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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NOS. G111165-01-76H AND G151753-01-76H BY WILLIAM A. AND EVA JEAN WORF	)))))	FINAL ORDER

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. Applicant filed timely exceptions. The thrust of said exceptions is that the Examiner failed to consider, or properly weigh, certain evidence alleged to be contained in the record regarding return flows to Sharrott Creek.

First, Applicant maintains that the evidence shows that there were historically no return flows to Sharrott Creek from flood irrigation of the property to which the captioned water rights were initially appurtenant, and that therefore Conclusion of Law 6 (and, implicitly, the supporting Finding, Finding of Fact 10) is in error. However, the sole evidence pointed out by Applicant in support of this assertion is an aerial map which supposedly shows how no water could have returned to Sharrott Creek. The map is not buttressed by any testimony that I can find in the record; accordingly, the Examiner's failure to find, as Applicant asserts, that there was no historic return flow, is certainly justified. More important, however, is the fact that the issue of the existence of historic return flow resulting from flood irrigation of the original place of use was already decided

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in the affirmative in In Re Application No. V111165-76H and V151753-76H by Worf and Brown (1987), a contested case involving the same issue and parties. It is upon this decision that the Examiner based Findings of Fact 10.

Worf is collaterally estopped from relitigating said issue in this proceeding. Regardless, the map presented here hardly compels a finding that there was no such return flow. Therefore, Conclusion of Law 6 and Finding of Fact 10 are hereby sustained.

Second, Worf contends that the Examiner overlooked maps and aerial photographs which supposedly show that there could have been no return flow from the original Latta Ditch to Sharrott Creek, because of the existence of intercepting ditches which did not end in Sharrott Creek. However, the extensive recorded testimony on the subject contains no testimony as to the map showing that such return is an impossibility, nor were the exhibits marked in such a way so as to demonstrate this position. How the Examiner was supposed to glean the alleged impossibility from the maps or photos alone is uncertain. However, there is ample testimony in the record to support a finding that there was some return flow. Indeed, Worf admitted that there was probably some return flow. Thus, the Finding to which Worf objects (implicit in Conclusion of Law 7), that there was return flow from the Latta Ditch to Sharrott Creek, is based on substantial credible evidence. It is hereby sustained.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts

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the Findings of Fact and Conclusions of Law as contained in the August 24, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G111165-01-76H is hereby granted to William A. and Eva Jean Worf to increase the acreage irrigated under said right from the present 18 acres to 27 acres located in the W½W½NW¼NW¼ of Section 20 and in the NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West; and Application for Change of Appropriation Water Right No. G151753-01-76H is hereby granted to William A. and Eva Jean Worf to increase the acreage irrigated under said right from 20.8 acres to 31.2 acres located in the W½W½NW¼NW¼ of Section 20 and in the NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West.

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

A. Any 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 appropriator to divert water to the detriment of any senior appropriator.

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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. 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. Appropriator shall install an accurate flow measuring device in the pipeline used to convey water hereunder at a point above any pressure reduction device or other opening in the pipeline, and as close to the source as is practicable.

E. Within 30 days of the Final Order herein, Appropriator shall file an exact description of the acreage to be irrigated with each right hereby changed.

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 19 day of October, 1989.

Laurence Siroky, Assistant Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

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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, certified mail, return receipt requested, at their address or addresses this 24th day of October, 1989, as follows:

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

Leo H. and Effie Lubbers
339 South Kootenai Road
Stevensville, MT 59870

Douglas P. Whitfield
528 Redtail Hawk Lane
Stevensville, MT 59870

Bruce R. Nelson
P.O. Box 416
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Trace and Jenny Stewart
3688 Salish Trail
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Charlynn J. Steele
3800 Salish Trail
Stevensville, MT 59870

Kay and Darlene Cotton
3734 Salish Trail
Stevensville, MT 59870

William T. Gilliard
3759 Salish Trail
Stevensville, MT 59870

Baldwin Land Partnership
3549 Salish Trail
Stevensville, MT 59870

Mike McLane, Field Manager
P.O. Box 5004
Missoula, MT 59806

Irene V. LaBare
Legal Secretary

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BB

[redacted]

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

* * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G111165-01-76H AND G151753-01-76H BY WILLIAM A. AND EVA JEAN WORF	)))))	PROPOSAL FOR DECISION

* * * * * * * *

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 April 28, 1989 in Missoula, Montana.

Applicants William A. and Eva Jean Worf (hereafter, "Applicant" or "Worf") appeared by and through said William A. Worf. Mr. Worf called witnesses Forrest Berg and Fred Burnell, and introduced four exhibits. Three of the proposed exhibits, Applicant's Exhibits 1 (four charts, a statement, and a map), 2 (three charts), and 3 (water use records), were admitted.

Objector Douglas Whitfield appeared pro se.

Objector William Gilliard appeared pro se.

Objector Charlynn J. Steele was represented by her husband, Bob Steele.

Objectors Leo H. and Effie R. Lubbers appeared by and through said Leo H. Lubbers.

Objector Baldwin Land Partnership was represented by Carl Baldwin.

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

The record closed at the end of the hearing.

FINDINGS OF FACT

1. Both captioned Applications were duly filed on August 26, 1988.

2. The pertinent facts of both Applications were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on November 2, 1988. Timely Objections to both Applications were received from Donald and Virginia K. Thompson, Leo H. and Effie R. Lubbers, Douglas P. Whitfield, Bruce R. Nelson, Tracy and Jenny Stewart, Charlynn J. Steele, Kay and Darlene Cotton, and William T. Gilliard. Objectors Thompson subsequently withdrew their Objection. Baldwin Land Partnership filed a timely Objection to Application No. 151753 only.

3. By Statement of Claim of Existing Water Right No. 151753-76H, one Joseph E. Brown claimed 50 miner's inches up to 154 acre-feet per annum of water from Sharrott Creek, diverted and used from May 1 to September 30, inclusive, each year at a point located in the NW¼SW¼SE¼ of Section 19, Township 09 North, Range 20 West, for irrigation of 52 acres located in E½NW¼ of Section 20 of said Township and Range, with a claimed priority date of December 20, 1881.

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In 1988, 20 M.I. up to 61.6 acre-feet of said water right (often referred to as the "1st right" on Sharrott Creek) was transferred to Applicant for use on 20.8 acres of land located as follows: 13 acres located in N½NE¼NE¼ of Section 19, and 7.8 acres located in the S½NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West. See In the Matter of the Application to Sever and Sell Appropriation Water Right No. V11165-76H by William A. Worf and Eva J. Worf and the Application to Sever and Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown, Final Order, May 5, 1987

4. By Statement of Claim of Existing Water Right No. W111165-76H, Applicant claimed 31.25 M.I. up to 120 acre-feet per annum of water from Sharrott Creek, diverted and used from April 15 to October 15, inclusive, each year at a point located in the NW¼SW¼SE¼ of Section 19, Township 09 North, Range 20 West, for irrigation of 40 acres located in NE¼NE¼ of Section 19 and 10 acres located in the W½NW¼NW¼ of Section 20 of said Township and Range, with a claimed priority date of April 1, 1895.

In 1987, Applicant transferred ownership of a portion of said claimed right (often referred to as the "8th right" on Sharrott Creek). Applicant presently owns 11.25 M.I. up to 43.2 acre-feet per annum of said water right for use on 18 acres of land located as follows: eight acres located in NE¼NE¼ of Section 19, and 10 acres located in the NW¼NW¼ of Section 20, all in Township 9 North, Range 20 West. See Worf, supra.

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5. By these Applications, Applicant seeks to expand the place of use of both of his portions of above-said claimed rights. The place of use under each said portion would be expanded so that each portion would cover the same 36 acres, described as follows: 10 acres located in the W½W½NW¼NW¼ of Section 20, and 26 acres located in the NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West.

6. All Objectors hereto assert that the proposed expansion of acreage irrigated under the above-described water rights will adversely affect their water rights. Although Worf has not requested that the historic flow rates associated with his portions of the captioned water rights be increased, Objectors allege that more water would inevitably be diverted from Sharrott Creek to irrigate the increased acreage, and that there would thus be less water available to fill their junior water rights. They assert that greater than historic flow rates could be diverted because of inadequate flow measuring capability; and further assert that, even at the historic flow rates, greater than historic volumes could be diverted, i.e., Worf might divert at the historic flow rate, but for longer than historically was done, in order to cover the additional acreage, or Worf might consume water which formerly returned to Sharrott Creek to cover the additional acreage.

7. Under the captioned water rights as originally used for flood irrigation, there were some return flows to Sharrott Creek via a ditch located below the original place of use of

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each right. These return flows remained unquantified in the 1986 proceedings to sever and sell a portion of the each right. See Worf, supra. Accordingly, in order to prevent adverse effect to junior users on Sharrott Creek due to the increase in net depletion of the source which would occur were Worf to consume the former return flows, the severance was limited so that, after the transfer Worf could irrigate only the amount of acreage that his portion of each water right would have irrigated at its original place of use.[1]

8. The former return flows mentioned in Finding of Fact 7, supra, were not quantified in this proceeding either.

9. Prior to the installation of the pipeline that replaced the flumes and unlined ditches which originally conveyed the captioned water rights, there was a tremendous loss of water from the flumes because they had deteriorated with age. Such lost water returned to Sharrott Creek. In addition to the flume loss, there was a loss in each of said ditches of approximately 50% of the water diverted. Such loss is apparently common in the area, even when ditches are new. There is no loss in the pipe-

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[1] The change authorization was thus limited on the theory that net depletion of the source would remain unchanged if acreage irrigated remained unchanged. That is, as per acre crop consumption should remain constant in the same area, given the same acreage, net depletion of the source should remain unchanged, because that amount of water which formerly returned to the source after flood irrigation would not need to be diverted in the first place in order to facilitate sprinkler irrigation. See In the Matter of the Application to Sever and Sell Appropriation Water Right No. V111165-76H by William A. Worf and Eva J. Worf and the Application to Sever and Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown, Final Order, May 5, 1987.

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line (assuming no leaks, and no overflow through pressure release tanks installed therein).

10. Of the amounts historically diverted pursuant to the captioned rights, approximately 50% was unavailable to Worf or his predecessors for irrigation, due to ditch loss.[2] Under the present circumstances, diversion of this 50% is not necessary, as Worf has installed a nearly 100% efficient pipeline but still irrigates the same amount of acreage as was historically irrigated.

Of the water which ultimately reached the fields, an unknown percentage historically returned to Sharrott Creek after use. This amount presently need not be diverted, as the sprinkler system now in use irrigates the same amount of acreage as was historically irrigated but does not require as much head to get the water across the field.

11. The pipeline is presently operational and is adequate to deliver the water herein at issue. However, the flow meter presently installed in the pipeline is located below pressure release tanks. These tanks can overflow either into Larson Creek or Applicant's pond system; therefore, more water can be diverted than is measured.

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[2] The Examiner does not include the tremendous loss out of the deteriorated flumes, because the flumes were almost certainly watertight when new. Water thus lost was originally available for irrigation.. (Water returned to the source because of deteriorated conveyance facilities can only be considered return flow to which other appropriators are entitled if it is the intent of the appropriator losing the water to abandon such water. There is no evidence of such intent here.)

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12. Objectors testified that all or some of the ditch loss surfaced below the ditch, then ran overground, and ultimately reached either Sharrott Creek or another ditch which carried water back to the Sharrott Creek drainage. Mr. Gilliard testified that, prior to installation of the pipeline, there was a lot of water present below the original ditches, but that now there is none. However, the parties stipulated that the years since the installation of the pipeline have been exceptionally dry, and Mr. Worf suggested natural springs which might be the source of this water would thus no doubt be running low. Further, Mr. Worf asserted that some of the water Gilliard had seen had been intentionally diverted out of the ditches.

13. Approximately 50% of each of the original conveyance ditches crossed the Sharrott Creek drainage, as well as a small drainage which also contains a ditch (below the original conveyance ditches) which leads to Sharrott Creek.

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

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 is properly before the Examiner.

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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. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. Objectors have alleged they will be adversely affected by the proposed expansion of acreage irrigated under each right because the expansion will result in greater than historic depletion of the source. Although, the rates of diversion are not to increase hereunder, Objectors have raised the possibility of increased depletion due to deprivation of return flows[3] (actually, their equivalents, which are presently left in the source), and/or increased length of diversion within the period of diversion (which would increase annual volume consumption).

Expansion of irrigated acreage cannot be allowed unless waters which once returned to the source, but which now remain undiverted (hereafter, referred to as "return flow equivalents"),

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[3] Whether Objectors' water rights can, as a matter of law, be adversely affected by deprivation of return flows that did not in the past rejoin the source by natural means, but did so instead by artificial means, i.e., by means of a ditch returning from the drainage into which the water had been imported, was answered in the affirmative in Worf, supra.

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will continue to remain undiverted, nor can it be allowed if Applicant will have to divert for longer intervals in order to supply the additional acreage, for any increase in the net depletion of the source will adversely affect Objectors. Accordingly, Applicant seeks to prove that he has provided sufficient water to expand the amount of acreage irrigated, not by using such return flow equivalents or extending his time of diversion, but by salvaging formerly wasted water.

6. Applicant first tried to show that some of the water formerly used to flood irrigate was salvaged by conversion from flood irrigation to sprinkler irrigation. He presented a witness who testified that using sprinklers to apply water is 55% efficient, while applying water by flooding is only 33% efficient, apparently assuming that the difference must be salvage. However, in order to constitute salvage, the difference must have been water which was formerly lost to the source; it cannot be a return flow equivalent.

Here, 67% of the water reaching the field for flood irrigation was not used by the crop; however, some portion of the 67% returned to the source. Currently, only 45% of the water reaching the field for sprinkler irrigation is not used by the crop, but there is no return flow. If the difference, or 22%, originally returned to the source, there is no salvage; if less than 22% returned, there is salvage.

Applicant did not quantify historic flood irrigation return flow; therefore, Applicant could not prove how much salvage there

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is, if any. Failure to prove the amount of salvage precludes acreage expansion based upon flood to sprinkler conversion.

7. Applicant also sought to show that water formerly lost in conveyance, i.e., ditch losses, but now saved due to the replacement of ditches with a pipeline, was salvage. However, Objectors alleged that some of the seepage from the original conveyance ditches returned to Sharrott Creek, and thus that not all of the saved water was salvage. Worf denied this allegation.

Applicant need only disprove an allegation if the record contains facts which make the allegation plausible. In the Matter of the Application for Beneficial Water Use Permit No. 55749-g76L by Meadow Lake Country Club Estates, Final Order, January 27, 1988. The record contains testimony that water which surfaced below the first half of the unlined ditches ultimately returned to Sharrott Creek either directly or via a third ditch. This alone is insufficient to satisfy Objector's burden of production because there are possible sources of this water other than ditch seepage. However, there is also testimony that, since the installation of the pipeline there has been no water in the areas below the unlined ditches. The combination is sufficient to meet Objector's burden of production. Accordingly, Applicant bears a burden of proof regarding this issue.

The evidence given on both sides was solely anecdotal in nature. There was no scientific evidence presented as to where water which was observed to enter Sharrott Creek came from. Worf admitted that there was probably some seepage which surfaced and

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returned, but alleged it could not have been much. He asserted that some of the flow observed by Objectors was natural and was presently lessened due to the current drought, and further asserted that most of the flow observed was diverted directly from the ditches. Objectors stood by their contentions.

The Examiner regards both the explanations of Worf and the Objectors pertaining to the origins of this water to be equally convincing; either explanation, or portions of both, may be true. However, it is Worf who bears the burden of proof in this matter. As he has failed to provide a preponderance of evidence sustaining his position, the Examiner must conclude that such water as seeped from each ditch, and surfaced in the Sharrott Creek drainage or above the return ditch, did ultimately return to Sharrott Creek. Deprivation of these return flows, that is, the return flow equivalents now left undiverted, would harm the Objectors. Nevertheless, the Authorization may be granted if it can be conditioned so that above-said return flow equivalents remain in the source, undiverted.

The record shows that 50% of the length of the original unlined ditches existed in the Sharrott Creek drainage and a small drainage which led to the return ditch. The loss over the entire ditch was 50%. Thus, at most, 25% of the 1st right (50% of the 50% lost over the total length of the ditch), and 25% of the of 8th right could have returned to Sharrott Creek historically. Although the full amount of seepage no doubt did not reach Sharrott Creek, there is no evidence in the record

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which will allow a conclusion as to how much less than the full amount of water which seeped from the ditches surfaced and returned to Sharrott Creek. It is an all or none proposition.

Due to the certain adverse effect which would result from concluding that no seepage water returned to Sharrott Creek, it must be concluded that all of it did. Thus, no acreage expansion can be allowed based upon the 25% of the water diverted which was historically lost from the first half of each ditch. However, the 25% of water diverted which historically seeped from the second half of each ditch appears to have been lost to the source and thus was historically unavailable to the Objectors; accordingly, it is now consumable by Worf as salvage.

8. Because unquantified return flows which historically resulted from flood irrigation are now unquantified return flow equivalents left undiverted, the actual volumes which can legally be diverted for irrigation of the present acreage are not of record (and probably cannot now be ascertained as the old flood irrigated acreage has either been retired, or is now sprinkled). That Worf would not, after the changes in these rights already authorized were made, consume a volume greater than was historically consumed under these rights has therefore not been ensured by the imposition of volume caps per se; rather, the volume which can be diverted has been restricted to the historic consumed volume by Department limitation of acreage irrigated. See Finding of Fact 7.

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In the present case, the former method of diversion control is likewise not available; however, the latter method should serve as well. If Worf is allowed to expand acreage irrigated only in proportion to the percentage increase in water now available for irrigation, by the same logic set forth in Worf, supra, an increase in source depletion will be prevented.

With a 50% ditch loss, Worf's portion of the 1st right (less return flow) was used to irrigate 20.8 acres; his portion of the 8th right (less return flow) was used to irrigate 18 acres. Half of the water historically lost in each ditch, i.e., one-half of 50%, or 25%, has been salvaged by Worf. Thus, Worf can now irrigate at least half again more acreage with his portion of each right without increasing the depletion of Sharrott Creek over that historically due to these rights; that is, he may irrigate 31.2 acres under the 1st right, and 27 acres under the 8th right, without adversely affecting other appropriators on Sharrott Creek.

9. The means of diversion, construction, and operation of the appropriation works are adequate to physically divert and convey water appropriated pursuant to the Worf rights to the proposed place of use. However, the location of the flow measuring device, below two pressure reduction units, is not adequate for proper administration of these rights. The location of these units allows water to be removed from the pipeline prior to its measurement, thus yielding the possibility of undermeasurement of the actual flow diverted. Accordingly,

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any Authorization will be conditioned to require that an accurate flow measuring device be placed in the pipeline at a point above any pressure reduction unit, or other opening in the pipeline, and as close to the source as possible.

Based upon the foregoing, the Examiner proposes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G111165-01-76H is hereby granted to William A. and Eva Jean Worf to increase the acreage irrigated under said right from the present 18 acres to 27 acres located in the W½W½NW¼NW¼ of Section 20 and in the NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West; and Application for Change of Appropriation Water Right No. G151753-01-76H is hereby granted to William A. and Eva Jean Worf to increase the acreage irrigated under said right from 20.8 acres to 31.2 acres located in the W½W½NW¼NW¼ of Section 20 and in the NE¼NE¼ of Section 19, all in Township 9 North, Range 20 West.

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

A. Any 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 appropriator to divert water to the detriment of any senior appropriator.

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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. 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. Appropriator shall install an accurate flow measuring device in the pipeline used to convey water hereunder at a point above any pressure reduction device or other opening in the pipeline, and as close to the source as is practicable.

E. Within 30 days of the Final Order herein, Appropriator shall file an exact description of the acreage to be irrigated with each right hereby changed.

Dated this 24 day of August, 1989.

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

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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.

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, certified mail, return receipt requested, at their address or addresses this 25th day of August, 1989, as follows:

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

Leo H. and Effie Lubbers
339 South Kootenai Road
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