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

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IN THE MATTER OF THE APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHT G(W)150892-76H AND G(W)151192-76H BY IVAN E. AND LOIS E. HOWARD	)))))	PROPOSAL FOR DECISION

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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 6, 1995, in Hamilton, Montana, to determine whether authorizations to change appropriation water right should be granted to Ivan E. and Lois E. Howard for the above-entitled applications under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1993).

APPEARANCES

Applicants Ivan E. and Lois E. Howard appeared at the hearing by and through Ivan E. Howard and counsel, Robert H. Scott.

Lee Yelin, Senior Water Right Specialist, and Clint M. Brown, Senior Geologist, with Water Rights, Inc., appeared at the hearing as witnesses for Applicants.

Objector Delia Kelly appeared at the hearing by and through counsel, Zane K. Sullivan.

Joe Thompson, Objector Kelly's fiance', appeared at the hearing as a witness for Objector Kelly.

Duane Zeiler, longtime resident of the area, appeared at the hearing as a witness for Objector Kelly.

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Steve Spears, landowner in the area, appeared at the hearing as a witness for Objector Kelly.

Tom Gale, former water commissioner, appeared at the hearing as a witness for Objector Kelly.

Wes McAlpin and Gerald Reddig, Water Resources Specialists with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

Objector Edward A. Cummings had withdrawn his objections to this application by a Notice of Withdrawal of Objections dated May 5, 1995.

Objector Baker/Ziener failed to appear at the hearing, was declared in default, and is no longer a party to this proceeding.

EXHIBITS

Applicants offered eight exhibits for inclusion in the record. Objectors objected to Applicants' Exhibit 3 on the basis that it is not representative of the status of that area in a typical year. The Hearing Examiner reserved a ruling on the objection until this proposal. This exhibit was not offered to show any status of the area at any time, it was offered to show the metal box at that location. On that basis the Hearing Examiner overrules the objection and Applicants' Exhibit 3 is accepted into the record.

Applicants' Exhibit 1 is an aerial photo, approximately 28.25 inches square, upon which certain property lines, property owners, section corners, and ditches are shown in blue and

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certain measuring points and Objector Kelly's property ownership is identified in red orange.

Applicants' Exhibit 2 is a one-page site visit report by Clint Brown and Lee Yelin documenting various activities performed at the site on August 23, 1995, and making a conclusion based upon facts gathered at that time.

Applicants' Exhibit 3 is a copy of a photograph taken by Clint Brown on June 20, 1995. The photograph depicts a metal box just below the headgate of No. 8 Ditch.

Applicants' Exhibit 5 is a copy of a photograph taken by Clint Brown on June 20, 1995, of Kootenai Creek at the headgate of No. 8 Ditch which can be seen in the foreground.

Applicants' Exhibit 6 is a copy of a photograph taken by Clint Brown on June 20, 1995, of Kootenai Creek and the headgate of No. 8 Ditch.

Applicants' Exhibit 7 is a copy of a photograph taken by Clint Brown on June 20, 1995, of the headgate of No. 8 Ditch and Kootenai Creek.

Applicants' Exhibits 4 and 8 were withdrawn after receiving objections and the Hearing Examiner sustained the objections to the acceptance of these exhibits into the record.

PRELIMINARY MATTERS

At the beginning of the hearing Objector Kelly's attorney, Zane Sullivan, moved the hearing be continued until such time as the water court determines the ownership of the water rights to be transferred. At that time the Hearing Examiner ruled that the

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hearing could be held and a decision could be made without such a ruling by the water court. In her ruling, she stated if the water court eventually determined Applicants did not own the water right to be transferred, any change that may be granted as a result of this hearing would then be null and void. At the end of the hearing Mr. Sullivan requested the record be left open for submission of a memorandum dealing with the water right ownership issue. Although she had previously ruled on this subject, in order to be completely fair to all parties, the record would remain open for 14 days to allow Mr. Sullivan to present a memorandum on that subject to the Hearings Examiner and a copy to Mr. Scott. Mr. Scott would then have 14 days in which to respond to the memorandum. A Motion to Certify Issue of Ownership and supporting brief was received by the Department on October 20, 1995. Mr. Scott's response was received by the Department on November 6, 1995. While there is a possibility Applicants do not own the water rights intended to be changed, the decision in this Proposal renders that issue moot. Therefore, the motion to Certify Issue of Ownership is **DENIED.**

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(W)150892-76H in the name of and signed by Ivan E. and Lois E. Howard was filed with the Department on January 6, 1994.

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Application for Change of Appropriation Water Right G(W)151192-76H in the name of and signed by Ivan E. Howard and Lois E. Howard was filed with the Department on May 1, 1994. (Department file.)

2. Pertinent portions of each application were published in the *Ravalli Republic* on October 13, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed changes. Three timely objections to Application G(W)151192-76H and two timely objections to Application G(W)150892-76H were received by the Department. Applicants were notified of the objections by a letter from the Department dated November 29, 1994. Objector Kelly based her objection in part on the loss of carriage water if Applicants are allowed to remove their water from No. 8 Ditch to No. 7 Ditch. (Department file.)

3. For Statements of Claim for Existing Water Right (Claims) 76H-W150892 and 76H-W150893, Applicants propose to change the point of diversion from the NE¼SE¼SW¼ of Section 17, Township 09N, Range 20 West, Ravalli County[1] to the SW¼NE¼SW¼ of Section 17. Applicants propose to take 8.17 acres in the NE¼ of Section 21 out of irrigation and change the place of use to 8.00

[1]Unless otherwise stated, all land descriptions in this Proposal are in Township 09 North, Range 20 West, Ravalli County.

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acres in the E½SE¼SE¼ of Section 16.[1] Applicants propose to change the means of conveyance from the No. 8 Ditch to No. 7 Ditch. The claimed period of use would remain the same, from April 1 through October 1, inclusive of each year. The claimed flow rate of 91.66 gallons per minute would not be changed.

For Claims 76H-W151192 and 76H-W151193, Applicants propose to change the points of diversion from the NE¼SE¼SW¼ of Section 17 and the SW¼SE¼NW¼ of Section 21 to the SW¼NE¼SW¼ of Section 17. Applicants propose to take 31.91 acres in the E½E½NE¼ of Section 21 and 21 acres in the W½W½NW¼ of Section 22, for a total of 52.91 acres, out of irrigation and change the place of use to 30.70 acres in the SW¼ of Section 15, 13.1 acres in the SE¼SE¼ of Section 17, and 27.00 acres in the NW¼NW¼ of Section 21, for a total of 70.80 acres. The claimed period of use would remain the same, from April 1 through October 1, inclusive of each year. The claimed combined flow rate of 593.76 gallons per minute would not be changed.

4. Applicants have not proven by a preponderance of evidence 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.

Although Applicants have been using the water without authorization in the No. 7 Ditch since 1981, they have not used

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[1]Ivan Howard testified at the hearing that he no longer owns the full 8.00 acres. He sold 3.00 acres and now owns 5.00 acres in the SE¼SE¼SE¼ of Section 16.

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the water in that ditch during the low flow periods when the water commissioner distributed the water. It is not clear whether, since 1981, the water formerly used by Applicants during low flow periods was available in No. 8 Ditch for use as carriage water for Objector Kelly and Mr. Spears since Applicants have not, since 1981, appropriated during low flows. (Testimony of Ivan Howard, Lee Yelin, Joe Thompson, and Steve Spears.)

5. Applicants have not proven by a preponderance of evidence the proposed use of water is a beneficial use for Application G(W)151192-76H. There is a question whether the combined amount of water, 685.42 gallons per minute, would ever reach the new places of use on the east side of Highway 93: 4.70 acres in the NW¼SW¼ owned by Matusick, 26.00 acres in the SW¼SW¼ of Section 15 owned by Glaze, and 8.00 acres in the SE¼SE¼SE¼ of Section 16 owned by Applicants. Evidence on ditch loss and gain was conflicting with no preponderance either way. If Applicants are allowed to change the places of use and the water turned in at the headgate which is approximately two miles from the property east of the highway, did not arrive at the proposed places of use, that water would be wasted. (Department file, Applicants Exhibit 1, and testimony of Ivan Howard, Lee Yelin, Tom Gale, and Joe Thompson.)

6. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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Although the headgate at the No. 7 Ditch is in disrepair, Ivan Howard testified he would upgrade the headgate if the change authorization were granted. The remainder of the ditch appears to be adequate since it has been used for many years by the existing water users and it is large enough to accommodate the additional first and third right waters proposed to be moved by Applicants. For Application G(W)151192-76H the water would be used for supplemental flood irrigation using existing systems and for Application G(W)150892-76H the water would be pumped from the ditch into a sprinkler system. (Testimony of Ivan Howard and Lee Yelin.)

7. Applicants have proven by a preponderance of evidence they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. There are, in the Department file, written consents of the property owners where Applicants propose to use the water to irrigate acreage Applicants do not own, 5.56 acres in the SE¼SE¼ of Section 17, 27.00 acres in the NW¼NW¼ of Section 21, 30.70 acres in the SW¼ of Section 15. Applicants own the remaining acreage in the proposed places of use. (Department file and testimony of Ivan Howard and Lee Yelin.)

8. No objections relative to water quality were filed against these applications nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

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

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. *See* Findings of Fact 1 and 2.

2. Applicants have not met all the criteria for issuance of an authorization to change appropriation water right. *See* Findings of Fact 4 and 5.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Applications to Change Appropriation Water Right G(W)150892-76H and G(W)151192-76H are hereby **DENIED.**

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after

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service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 7th day of November, 1995.

Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

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, first class mail, at their address or addresses this 7th day of November, 1995, as follows:

Ivan E. and Lois E. Howard
P.O. Box H
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Cindy G. Campbell
Hearings Unit Legal Secretary

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