from, the court. Regardless, no decision has been made part of this record. However, even if there were a decision granting or denying approval of the change it would not be dispositive in this matter, for the reasons above-outlined.

The precise scope of the court's jurisdiction to control waters decreed by itself is problematic. Whether Applicant must have court permission in this instance, in addition to an authorization from the Department, is a question which presently remains unanswered. However, it is clear that Applicant must

prove his case in the administrative forum, and obtain Department authorization for the change prior to making it, regardless of other and further hurdles which may remain before him.

In summary, the District Court may not prevent the Department from hearing and acting upon the Application. Further, lack of Court approval here does not constitute sufficient evidence of adverse effect to other appropriators to defeat the Application.

9. The proposed use will not adversely affect the water rights of other persons, if the change authorization is properly conditioned.

The evidence indicates that no significant return flows have been historically generated by Applicant's use. Runoff which does not return to the source is waste and, even if it is subsequently used, no protectible right may be acquired in it. Newton v. Weiler, 87 Mont. 164 (1930); Popham v. Halloran, 84 Mont. 442 (1929); Galiger v. McNulty, 80 Mont. 339 (1927). The evidence further indicates that Applicant's full appropriation has been delivered to him and used annually as claimed. (Finding of Fact 11.) Thus, no alteration in the pattern or results of use can be reasonably expected after the change is made.

Further, no allegation has been made that diversion by exclusive use of Headgate No. 1 will affect other users on the source in any way. In conclusion, no adverse effect can reasonably be anticipated resulting from the proposed use.

However, regarding the acreage now supplementally irrigated (365 acres) with the right to be changed, Applicant has shown consistent historic use of, and thus need for, the 40 miner's

inches he seeks to change. Thus, it follows that full service irrigation of the entire 365 acres, from which 40 miner's inches has been severed, will not be possible.

In order to ensure that the annual volume diverted under the water rights remaining appurtenant to said 365 acres after the change does not increase to the detriment of junior appropriators, i.e., so that Applicant's historic diversion of water does not increase, Applicant must reduce the acreage historically supplementally irrigated by that amount of land which could have been fully irrigated using only the 40 miner's inches Applicant proposes to sever. Unfortunately, there is no evidence in the record which allows quantification of such amount. However, the record does show that the present place of use and the proposed place of use are in close proximity.

(Applicant's Exhibit 1.) Thus, absent evidence to the contrary, it is probable that irrigation requirements for the two areas are similar. Accordingly, it may be inferred that a reduction in the size of the present place of use equivalent to the size of the proposed place of use (80 acres) will adequately safeguard other appropriators' rights. Therefore, the Authorization will issue subject to the condition that Applicant irrigate only 285 acres of the 365 acres of land formerly supplementally irrigated under the right (as described in Finding of Fact 4) in any given season.

10. The proposed use will not adversely affect other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 16.)

**CASE # 128519**

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

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G128519-76H by Robert E. and Alice E. Thoft is hereby granted to change Claimed Water Right No. 128519-76H as follows: Claimed Water Right No. 128519-76H, priority date July 1, 1852, claiming use of 40 miner's inches up to 301.67 acre-feet per year of water from Burnt Fork Creek for irrigation use between May 1 and October 1, inclusive, of each year, upon 365 acres located in Township 8 North, Range 19 West, Ravalli County, Montana. The claimed points of diversion are the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, both in Township 8 North, Range 19 West, Ravalli County, Montana. The claimed places of use are in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 (40 acres), NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (40 acres), SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10 (15 acres), N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 7 (20 acres), N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 7 (20 acres), NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10 (40 acres), NW $\frac{1}{4}$  of Section 8 (130 acres), and S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 7 (60 acres), all in Township 8 North, Range 19 West, Ravalli County, Montana, is hereby changed to use of 40 miner's inches up to 301.67 acre-feet per year of water from Burnt Fork Creek for irrigation use between May 1 and October 1, inclusive of each year, upon 80 acres located in the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 9, Township 8 North, Range 19 West, Ravalli County, Montana.

The point of diversion is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 19 West, Ravalli County, Montana.

The priority date is July 1, 1852.

This Change Authorization is granted subject to the following express conditions:

1. This Change Authorization is subject to any final determination of existing water rights, as provided by Montana Law.
2. The issuance of this Change Authorization by the Department shall not reduce liability for damages caused by Appropriator's actions pursuant to this Change, nor does the Department in issuing the Change Authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of the existing right as changed hereunder.
3. The Appropriator shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Appropriator shall cause and otherwise allow the waters to remain in the drainage for use by other appropriators.
4. This Change Authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

**CASE # 128519**

5. Applicant shall in any given year irrigate only 285 acres out of the 365 acre tract formerly supplementally irrigated with this claimed right.

NOTICE

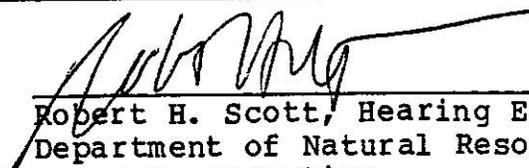
This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Authorization, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th 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 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 # 128519**

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

DONE this 15 day of October, 1986.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

**CASE #** 128519

AFFIDAVIT OF SERVICE  
MAILING

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

DONNA ELSER, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 16, 1986, she deposited in the United States mail, First Class postage prepaid, a PROPOSAL FOR DECISION by the Department on the Application by Robert E. and Alice E. Thoft, Application No. G 128519-76H, an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Robert E. & Alice E. Thoft, 5120 S. Burnt Fork Road, Stevensville, MT 59870
2. Larry Persson, Attorney at Law, P.O. Box 111, Hamilton, MT 59840
3. Vernon Woolsey, 1008 Mid Burnt Fork Road, Stevensville, MT 59870
4. Joseph B. and Theola M. Warren, 790 N. Burnt Fork Road, Stevensville, MT 59870
5. Jay Meyer, 3678 Lower Burnt Fork School Road, Stevensville, MT 59870
6. Thomas G. Jones, 1680 Mid Burnt Fork Road, Stevensville, MT 59870
7. Donald F. and Janet I. Park, 1410 Middle Burnt Fork Road, Stevensville, MT 59870
8. Ellen H. Little, 365 Higgins Lane, Stevensville, MT 59870
9. Alda Bailey, 702 College Street, Stevensville, MT 59870
10. Dayle H. Franks, 2619 B. Street, Forest Grove, OR 97116
11. Herman W. and Roy F. Stenman, 1003 Middle Burnt Fork Road, Stevensville, MT 59870
12. George E. Farrell, 1241 Middle Burnt Fork, Stevensville, MT 59870
13. Elmer D. Severson, 480 Middle Burnt Fork Road, Stevensville, MT 59870
14. Michael P. McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
15. Gary Fritz, Administrator, Water Resources Division, DNRC (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

CASE # 128519

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

On this 16<sup>th</sup> day of October, 1986, before me, a Notary Public in and for said state, personally appeared DONNA ELSER, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

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

**CASE # 128519**