

BB

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
TO CHANGE APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. 150741-41H BY WILLIAM )  
TIETZ )

\* \* \* \* \*

On March 7, 1989, the Department Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended that Application to Change Appropriation Water Right No. 150741-41H be granted to William Tietz to change the point of diversion of 20 miner's inches up to 16.1 acre-feet per annum of Hyalite Creek water from the headgate of the Bradley-Ferguson-Krude Ditch to the headgate of the Dusenberry Ditch. Objector Nancy J. Westland filed exceptions to the Proposal and requested that oral arguments be held. An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on May 30, 1989. Present at the hearing were the Applicant William Tietz with his attorney, Matthew W. Williams. Objector Nancy J. Westland and her attorney C. Bruce Loble.

The Objector objects to Proposed Finding of Fact 9. The Finding states in part: "However, the evidence also shows that the Dusenberry Ditch in this area tends to meander and is choked with vegetation. If the vegetation were removed from the ditch, and the meandering corrected (without enlarging the cross-section of the Ditch), it would be able to carry approximately 120 miner's inches." The Objector states that she recalls no

CASE # 150741

testimony by the Applicant evidencing any plan of operation to reroute the Ditch or any evidence by the Applicant that the Ditch has changed its location across the Westland property.

The Finding does not imply that the ditch will be rerouted or relocated but rather that routine maintenance will cause the ditch to have sufficient capacity to carry 120 M.I. Testimony in the record by Applicant's expert, Al Cunningham, and Objector's expert, Roger Perkins, both indicate that the ditch can easily be cleaned and maintained to carry the maximum expected diversion amount of 120 M.I. The Hearing Examiner's Finding of Fact is not clearly erroneous and is therefore not overturned. A condition added to the Order would assure the cleaning and maintenance as proposed by the Applicant is completed.

The Objector excepts to Proposed Finding of Fact No. 11: "In the past, the Dusenberry Ditch carried . . . sufficient water to irrigate 40 acres of Benape land . . . and is not presently irrigated." The Objector states that there was no indication that the Benape lands were irrigated at the same time as the Dusenberry lands and it appears to be speculation on the part of the Examiner to conclude that the Ditch in question carried both Dusenberry water rights and Benape water rights at the same time.

The Examiner's Findings can be reversed only if they are clearly erroneous. See, Billings v. Billings Firefighters Local No. 521, 200 Mont. 421 (1982). Mr. Dusenberry testified that Benape irrigated lands through the Dusenberry-Benape Ditch and that the lands that were served under the ditch are no longer

being irrigated and have been subdivided. From that evidence the Finding seems reasonable and I can find no evidence that the Finding is in error. It is not relevant whether the Benape right was historically conveyed down the Dusenberry Ditch at the same time as the Dusenberry appropriation. The issue properly focused on by the Examiner is whether the Dusenberry Ditch can be made physically adequate to transport the necessary water for sprinkler irrigation of seven acres as proposed in addition to other uses of water that may reasonably occur, that is the Dusenberry uses and Westland stock uses.

The Objector asserts that Finding of Fact No. 12 concerning the original design capacity of the Dusenberry Ditch of 120 M.I. is not supported by evidence.

The record supports the Finding of the Hearing Examiner. Testimony of Mr. Perkins was that cleaning of the vegetation in the ditch would increase the capacity without flooding to an estimated 120 to 130 M.I. Examination of the ditch by Mr. Compton and Mr. Mack indicated that the ditch's present capacity is 125 M.I. in most of its length except in areas on the Objector's property. Mr. Cunningham estimated that with minor cleaning the ditch could flow 110 M.I. without flooding but made no estimate of the ditch's original capacity. Mr. Perkins testified that the capacity of the ditch, not considering the restrictions of the culverts in the ditch, to be around 5.5 cfs or 220 M.I. except a short length of the ditch on the Westland property. It is the duty of the Hearing Examiner to weigh and

balance evidence and testimony in making a Finding of Fact. The Hearing Examiner had testimony of capacities of 110 to 220 M.I. to consider in making his Finding. Finding of Fact No. 12 is not clearly erroneous, and cannot be overturned or changed.

The Objector excepts to Finding of Fact No. 14. It states: "Objector Westland does not use the Dusenberry Ditch to convey stockwater pursuant to its stockwater rights." The Objector maintains that Martin Westland testified that he does not affirmatively regulate the diversion works at Bert Dusenberry's headgate but the stock do drink out of the Ditch. Water Right Claim No. 139066 admitted without objection, claims that Westland stock utilize water out of the Ditch.

The Finding seems to agree with Martin Westland's testimony that the stock right is not "conveyed" down the ditch. The Finding does not say that stock do not drink from the ditch. Mr. Westland was very specific in his testimony to say that he did not regulate the Dusenberry ditch for his stock water but his stock did drink from the ditch and in fact a water right claim was made by him for such use. The testimony has an interesting dichotomy and the proposed Finding is not clearly erroneous.

The Objector excepts to Proposed Conclusion of Law No. 4 where it states "[I]f the amount is so excessive as to result in a waste of the resource, a Petition for Relief can be made to the District Court pursuant to the provisions of Section 85-2-114, MCA." The Objector argues instead that the Department is under an affirmative duty to determine whether the proposed use of

these 20 M.I. is beneficial. The Objector claims the evidence indicates that the use will not be beneficial.

First, whether the Claim of Existing Water Right No. 150741-41H reflects beneficial use of the entire amount claimed, is not at issue in this proceeding. The Hearing Examiner's Notice of August 8, 1988 states in part ". . . such party may move the department under MCA §85-2-309(2) for certification to the Water Court of the issue of the existence, scope and extent of Water Right No. 150741-s41H, provided such party files the appropriate motion within 14 days of the date hereof. . .". No motion for certification was received. Second, there is ample evidence that the 103 gpm to be pumped and applied by a sprinkler system is a reasonable amount (Applicant's Exhibit A, and Objector's Exhibit No. 9, and Perkin's testimony). Third, as the Objector knows, the amount beneficially used upon any particular acreage embraces reasonable carriage losses in getting the water to the place of use. See, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). The amount of carriage water required by the Applicant will vary depending on the amount of other water carried by the ditch for other water uses such as the Dusenberry irrigation and the Westland stock use. I find the Objector's arguments unpersuasive and the Hearing Examiner's Proposed Conclusion of Law No. 4 does comply with the essential requirements of the law.

Further the Proposed Order Condition C will be adopted in the Final Order to ensure that no waste occurs.

P The Objector excepts to the following part of Proposed Conclusion of Law No. 6: "Removal of excess vegetation and correction of meandering . . . will restore this original capacity. . . . however, it is possible that in the future Dusenberry and/or other parties may legitimately conduct more than 100 miner's inches through the Dusenberry Ditch." The Objector claims that there is no basis in evidence to conclude that future parties or Dusenberry may legitimately conduct more than 100 M.I. through the Dusenberry Ditch.

P The Objector erroneously assumes that the Department has, by the term "legitimately", determined that the Applicant has the legal right to use the ditch for the purposes herein proposed. In fact, the Department has previously determined that an applicant for a Change of Appropriation does not need to establish that he has ditch easements. This was stated previously in an Order dated May 24, 1988, by the Hearing Examiner in response to a Motion for Summary Determination by the Applicant. Issuance of a Change is merely recognition of the physical adequacy of the appropriation works which the Applicant proposes to utilize; any legal right to use such works must be acquired separately. See, Application for Change of Appropriation W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc., Final Order, March 22, 1989, p. 5. Therefore the Department's use of "legitimate" does not refer to ditch rights.

P The Objector asserts that the Proposed Order should include a condition that less than 20 M.I. of water be diverted if water

for the Dusenberry appropriation is also conveyed in the ditch at the same time. Condition C as proposed by the Hearing Examiner already imposes this condition.

The Objector suggests that the Order include a condition that the Applicant's right be measured at the headgate to the Dusenberry Ditch. The Applicant agrees that the right should be measured at the point of diversion. The evidence shows that a Parshall flume already exists at the Dusenberry Ditch headgate and the water can be admeasured at that point. Therefore, the Applicant shall participate with other appropriators on the Dusenberry Ditch share in the cost and effort to maintain the measuring device at the headgate.

All other Findings and Conclusions of the Hearing Examiner are hereby adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the exceptions and oral arguments, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change Appropriation Water Right No. 150741-s41H is hereby granted to William Tietz to change the point of diversion of 20 miner's inches up to 16.1 acre-feet per annum of Hyalite Creek water from the headgate of the Bradley-Ferguson-Krudde Ditch located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 14, Township 3 South, Range 5 East, Gallatin County, Montana, to the headgate of the Dusenberry Ditch located in the

N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 10 of above-said Township and Range.

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

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

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

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

D. Issuance of this Change Authorization shall not be construed as a grant of any legal right to the use of the Dusenberry Ditch or the Dusenberry easement, or as a grant of another easement for conduction of the water diverted pursuant to this right.

E. The Appropriator shall maintain an adequate flow measuring device at his pump site and shall record each date on which he pumps water, the rate of pumping and the length of time water is pumped on that date.

F. The Appropriator may not divert water hereunder if such diversion would result in a total diversion into the Dusenberry Ditch of more water than it has the capacity to carry.

G. The Appropriator shall participate with other appropriators on the Dusenberry Ditch to maintain the measuring device at the headgate. The Applicant shall cause no more than 100 M.I. of water to be diverted at the headgate until the Dusenberry Ditch is properly cleaned and maintained as determined by the Department, after which time then no more than 120 M.I. may be diverted.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of December, 1989.

  
\_\_\_\_\_  
Laurence Siroky  
Assistant Administrator  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59620  
(406) 444-6610

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 19<sup>th</sup> day of December, 1989, as follows:

John H. Bos  
10250 Cottonwood Road  
Bozeman, MT 59715

William J. Tietz  
2310 Spring Creek Drive  
Bozeman, MT 59715

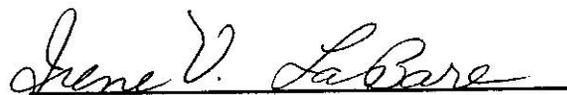
Nancy J. Westland  
8379 South 19th  
Bozeman, MT 59715

Scott Compton  
Bozeman Field Office  
1201 East Main  
Bozeman, MT 59715

Matthew H. Williams  
Moses, Wittemyer, Harrison  
and Woodruff, P.C.  
506 E. Babcock  
Bozeman, MT 59715

C. Bruce Loble  
Attorney at Law  
P.O. Box 1145  
Helena, MT 59624

Fay Bergan and  
Jim Madden  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59620

  
Irene V. LaBare  
Legal Secretary

BB

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
TO CHANGE APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. 150741-41H BY WILLIAM TIETZ)

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 20, 1988 in Bozeman, Montana.

Applicant appeared by and through Matthew W. Williams, attorney at law, of the firm Moses, Wittemyer, Harrison and Woodruff, P.C. Applicant testified, and called witnesses John Bos, Bert Dusenberry, Jan Mack, and Scott Compton, as well as expert witness Professor Al Cunningham.

Objector Nancy J. Westland appeared by and through C. Bruce Loble, attorney at law. Objector Westland called witness Martin Westland and expert witness Roger Perkins.

Scott Compton and Jan Mack, both with the Bozeman Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") Water Rights Bureau, appeared as staff witnesses.

The record closed at the end of the hearing, except for closing briefs due thereafter.

**CASE # 150741**

EXHIBITS

Applicant offered ten exhibits for the record.

Applicant's Exhibit A, a photocopy of a completed form entitled "Soil Conservation Service Sprinkler Irrigation - Design Guide", was admitted without objection.

Applicant's Exhibit B, a job estimate prepared for Applicant by Valley Sprinkler and Pump Co., Inc., was admitted without objection.

Applicant's Exhibit C, a map of the area containing the Tietz property, was admitted without objection.

Applicant's Exhibit D, a map of ditches in the area of the proposed project, was admitted without objection.

Applicant's Exhibit E, a photocopy of that portion of the Temporary Preliminary Decree, Gallatin River Basin No. 41H, concerning Water Right No. 41H-W-150741-00, was admitted without objection.

Applicant's Exhibit F, a photocopy of that portion of the Temporary Preliminary Decree, Gallatin River Basin No. 41H, concerning Water Right No. 41H-W-115628-00, was admitted without objection.

Applicant's Exhibit F-1, a photocopy of Water Right Transfer Certificate No. 41H-W150741, was admitted without objection.

Applicant's Exhibit G, a photocopy of that portion of the Temporary Preliminary Decree, Gallatin River Basin No. 41H, concerning Water Right No. 41H-W-115627, was admitted without objection.

Applicant's Exhibit H, a water surface elevation profile (of the Dusenberry Ditch) prepared by Al Cunningham and Dave Tyler on September 11, 1987, was admitted without objection.

Applicant's Exhibit I, a memorandum concerning a "Field Investigation of the Dusenberry Ditch", prepared by Jan R. Mack on July 5, 1988, was admitted without objection.

Objector Westland offered 14 exhibits for the record.

Objector's Exhibit 1-A, consisting of 14 photocopied pages of Statement of Claim of Existing Water Rights No. 136620 and related documents, was admitted without objection.

Objector's Exhibit 1-B, consisting of 14 photocopied pages of Statement of Claim of Existing Water Rights No. 139066 and related documents, was admitted without objection.

Objector's Exhibit 2, a skeletal map of certain features in the area of the Westland property, was admitted without objection.

Objector's Exhibit 3, a videotape recorded on June 6, 1988 by Martin Westland, was admitted without objection.

Objector's Exhibit 4, an album containing 17 pages of photographs, was admitted without objection.

Objector's Exhibit 5, Roger Perkins' resume', was admitted without objection.

Objector's Exhibit 6, an aerial photograph with overlay prepared by Roger Perkins, was admitted without objection.

Objector's Exhibit 7, a computer printout entitled "Dusenberry Ditch Profile", was admitted without objection.

Objector's Exhibit 8, a 12-page document consisting of photocopies of a series of worksheets re: System design - periodic move sprinkler, and the accompanying references, calculations, and data pertaining to the Dusenberry wheelines, was admitted without objection.

Objector's Exhibit 9, an eight page document consisting of photocopies of a series of worksheets re: System design - periodic move sprinkler, and the accompanying references, calculations, and data pertaining to the Tietz handlines, was admitted without objection.

Objector's Exhibit 10, a certified copy of a document entitled "Bill for Each Individual, Middle Creek", was admitted without objection.

Objector's Exhibit 11, a photocopy of an aerial photo marked "Dusenberry", was admitted without objection.

Objector's Exhibit 12, a photocopy of a document showing pump curves for a "Model 1½W" pump, was admitted without objection.

Objector's Exhibit 14, a photocopy of a warranty deed to William Tietz, was admitted without objection.

The Department offered four exhibits for the record.

Department's Exhibit 2, a two-page document entitled "Correction to July 5, 1988 memo" prepared by Jan R. Mack, was admitted without objection.

Department's Exhibit 3, two photographs of the Dusenberry Ditch, was admitted without objection.

Department's Exhibit 4, two photographs of the Dusenberry Ditch, was admitted without objection.

Department's Exhibit 5, two photographs of the Dusenberry Ditch, was admitted without objection.

There were objections to two items contained in the Department file, i.e., to a letter from Mike Nash, and to an October 24, 1985 memo from Jan Mack. There was no objection to the exclusion of these items from consideration; accordingly, they were stricken from the record. The remainder of the contents of the Department file were not objected to and will be considered in the Examiner's deliberations.

#### PRELIMINARY MATTERS

This matter has heretofore been captioned "Application to Sever or Sell..." because the Application was originally filed prior to the 1985 repeal of § 85-2-402(6), MCA (1983), which statute required a person to obtain Department approval to sever or sell a water right, and because the Application was filed prior to the late amendment of Statement of Claim No. 150741-41H which added 72 acres to the description of the claimed place of use, which 72 acres includes Applicant's seven acre place of use. Said addition to the claim rendered that portion of the Application requesting Department approval of severance extraneous. Therefore, only that portion of the Application which requests a change in point of diversion need here be acted upon.

Further, that portion of the present Application which requests a change in point of diversion will be processed herein pursuant to the provisions of § 85-2-402, MCA, as the procedural requirements for processing a change application have been substantially complied with. Additionally, the caption relating to this matter has been altered to conform to the present scope of the Application.

FINDINGS OF FACT

1. Section 85-2-402, Montana Code Annotated (hereafter, "MCA"), provides that "[an] appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department. . . .".

2. This Application was duly filed on May 1, 1985.

3. The pertinent facts of the Application were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on July 3, and July 10, 1985.

4. Statement of Claim of Existing Water Right No. 150741-41H, as initially filed by John H. Bos on April 30, 1982, claims 100 miner's inches up to 450 acre-feet per annum of water from Hyalite Creek diverted at a point located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 14, Township 3 South, Range 5 East, for irrigation of 300 acres located in the E $\frac{1}{2}$  of Section 9, Township 3 South, Range 5 East, priority date July 1, 1877. After the deadline for filing claims had passed, Mr. Bos amended said claim to include as part of the place of use 72 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 10,

in above-said Township and Range. This amendment was incorporated in the Temporary Preliminary Decree for the Gallatin River Basin.

5. On September 27, 1983, John Bos executed a warranty deed conveying to William Tietz Tract 1-A-1, located in the SW $\frac{1}{4}$  of Section 3 and the NW $\frac{1}{4}$  of Section 10, Township 3 South, Range 5 East, together with "20 miner's inches of Middle Creek water rights appropriated in 1878 [sic], to be delivered through the Bradley-Ferguson-Krudde Ditch, along with an easement and ditch rights across Tract 3-A for delivery of the water to Tract 1-A-1." No volume was specified in the deed.

On April 4, 1987, a Water Right Transfer Certificate allegedly reflecting the conveyance of said 20 miner's inches (no volume specified) for irrigation was filed with the Department. However, this Certificate identified the transferred water right as a portion of that water right claimed under Claim of Existing Water Right No. 150741-41H, which Claim identifies a priority date of July 1, 1877. Applicant explained the discrepancy as a clerical error which was soon to be rectified.

For purposes of this proceeding, the Examiner finds that the 20 miner's inch water right deeded to Tietz is a portion of Claimed Existing Water Right No. 150741-41H.

6. By this Application, Applicant seeks to change the point of diversion of 20 miner's inches up to 90 acre-feet per annum of Water Right No. 150741-41H from the headgate of the Bradley-Ferguson-Krudde Ditch, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 14,

Township 3 South, Range 5 East, Gallatin County, Montana, to the headgate of the Dusenberry Ditch, located in the N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 10 in above-said Township. Although the Application as originally filed also requests a change in place of use to Seven acres located in the N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 10, said request has been rendered extraneous by the filing of a late amendment to Statement of Claim of Existing Water Right No. 150741-41H. (See Finding of Fact 4, supra.)

7. Objector Westland objects to the proposed change alleging that the Dusenberry Ditch, especially where it runs through her property, is of insufficient capacity to carry the Applicant's water in addition to what it now carries; that the proposed use of water would result in a waste of water; that the proposed change would adversely affect her stockwater rights; and that the proposed means of diversion, construction and operation of the appropriation works are not adequate. (Objector Westland also alleged that the water right claimed by Bos does not exist, or at least that it does not exist as indicated in the amended claim; however, for the purposes of this hearing, said issue was disposed of when no party filed a motion for its certification pursuant to the option set forth in the Examiner's Order of August 8, 1988.)

8. When Bert Dusenberry is not diverting water for use at his place (which is further down the Dusenberry Ditch than the Tietz property), Applicant intends to supply his pump with the approximately 103 gpm required to operate his sprinkler

irrigation system by diverting his full 20 miner's inches into the Dusenberry ditch. However, when Dusenberry is diverting, the Dusenberry appropriation would function as carriage water; thus, when Dusenberry is diverting, Applicant intends to divert only about 9 miner's inches, which would then adequately supply his system.

9. At the present time the Dusenberry Ditch, at its point of least capacity (located where it passes through the Westland property), will carry 80-90 miner's inches of water without overtopping the bank. However, the evidence also shows that the Dusenberry Ditch in this area tends to meander and is choked with vegetation. If the vegetation were removed from the ditch, and the meandering corrected (without enlarging the cross section of the ditch), it would be able to carry approximately 120 miner's inches.

10. Bert Dusenberry presently diverts for his own use a maximum of 100 miner's inches through the Dusenberry headgate. Of this amount, approximately 80 miner's inches reaches the place of use. In the past, when Dusenberry flood irrigated only, he needed 100 miner's inches at the field, and could get that amount by diverting approximately 10-20% more than 100 miner's inches at the headgate (because the ditch loss is 10-20%). However, the ditch is not presently capable of delivering 100 miner's inches to the Dusenberry place of use.

11. In the past, the Dusenberry Ditch carried, in addition to the Dusenberry appropriation, sufficient water to irrigate 40

acres of Benape land. This property, located north of the Tietz property, has since been subdivided and is not presently irrigated.

12. The Examiner finds that the capacity of the Dusenberry Ditch as originally designed was approximately 120 miner's inches; that its capacity is presently only 80-90 miner's inches because that portion of said ditch which runs through the Westland property has not been properly cleaned and maintained; that the Dusenberry Ditch could be restored to original capacity by simple removal of vegetation and by returning the ditch to its original nonmeandering course; and, that enlargement of the ditch with a backhoe or other heavy equipment is not necessary to return the ditch to its original capacity, but that the ditch could be restored to its original capacity with hand tools.

13. The evidence indicates that about 2.1 acre-feet of water per acre per annum applied to the field is a reasonable amount of water to irrigate Tietz' seven acres in a dry year. Thus, accounting for a minimum Bradley-Ferguson-Krudde Ditch loss of approximately 10% (Applicant did not provide evidence of higher ditch loss), about 2.3 acre-feet per acre is the maximum annual per-acre volume which would have been historically diverted for beneficial use on the seven acres now owned by Tietz. Accordingly, the Examiner finds that the maximum volume of water which has been historically diverted for beneficial use on the seven acres now owned by Tietz is 16.1 acre-feet per annum.

14. Objector Westland does not use the Dusenberry Ditch to convey stockwater pursuant to its stockwater rights.

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

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

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

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402(2), MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

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

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

4. Applicant herein does not propose to change the use of water from that claimed in the statewide adjudication, and the claimed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA. Thus, the criterion set forth in

§ 85-2-402(2), MCA, appears satisfied prima facie. However, allegations regarding duty of water were made.

Whether Claim of Existing Water Right No. 150741-41H reflects beneficial use of the entire amount claimed therein is not at issue in this proceeding<sup>1</sup>; however, Objectors have raised the issue of whether the portion of said water right which has been transferred to the Applicant may be excessive for use on seven acres. According to the Bos claim as amended, 100 miner's inches of water up to 450 acre-feet per year has historically been used to irrigate 372 acres; that is, on the average about .2688 miner's inches up to 1.21 acre feet per annum was diverted under this right to irrigate each acre of land. Applicant has purchased 20 miner's inches to irrigate seven acres of pasture, or about 2.85 miner's inches per acre, which is more than 10 times the flow rate per acre claimed by Bos. (Of course, this ratio is meaningless if Bos irrigated said 372 acres with other rights supplemental to this water right.) The annual volume which Applicant may divert pursuant to the purchase was not specified either in the conveying instrument. However, the Application indicates that 90 acre-feet are to be conveyed to the seven acres.

This Application requests only a change in point of diversion; it does not request a change in the place of use

---

<sup>1</sup> The issue of whether the Bos claim, as amended, accurately represents an existing water right has been deferred. See Department File: Order of August 8, 1988. Accordingly, for purposes hereof, the Bos claim, as amended, is recognized as accurate, and as reflecting beneficial use of the amounts claimed.

(because the water right was transferred to the Applicant by warranty deed as an appurtenance to real property already claimed as its place of use), or purpose of use. As a simple change in point of diversion does not affect appurtenancy, this is not the proper forum for making a determination regarding the efficacy of irrigating seven acres with the amount of water transferred. If the amount is so excessive as to result in a waste of the resource, a petition for relief can be made to the district court pursuant to the provisions of § 85-2-114, MCA.

Nevertheless, all parameters of the right to be changed must be specified in order that the Department may fully consider the potential effects of the change. Applicant has indicated that he wishes to change the point of diversion for a volume of up to 90 acre-feet per annum. However, there is no evidence that Applicant owns a right to divert up to 90 acre-feet, for no volume was specified in the conveying instrument.

The Supreme Court of Montana has held that the volume of a water right is that volume reasonably necessary to effect the beneficial use. (Accordingly, volumes specified in the statewide adjudication are nonbinding.) McDonald v. State of Montana, 43 St. Rptr. 576, 722 P.2d 598 (1986). Therefore, the volume which may be diverted under Water Right No. 150741-41H, i.e., the volume which is appurtenant to the claimed acreage, is that volume reasonably necessary to irrigate that 372 acres.

Here, as in most conveyances, there is no indication in the deed regarding the volume transferred to Tietz. However, a

certain volume must have been transferred by necessary implication. The Examiner holds that the volume of water transferred by implication is the volume historically appurtenant to the particular acreage conveyed, i.e., the volume reasonably necessary to irrigate the particular acreage conveyed.<sup>2</sup> Thus, the Examiner concludes that the volume here transferred by implication, by the warranty deed's silence, was 16.1 acre-feet per annum. (Finding of Fact 13.) Accordingly, the Department recognizes 16.1 acre-feet per annum as the volume of the water right here to be changed, and will not approve this Change Application for a volume of more than 16.1 acre-feet per annum.

5. The Applicant has provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

The change in point of diversion herein requested will not of itself increase the burden on the source. As long as Applicant diverts no more than the 20 miner's inches up to 16.1 acre-feet per annum to which he is legally entitled (and assuming the owner(s) of the remainder of this water right divert only what they are legally entitled to), the burden on Hyalite Creek due to this appropriation will be the same whether Applicant diverts into the Bradley-Ferguson-Krudde Ditch, or into the

---

<sup>2</sup> This, notwithstanding the holding in Spaeth v. Emmett, 142 Mont. 231 (1963), which the Examiner understands as governing the flow rate of a water right granted by such implication, and not the volume. (Volume is rarely, if ever, expressly set forth even in conveyances which specify flow rate.)

Dusenberry Ditch. Thus, the Examiner concludes that there will be no increase in the burden on Hyalite Creek due to the proposed change in point of diversion.

Regarding the only specific allegation of adverse effect to a water right (Objector Westland's stockwater right) entered, the evidence shows that the right is not exercised by means of the Dusenberry Ditch, and Objector presented no plausible theory as to how this right could in any way be affected by the change proposed herein. Accordingly, Objector did not meet its burden of production regarding the allegation, and Applicant therefore has no burden to disprove the allegation.

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

The evidence shows that, with normal maintenance, the Dusenberry Ditch has the capacity to carry 120 miner's inches of water without overtopping its banks. The headgate and ditch have been in operation for decades, and in their original condition served to divert at least 120 miner's inches, delivering same to the field less about 10-20% (lost due to seepage and evaporation). Removal of excess vegetation and correction of meandering in the segment crossing the Westland property will restore this original capacity.

Bert Dusenberry normally diverts no more than 100 miner's inches. This leaves room in a clean and maintained ditch for an additional 20 miner's inches, which is the maximum flow Applicant wishes to conduct. However, it is possible that in the future

Dusenberry and/or other parties may legitimately conduct more than 100 miner's inches through the Dusenberry Ditch.

Accordingly, any Authorization must be conditioned to prohibit Applicant from diverting at a flow rate which would cause the total flow of the Dusenberry Ditch to exceed its capacity.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Examiner propounds the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change Appropriation Water Right No. 150741-s41H is hereby granted to William Tietz to change the point of diversion of 20 miner's inches up to 16.1 acre-feet per annum of Hyalite Creek water from the headgate of the Bradley-Ferguson-Krudde Ditch located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 14, Township 3 South, Range 5 East, Gallatin County, Montana, to the headgate of the Dusenberry Ditch located in the N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 10 of above-said Township and Range.

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

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

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

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

D. Issuance of this Change Authorization shall not be construed as a grant of any legal right to the use of the Dusenberry Ditch or the Dusenberry easement, or as a grant of another easement for conduction of the water diverted pursuant to this right.

E. The appropriator shall maintain an adequate flow measuring device at his pump site and shall record each date on which he pumps water, the rate of pumping and the length of time water is pumped on that date.

F. The appropriator may not divert water hereunder if such diversion would result in a total diversion into the Dusenberry Ditch of more water than it has the capacity to carry.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party

adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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 pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 7 day of March, 1989.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13<sup>th</sup> day of March, 1989, as follows:

John H. Bos  
10250 Cottonwood Road  
Bozeman, MT 59715

William J. Tietz  
2310 Spring Creek Drive  
Bozeman, MT 59715

Nancy J. Westland  
8379 South 19th  
Bozeman, MT 59715

Scott Compton  
Bozeman Field Office  
1201 East Main  
Bozeman, MT 59715

Matthew H. Williams  
Moses, Wittemyer, Harrison  
and Woodruff, P.C.  
506 E. Babcock  
Bozeman, MT 59715

C. Bruce Loble  
Attorney at Law  
P.O. Box 1145  
Helena, MT 59624

  
Irene V. LaBare  
Legal Secretary