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D.N.R.C.

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

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G15928-76H BY SAMUEL T.)
AND VIRGINIA ALLRED)

On June 8, 1989, the Department Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended granting the Application for Change of Appropriation Water Right except for 6.7 M.I. to remain in the Upper Burke Ditch as carriage water for other water users on that ditch. Objector Ray Gramza and Darlene Gramza 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 September 6, 1989. Present at the hearing were the Applicant Samuel T. Allred and his attorney, Ted J. Doney. Objectors Ray and Darlene Gramza appeared by and through Walter Congdon, attorney at law. Other Objectors at the hearing were Miles S. Knutson, Leslie Golden, and Rhonda Gividen. Mike McLane from the DNRC Missoula Field Office, and Faye Bergan from the DNRC legal staff were also present at the hearing.

The exceptions filed by Objector Gramza contend that there are two issues concerning carriage water that the Proposal for Decision does not correctly deal with. They assert that the Proposal for Decision does not address the rotation system historically used to exercise water rights, and that the Proposal does not consider

carriage water necessary to exercise fourth rights. Essentially, the Gramzas want to require carriage water from the fourth right to also be left in the Burke ditch. Objectors Knutson, Golden, and Gividen made similar arguments at the oral argument as well.

Objector Gramza argues that there have been problems with the operation of this irrigation diversion and other irrigation diversions on Sheafman Creek, which have resulted in all of the Objectors having difficulty in procuring water to which they are entitled under their water rights. Objector Gramza asserts that the Proposal for Decision should be modified to include a finding and conclusion that during times of low flow, parties having first and fourth water rights have participated in a rotation or sharing arrangement as well as pro rata shares during times of water shortages.

The record does reflect that the Objectors participate in a rotation and sharing system when water becomes short. That fact however, is not relevant to these proceedings and not making a finding concerning this does not materially change the outcome.

At the hearing the Objectors did not object on the basis that fourth rights would be adversely affected, only first. A review of the transcript reveals that the Findings of Fact as proposed by the Hearing Examiner accurately reflects the nature of the objections raised. The Objector Gramza testified that impacts occur during "low water" and gave examples of impacts of the first right only. Other Objectors testified about impacts during low water but did not specify whether the impacts were to their first or fourth rights or both. The Hearing Examiner did not overlook the testimony of the Objectors in

this matter and specifically concluded that "[n]o similar provision need be made in case of the changes to be made to Applicant's 4th rights because Objectors with 4th rights did not specifically aver adverse affect thereto due to loss of carriage water as a result of moving the 4th right." Conclusion of Law No. 9. Only issues and factual information raised during the contested case hearing will be considered during the final decision-making process. ARM

36.12.229(2)(a). The Findings of Fact in the Proposal for Decision are based on competent substantial evidence and will not be modified or rejected. Section 2-4-621(3), MCA.

In a similar argument, the exceptions filed by Objector Gramza allege that Finding of Fact No. 23 should be amended. Proposed Finding of Fact No. 23 provides that Objectors Gramza, Gividen, Golden, Knutson, Trotter, and OML allege that the proposed change in the point of diversion of the first right water will adversely affect them by depriving them of carriage water. Objector Gramza alleges that this Finding be amended to provide that there are alleged problems of loss and shortage of water with both the first water right and the fourth water right. They contend that testimony at the hearing indicated that shortages of fourth right water also created problems for a number of Objectors, including those who had first and fourth water rights and those who had just fourth water rights.

The record shows that no Objector claimed just fourth water rights. The testimony of Raymond A. Gramza is that he claims first and fourth water rights. (Tr. p. 128.) Chuck Gividen claims a part of a fifth right for irrigation and stock. (Tr. p. 245.) Les Golden

claims a first and fourth right for irrigation as well as a stock right from the Burke Ditch. (Tr. pp. 280-281.) Miles Knutson claims first and fourth water rights. (Tr. p. 282.) Tim Trotter claims first and fourth water rights. (Tr. p. 209.) Curtis Kline, on behalf of O.M. Lord Investment Company, claims 20 M.I. of first water right. (Tr. pp. 254-280.)

The water right position of first, fourth, and fifth rights for Gramza, Gividen, Golden, Knutson, Trotter, and OML are correctly identified in Findings of Fact Nos. 13, 15, 17, 18, 14, and 21 respectively. Finding of Fact No. 23 is reasonably based on the testimony given. Judgment was required by the Hearing Examiner as to what was meant by affect during "low water flows." However, the Hearing Examiner's Findings are reversed only if they are clearly erroneous. See, Billings v. Billings Firefighters Local No. 521, 200 Mont. 421 (1982). A finding is clearly erroneous if a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." Wage Appeal v. Bd. of Personnel Appeals, ___ Mont. ___, 676 P.2d 194, 198 (1984). In this case judgments made by the Hearing Examiner are well reasoned and supported by the record and Finding of Fact No. 23 and not clearly erroneous, and will not be modified or rejected. Section 2-4-612(3), MCA.

The Objector Gramza states that Conclusion of Law No. 7 should include language that removal of the fourth water right will adversely affect the Objectors as well, based on their testimony. They contend, the Applicant should make fourth water right available to the Objectors for carry water.

The Findings of Fact as proposed by the Hearing Examiner are not clearly erroneous as discussed above so making alternate Findings of Fact to support the proposed Conclusions of Law as suggested by the Objector's cannot be done.

The Objector Gramza asserts that Conclusion of Law No. 9 should be amended to provide that the fourth water right was originally controlled by one entity, and that it should be treated identically in the manner the first water right is being treated. They contend that this is supported by the Objectors testimony at the hearing and a result of the water shortages evidenced at the hearing.

The Hearing Examiner correctly decided that the Objectors did not object to the changes on the basis that they needed the carriage water from the fourth right. As discussed above, the record does not support a conclusion as proposed by the Objector.

The Objector excepts in that Finding of Fact No. 9 should be amended to provide that the present site of use is 40 acres in size rather than 20 acres in size. The Applicant agrees that this Finding is in error.

The reference to 20 acres current place of use in Finding of Fact No. 9 is in error and is hereby amended to read 40 acres in size.

The Objectors state that Finding of Fact No. 8 (actually should be 28) should be amended to provide that as ditch flow increases, seepage from the ditch increases because the Findings relate to the bottom of the ditch. Finding of Fact 28 states: "Howard Newman measured total seepage loss in the upper Burke Ditch at approximately 15 M.I. Newman's measurements were taken at very low diverted flows.

According to Newman, with increasing diverted flow, the total amount of seepage loss will increase with the wetted perimeter; however, the amount of loss probably won't go up 'either linearly or exponentially'. Therefore, he concluded that the rate of seepage loss is 'for all intents and purposes relatively constant' for all rates of flow."

A review of Newman's testimony shows that the Finding of Fact No. 28 is accurate and is not in error. Mr. Newman's opinion relates to the full ditch rather than just losses from the ditch bottom. At hearing Mr. Newman stated that "the ditch losses basically given that you're at relatively bank full stage, are probably going to be fairly constant, and if you can add water to or subtract from, you're probably not going to change that rate of loss much at all." (Tr. p. 174). Mr. Newman clarifies the statement further by stating that for lower flows of water the seepage is constant but at low flows the seepage loss is going to be proportionately greater than it will be at high flows. (Tr. p. 182.) The Hearing Examiner in Finding of Fact No. 29 weighed the testimony of Roger DeHaan (referenced in Finding of Fact No. 27) and Howard Newman and ruled that Newman's assessment of the ditch is based on a more thorough examination and was the more convincing. It is the duty of the Hearing Examiner to weigh and balance evidence and testimony in making findings of fact. The Hearing Examiner's findings of fact are reversible only if they are clearly erroneous. My review of the record shows that Finding of Fact No. 28 is based on substantial credible evidence and is not clearly erroneous, and is accepted as proposed.

Objector Gramza feels that a Finding of Fact should be added noting that both experts testified that water in the ditch is recharged from a pond adjacent to the ditch upstream from the Applicants' property which pond may mitigate seepage losses which occur in the ditch. The Objector contends the Finding should further incorporate the testimony that the pond does not have a valid permit from the Department at this time, although application has been made for one.

There was considerable discussion throughout Mr. Newman's testimony concerning the influence of the pond on the seepage measurements and loss estimates. (Tr. pp. 174-201.) Mr. Newman specifically stated that whether the pond was mentioned or not, the numbers properly represent what has happened in the ditch as a result. (Tr. p. 201.) Finding of Fact No. 29 sums up the testimony of Newman and is the Hearing Examiner's assessment of the ditch losses including influences such as the pond. The additional suggested finding is not necessary since the influence of the pond is summed up in Finding of Fact No. 29. The Objector presented no arguments as to the relevance of whether the pond has a valid water use permit from the Department to this matter and I fail to find any from my review of the record.

The Objector Gramza asserts that Conclusion of Law No. 10 should be amended to be consistent with Conclusion of Law No. 9, in that carriage water in the Creek should be treated similarly to the carriage water in the ditch, for the first water right and the fourth water right. He asserts in his exceptions that since the ditch does clearly lose water due to seepage, and is located on similar topo-

graphy and similar terrain and soil type, indicates that the Creek does lose water. They contend that a substantial portion of the Creek's flow is subsurface in some stretches indicates that carriage water is needed to move the water to the original point of diversion and is important to the Objectors' enjoyment of the first and fourth right water.

The Hearing Examiner concluded that the Objectors did not meet their burden of production on this issue, and therefore no conclusions can be made regarding seepage losses in the stream. The Objectors' parallel drawn between the ditch and the Creek in the exception is not supported by any reference to the record and is therefore accorded little attention. See, ARM 36.12.229. My examination of the record reveals that the Objectors neither raised the issue nor presented evidence concerning the impacts of the proposed change on the Creek. This is supported by the fact that at nearly the end of the hearing Lee Yelin testified that he had heard no testimony or study concerning whether or not the Creek is a gaining or losing stream. (Tr. pp. 259-260.)

The Objector Gramza states that the proposed means of diversion, construction, and operation of the appropriation are not adequate contrary to Finding of Fact No. 33 and Conclusion of Law No. 16. He asserts that the evidence at the hearing indicated a problem with allocating water at the diversion sites and that the Applicant has not provided for utilization or pro rata sharing of less than the full amount of the first right water.

The Objector Gramza fails to cite any specific evidence to support his argument. Alleged problems with allocation of water are not related to this issue. The Applicants' choice to participate in a water right sharing or rotation is not a factor in the evaluation of this application for change in point of diversion. Also, there is no evidence concerning inability of Heckathorn Ditch to perform its intended function and therefore I adopt Finding of Fact No. 33 and the subsequent Conclusion of Law No. 16 as proposed.

The Objector Gramza states in his exceptions that the proposed Order should be amended to provide that the remaining water right appropriators of the first water right and the fourth water right should have first priority to the carriage water necessary to utilize their ditch before the Applicant is entitled to divert water at the upstream point.

As discussed already the record cannot support the proposed modification. The Applicants are restricted in the amount of water they can divert of the first right to 13.3 M.I. when the first right users on Burke Ditch are using water. If neither the Gramzas nor the other first right water right users on Burke Ditch are using water, then the Applicants may divert the entire 20 M.I. of the first right. If and when there is insufficient water in Sheafman Creek for both the Applicants and the other first right users, then each user will be entitled to divert the proportionat share based upon the flow rate of each water right (now 13.3 M.I. for the Applicants) or by their own choice enter into a rotation and sharing arrangement. There is no

need to amend the Proposed Order since it is reasonable based on the record.

Upon review of the evidence herein, consideration of the exceptions, response to those exceptions, and oral argument by the parties, the Proposed Findings of Fact as amended herein and Proposed Conclusions of Law as proposed of the Hearing Examiner are hereby adopted.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change of Appropriation Water Right No. G15928-76H be granted to Samuel T. and Virginia Allred to change the point of diversion and place of use of 13.3 M.I. up to 84.92 acre-feet per annum of Sheafman Creek water claimed pursuant to Statements of Claim Nos. W17858-76H and W19709-76H, and to change the point of diversion and place of use of 20 M.I. up to 162.75 acre-feet per annum of Sheafman Creek water claimed pursuant to Statements of Claim Nos. W15928-76H and W19708-76H, and to change the point of diversion and place of use of all water claimed pursuant to Statement of Claim No. W15930-76H, as follows: the point of diversion from the headgate of the upper Burke Ditch located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West to a point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, of said Township and Range; the place of use from 20 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 20 acres located in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West to 35 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of

Section 28, and 5 acres located in the NE¼NE¼NE¼ of Section 33, all in said Township and Range.

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.

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.

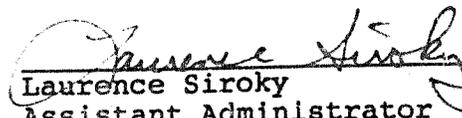
D. Appropriator shall authorize and allow the remaining 1st water right appropriators, who remove water from the upper Burke Ditch at a point below the divider box therein, to divert the 6.7 M.I. of 1st right water, claimed under Statements of Claim Nos. 17858-76H and 19709-76H, but for which no authorization to change has here been granted, at the original point of diversion for continued use by said appropriators as carriage water for their water rights.

E. Appropriator shall maintain an adequate flow measuring device at or near the headgate of the new point of diversion, and shall record each date on which water is diverted pursuant hereto, the rate at which said water is diverted, and the length of time water is diverted on that date. Appropriator shall supply such records to the Department on demand.

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 5 day of February, 1990.


Laurence Siroky
Assistant Administrator
Department of Natural Resource
and Conservation
1520 East 6th Avenue
Helena, Montana 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 5th day of February, 1990, as follows:

Samuel and Virginia Allred
P.O. Box 66
Pinesdale, MT 59841

Dwayne and Evelyn Klinger
345 Knapweed Lane
Victor, MT 59875

Sharon K. Mathews
355 Knapweed Lane
Victor, MT 59875

Eleanor and Patricia Moore
341 Bourne Lane
Victor, MT 59875

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. G15928-76H)
BY SAMUEL T. AND VIRGINIA ALLRED)

* * * * *

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 November 30, 1988 in Missoula, Montana.

Applicant appeared by and through Ted J. Doney, attorney at law. Mr. Doney called witness Samuel Allred, expert witness Roger DeHaan, and Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") staff witness Lee Yelin.

Objectors Ray and Darlene Gramza (hereafter, "Objector Gramza" or "Gramzas") appeared by and through Walter Congdon, attorney at law. Mr. Congdon called witnesses Ray Gramza and Darlene Gramza, expert witness Howard Newman, and DNRC staff witness Lee Yelin.

Objector Tim Trotter appeared pro se.

Objectors Charles and Rhonda Gividen (hereafter, "Objector Gividen") were represented by said Charles Gividen, who testified.

Objector Miles S. Knutson appeared pro se.

Objector O. M. Lord Investment Co. (hereafter, "Objector OML") was represented by Otis Kline, Jr. Mr. Kline testified, and called DNRC staff witness Lee Yelin.

Objectors Leslie and Agnes Golden (hereafter, "Objector Golden") were represented by said Leslie Golden, who testified.

Objectors Henry and Jeannette Winters (hereafter, "Objector Winters") were represented by said Henry Winters, who testified.

Objectors Roger and Barbara Ryan (hereafter, "Objector Ryan") appeared at the hearing through said Roger Ryan; however, Mr. Ryan did not participate.

Objectors Walter, Leonard, and Ruth Easley (hereafter, "Objector Easley") appeared at the hearing through said Leonard and Ruth Easley; however, the Easleys did not participate.

Michael McLane, Field Manager of the Missoula Field Office of the DNRC Water Rights Bureau, was present at the hearing, but did not testify.

The record was held open after the hearing for receipt of affidavits from Roger DeHaan and Howard Newman, as well as closing briefs or statements from all parties. The record closed on March 9, 1989.

EXHIBITS

Applicant offered two exhibits for the record.

Applicant's Exhibit 1, a report prepared by Roger W. DeHaan of Pinnacle Engineering, dated October 7, 1988, entitled "An Impact Assessment of Transferring Water Rights Between Ditches in the Sheafman Creek Drainage", was admitted without objection.

Applicant's Exhibit 2, an Addendum to above-said report, prepared by Pinnacle Engineering, dated November, 1988, was admitted without objection.

Objector Gramza offered one exhibit.

Objector Gramza Exhibit 1, a document entitled "Delivery Efficiency of the Upper Burke Ditch", prepared by Howard Newman, dated October 17, 1988, was admitted without objection.

Objector Gividen offered two exhibits.

Objector Gividen Exhibit 1, a map of the area of Gividen's property, hand drawn by Chuck Gividen, was admitted for demonstrative purposes without objection.

Objector Gividen Exhibit 2, a photograph of Gividen's place of use for irrigation water taken in August of 1982, was admitted without objection.

Objector OML offered seven exhibits.

Objector OML Exhibit 1, a photocopy of a USDA Soil Conservation Service report entitled "Reconnaissance Conservation Report on Water Control, Use and Disposal - Bitterroot River Drainage Basin, Ravalli County, Montana", dated April, 1947, was admitted without objection.

Objector OML Exhibit 2, a photocopy of a DNRC record regarding Water Right No. W21959-76H, was admitted without objection.

Objector OML Exhibit 3, two handwritten pages prepared by Otis Kline, Jr. entitled "Answers to Items 10 - 16 from 'Green Sheets'", was admitted without objection.

Objector OML Exhibit 4, a copy of an aerial photo taken after 1969 of the general area of the Applicant's present place of use, was admitted without objection.

Objector OML Exhibit 5, a handdrawn map prepared by Otis Kline, Jr. showing features of OML property, was admitted without objection.

Objector OML Exhibit 6, a photocopy of a warranty deed from Philip and Phyllis Baden to Sam and Jewell McDowell, was admitted without objection.

Objector OML Exhibit 7, a photocopy of a two page letter from Otis Kline, Jr. to Ted Doney dated October 19, 1988, was admitted without objection.

Pursuant to stipulation entered into during the hearing, Applicant, on December 8, 1988, submitted an affidavit by Roger DeHaan; Objector Knutson submitted a closing affidavit on December 15, 1988; and Objector Golden submitted a closing affidavit on December 15, 1988. Said affidavits were made part of the record herein.

Administrative Notice was taken of the Application for, and Order Authorizing, Change of Appropriation Water Right No. 12307-76H, issued to Philip L. Baden on July 27, 1977, as well as all pertinent Department records.

There were no objections to any of the contents of the Department file. Accordingly, it remains part of the record herein in its entirety.

PROPOSED FINDINGS OF FACT

1. Section R5-2-402, 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. The captioned Application was duly filed on July 20, 1987.

3. The pertinent facts of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on February 17, 1988. Timely objections were received from Dwayne D. and Evelyn V. Klinger, Eleanor G. and Patricia E. Moore, Don J. and L. Karen Blatter, Robert and Marlene Takle, Roger W., Barbara J., and John L. (Jr.) Ryan, D. Clarke Pile, Charles K. and Shirley A. Wheat, Norman E. Allison, Luverne E. McIlree, Robert Brandbo, Gayle E. Munson, Tim Trotter, Ray Crosley, Jean R. Ferien and Jackie A. Few, O. M. Lord Investment Co., James A. and Dorothy M. Quinn, Randy and Luayne Wolfe, Randy L. and Sharon K. Mathews, Charles V. and Rhonda A. Gividen, Ray and Darlene Gramza, Martha A. McDaniel, Walter, Leonard and Ruth Easley, Richard and Bonnie Hagerty, Raymond F. Holt, Alice M. Bryant, Miles S. Knutson, Henry and Jeanette Winters, Leslie and Agnes Golden, C.I. Hendricks, and Barbara J. Alarcon.

4. By this Application, Applicant seeks to change Claimed Existing Irrigation Water Rights Nos. 15928-76H, 17858-76H,

19708-76H, 19709-76H, and Claimed Existing Stockwater Right No. W15930-76H.

5. Statement of Claim of Existing Water Right No. W15928-76H claims 10.8 miner's inches (M.I.) up to 81 acre-feet per year of water from Sheafman Creek diverted in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West for irrigation of 20 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West (more particularly described as Parcel D, Certificate of Survey No. 1684), with a priority date of June 1, 1883. This Claim represents a portion of a larger water right, commonly known as the "4th water right" on Sheafman Creek.

6. Statement of Claim of Existing Water Right No. 17858-76H claims 11.00 miner's inches (M.I.) up to 66.75 acre-feet per year of water from Sheafman Creek diverted in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West for irrigation of 20 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West (more particularly described as Parcel D, Certificate of Survey No. 1684), with a priority date of July 28, 1882. This Claim represents a portion of a larger water right, commonly known as the "1st water right" on Sheafman Creek.

7. Statement of Claim of Existing Water Right No. 19708-76H claims 10.9 miner's inches (M.I.) up to 81.75 acre-feet per year of water from Sheafman Creek diverted in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West for irrigation of 20 acres located in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West (more particularly described as Parcel E,

Certificate of Survey No. 1684), with a priority date of June 1, 1883. This Claim represents a portion of a larger water right, commonly known as the "4th water right" on Sheafman Creek.

8. Statement of Claim of Existing Water Right No. 19709-76H claims 11.5 miner's inches (M.I.) up to 86.25 acre-feet per year of water from Sheafman Creek diverted in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West for irrigation of 20 acres located in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West (more particularly described as Parcel E, Certificate of Survey No. 1684), with a priority date of July 28, 1882. This Claim represents a portion of a larger water right, commonly known as the "1st water right" on Sheafman Creek

9. Regarding the total amounts claimed by Applicant, Applicant's own testimony is that the flow rates stated in the irrigation claims may be overstated. The Department Field Report (see Department File) indicates that the 1st and 4th water rights on Sheafman Creek were initially decreed based on a flow rate of 0.5 M.I. per acre. See Decree in Case No. 1620, Ainsworth v. Buckridge. There is no evidence that the conveyance of the 1st right was expressed in terms of a specific flow rate. Assuming a 0.5 M.I. per acre standard, Applicant holds a total of 20 M.I. of the 1st water right (on the 20 acre present place of use), and a total of 20 M.I. of the 4th water right (on the 20 acre present place of use).

10. By this Application, Applicant seeks to move the point of diversion and place of use of each of the four above-said

claimed water rights. Applicant would move the point of diversion of each right to a point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 7 North, Range 21 West; and would move the place of use of each right to a total of 40 acres, 35 acres of which are described as being located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 7 North, Range 21 West, and five acres of which are described as being located in NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 7 North, Range 21 West.

The new acreage to be irrigated under all four claimed rights would total 40 acres. Applicant would cease all irrigation of the 40 acres claimed historically irrigated under the four claimed rights.

11. The original 1st right appropriation was 160 miner's inches. This was diverted by means of two ditches with separate points of diversion. These are known as the "upper Burke Ditch" and the "lower Burke Ditch". It cannot be ascertained, based on this record, how much of the total 160 M.I. of the 1st right, or of the total 160 M.I. of the 4th right, was historically diverted into the upper Burke Ditch versus the lower Burke Ditch.

12. Presently both Bucke ditches utilize the original point of diversion for the upper Burke Ditch, with a divider box splitting the water into the original separate ditches about $\frac{1}{4}$ mile down the upper Burke Ditch. (Field Report.) The total amounts of 1st or 4th right water presently shunted into either the upper or the lower Burke Ditch cannot be ascertained based on this record.

13. Objector Gramza holds 50% of Statement of Claim No. W17859 by Joelina Holt, which claims .16 cfs (6.25 M.I.) of the 1st right on Sheafman Creek for irrigation; and has individually claimed .16 cfs of the 1st water right for irrigation under Statement of Claim No. W108935. Objector also holds 50% of Statement of Claim No. W15931 for stockwater.

Objector Gramza holds 50% of Statement of Claim No. W15929 by Joelina Holt, which claims .23 cfs (9.2 M.I.) of the 4th right on Sheafman Creek for irrigation; and has individually claimed .23 cfs of the 4th water right for irrigation under Statement of Claim No. W108934.

Water is diverted pursuant to all of these rights using the upper Burke Ditch, and remains in the upper Burke Ditch below the divider box. Gramzas' place of use is located downditch from Applicant's place of use.

14. Objector Trotter claims a portion of the 1st water right and of the 4th water right. Water diverted pursuant to these rights enters the upper Burke Ditch, and is thence shunted into the lower Burke Ditch.

15. Objector Gividen claims part of the 5th water right on Sheafman Creek for irrigation and stockwater. Water is diverted pursuant to this right into the upper Burke Ditch, evidently to be shunted into the lower Burke Ditch. Objector also has a groundwater right for domestic uses. The point of diversion of said groundwater right is not far from Applicant's present place of use.

16. Objector Easley claims a portion of the 3rd water right on Sheafman Creek, used for domestic, stock, and agriculture. Easley's point of diversion is on Sheafman Creek above the headgate of the upper Burke Ditch.

17. Objector Golden claims a portion of the 1st water right on Sheafman Creek (Claim No. W15942) and a portion of the 4th right on Sheafman Creek. Water is diverted pursuant to these rights into the upper Burke Ditch. Whether it is subsequently shunted into the lower Burke Ditch cannot be determined based on this record.

18. Objector Knutson holds 50% of Statement of Claim No. W17859 for .16 cfs of the 1st right on Sheafman Creek for irrigation, and 50% of .23 cfs of the 4th right for irrigation (Claim No. W15929). (Gramzas hold the other 50%. See Finding of Fact 13.) Knutson's water is diverted into the upper Burke Ditch, and remains therein below the divider box.

19. Objector Ryan claims 20 M.I. of a water right on Sheafman Creek, which is neither 1st nor 4th right (it appears to be part of the 10th right), and which is diverted below the headgate of the upper Burke Ditch.

20. Objector Winters claims 20 M.I. of the 2nd water right on Sheafman Creek, which right is diverted below headgate of the upper Burke Ditch.

21. Objector OML claims 20 M.I. of the 1st water right on Sheafman Creek. Objector OML's predecessor in interest, Phil Baden, who owned the entire 160 M.I. of 1st right and its place

of use, reserved 20 M.I. when he conveyed the place of use, and subsequently moved the point of diversion from the headgate of one of the Burke ditches to a point below the headgates of either of the Burke ditches.

22. The record also shows that nonappearing Objectors McDaniel and Blatter, as well as one Selby, convey water utilizing the upper Burke Ditch, above and below the divider box. (Objector Gramza Exhibit 1 - Figure 1). McDaniel claims .18 cfs of 1st right water (Statement of Claim No. W17874); Blatter claims .21 cfs of 1st right water (Statement of Claim No. W21155). The record will not allow a determination of the basis of Selby's diversion.

23. Objectors Gramza, Gividen, Golden, Knutson, Trotter, and OML each allege that the proposed change in point of diversion of 1st right water would adversely affect their water rights by depriving same of carriage water.

24. Objector Gividen also alleges that seepage from the irrigation of the Applicant's property and from the flow in the upper Burke Ditch supplies the aquifer which his groundwater well taps, and that the change will adversely affect his groundwater right by depriving his well of as much recharge water as it formerly received.

25. It is also alleged that the removal of irrigation from the present place of use would create an eyesore, further knapweed infestation, and create a fire hazard.

26. It is further alleged that moving the place of use will deprive Sheafman Creek water users of return flows historically generated by irrigation under this right. Such return flows are alleged to return to the Creek subsurface as a result of seepage from the upper Burke Ditch, and both on the surface and subsurface from irrigation of the present place of use. The present place of use straddles the top of a ridge. The ridge is 1/4 to 1/2 mile from Sheafman Creek. About 60% of the present place of use lies on the Sheafman Creek side of the ridge. The lower end of that 60% of the place of use is 1/8 to 1/4 mile from Sheafman Creek.

27. According to Roger DeHaan, 2 M.I. is sufficient carriage water to convey irrigation water to the present place of use. See Applicant's Exhibit 2. He did not state how much more would be required to convey irrigation water as far as Gramzas'. The 2 M.I. figure was reached by visual observation of very low flows. DeHaan testified that there would be little additional water lost at higher flows, as most of the loss is a result of saturating the bottom of the ditch, which is accomplished by a small flow. However, DeHaan admitted that, depending on porosity and other variables (which he had not studied), total loss could be a function of the wetted perimeter. Regardless, the amount lost would be substantially greater if the ditch is not well sealed.

28. Howard Newman measured total seepage loss in the upper Burke Ditch at approximately 15 M.I. Newman's measurements were

taken at very low diverted flows. According to Newman, with increasing diverted flow, the total amount of seepage loss will increase with the wetted perimeter; however, the amount of loss probably won't go up "either linearly or exponentially". Therefore, he concluded that the rate of seepage loss is "for all intents and purposes relatively constant" for all rates of flow.

29. The Examiner believes that Newman's assessment of upper Burke Ditch loss is based on a more thorough examination of the ditch and therefore finds his loss estimate more convincing. Both experts felt ditch loss would be relatively constant even at higher flow rates. Accordingly, the Examiner finds that between the headgate of the upper Burke Ditch and Gramza's, the amount of water lost to seepage is a relatively constant 15 M.I.

30. Gramzas, whose ditch takeoff is below the Applicant's, have no water for irrigation if only their portion of the 1st right (9.6 M.I.) are diverted into the upper Burke Ditch. This is because their entire diversion is consumed as carriage loss.

31. No water returns to Sheafman Creek as a result of surface runoff from irrigation.

32. Although expert witness DeHaan testified that it was theoretically possible, there is no empirical evidence that water returns to Sheafman Creek, subsurface, as a result of seepage from irrigation of the present place of use, within a short enough period of time to be of use to other appropriators thereon during the irrigation season.

33. The proposed means of diversion and operation consist of an existing headgate and ditch (the "Heckathorn Ditch"), which are of sufficient capacity to carry the water diverted pursuant hereto. There is a Parshall flume in said ditch.

Based upon the foregoing Findings of Fact, the Examiner makes 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 and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Examiner.

3. All those Objectors who did not appear at the hearing, except Objectors Norman Allison and Eleanor and Patricia Moore who were excused, are hereby declared in default and their Objections are dismissed. ARM 36.12.208.

4. 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, 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.

5. The prima facie value of Applicant's Statements of Claim for Irrigation having been overcome by other record evidence (see Finding of Fact 9), for purposes hereof and purposes hereof only, each of the water rights represented by said Statements of Claim (Nos. W15928-76H, W17858-76H, W19708-76H, and W19709-76H) is recognized as a water right for 10 M.I.

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

7. Objectors who appropriate by means of the Burke Ditch allege that the removal of Applicant's share of the 1st water right (20 M.I. - see Findings of fact 6, 8, 9 and Conclusion of Law 5) from the Burke Ditch will adversely affect their water rights in that it will deprive them of the use of carriage water to which they are entitled. Applicant argues that other Burke Ditch users are not entitled to the use of any part of his share of the 1st water right, and that, because their water rights do not include such entitlement, removal of his share of the 1st right from the Burke Ditch cannot adversely affect their water rights.

Pursuant to analysis set forth in Conclusions of Law 8 and 9, *infra*, the Examiner concludes that the Applicant holds in common with the other 1st right users on the upper Burke Ditch that part of his share of the 1st water right which was historically used for carriage; that those upper Burke Ditch users with 1st water rights are therefore entitled to the use of such carriage water; that deprivation of any part of such

carriage water will adversely affect at least those 1st right users at the end of the upper Burke Ditch; and that Applicant therefore must continue to make available to the remaining 1st right users on the upper Burke Ditch that portion of his share of the 1st water right which is used for carriage.

8. Applicant is quite correct insofar as his argument of non-entitlement to his first right water pertains to those users of the upper Burke Ditch who convey water under the auspices of water rights other than the 1st right. Users of separately appropriated water rights have no interest in, and are not entitled to, the use of any water conveyed in said ditch under other water rights as carriage water for their rights. Simply because the Burke Ditch may be used jointly to convey water diverted pursuant to several different water rights does not mean that the various ditch users hold the carriage water in common; rather, each separate water right stands free of the other water rights just as though it used a separate ditch¹, and must absorb its own carriage loss.² Cronwall v. Talbot, 45 Idaho 459, 262 P.

¹ That each separately appropriated water right is considered to stand free of the others as if it used a separate ditch means that each right is considered to include sufficient water to provide its own carriage to the place of use. This is because, even if other waters are generally conveyed in the same ditch (thereby reducing the amount of loss which each right must bear), the appropriator cannot rely on such waters, as he can neither expect nor compel the diversion of same by separate appropriators.

² For example, assume three separate 30 m.i. rights use a ditch with an evenly distributed loss of 18 M.I. along its length, and that right A is removed at 1/3 the distance along the ditch, right B at 2/3 the distance, and right C at the end. If water is diverted under all rights simultaneously, right A will

871 (1928). However, this case neither addresses nor resolves whether joint users of a single ditch hold the carriage water in common when their water rights derive from a single appropriation.

9. A tenancy in common is that character of tenancy whereby two or more persons own property in such a manner that they have separate freeholds in, but undivided possession of, the whole property. In other words, freeholders are tenants in common if their ownership is characterized by unity of the right to possess the property.

In certain jurisdictions, parties are considered to be tenants in common in a water right simply because they share in a right to divert water by means of a common headgate and ditch. Hough v. Porter, 51 Or. 318, 98 P. 1083, 1105 (1909); Moss v. Rose, 27 Or. 595, 41 P. 666. However, the rule in Montana has long been that, "[w]ith respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself." Norman v. Corbley, 32 Mont. 195, 79 P. 1059 (1905). Accordingly, it has been held that, if the various owners of the same water right do not hold the place of use of

lose 2 M.I. in the first reach (thus, receiving 28 M.I. at the place of use), right B will lose 2 M.I. in the first reach and 3 M.I. in the second reach (thus, receiving 25 M.I. at the place of use), and right C will lose 2 M.I. in the first reach, 3 M.I. in the second reach and 6 M.I. in the third reach (thus, receiving 19 M.I. at the place of use). However, if each is diverted individually, right A will lose 6 M.I., right B will lose 12 M.I., or right C will lose 18 M.I. It is these larger losses which each right is presumably able to bear, and neither A, B nor C is entitled to compel simultaneous diversion, regardless of the benefit.

water appropriated thereunder as tenants in common, there is "not such a unity of possession between the parties as to render the ownership of the right to use the water as that of tenants in common." Cocanougher v. Montana Life Insurance Co., 103 Mont. 536, 64 P.2d 846 (1936).

While it would thus appear that the interests of parties in a common appropriation, used to irrigate separately owned parcels by means of a common ditch, are considered entirely several, it must be pointed out that the Court in Cocanougher did not distinguish between carriage water and irrigation water when applying the "unity of possession" test. Nevertheless, the part of such a water right, which provides carriage water to deliver irrigation water to the fields, may reflect unity of user.

In the instant case, the entire 1st right appropriation of 160 miner's inches, was originally controlled by one entity. Water was conveyed by means of two separate ditches, and some portion of the amount diverted into each ditch was used as carriage water. Because the entire appropriation was controlled by one entity, the portion of water destined for each field on a given ditch could be relied upon to provide carriage water for the following portions irrigated by that ditch.³ Accordingly,

³ To illustrate, water diverted into the upper Burke Ditch for irrigation of the first field included carriage water for the distance between the headgate and the first field, which carriage water also functioned to carry all the water destined for further fields; water diverted for irrigation of the second field included carriage for the distance between the first and second fields, which carriage water also functioned to carry all the water destined for further fields, etc. Thus it is that each succeeding portion of the water right relies on the carriage

unlike the case where separately appropriated water rights are conveyed in a single ditch, the original appropriation cannot be considered as having included an allowance for such additional carriage water as might be necessary to provide for the individual conveyance of each separate portion of the subdivided water right to its field.

The 1st right place of use was subsequently conveyed, reserving 20 M.I. of 1st right water to the grantor. Said 20 M.I. was removed from 20 acres of the original place of use and transferred to a place of use other than the original. See Finding of Fact 21. The 140 acres of the original place of use with water still appurtenant was then subdivided, with the remaining 140 M.I. of 1st right water presumably conveyed non-specifically, simply as one of the appurtenances.⁴ Therefore, the division of the remaining 140 M.I. was pro rata, based on acreage conveyed. Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963) (regarding the grant of a water right as an appurtenance to acreage, without express division or reservation of the right). Thus, no allowance has been (if in fact it could be)

water from the portions before it to provide it with sufficient carriage water.

⁴ The great majority of land conveyances do not express the conveyance of the appurtenant water right in terms of a specific flow rate, e.g., "together with 20 m.i. of 1st right water"; rather, the water right is usually conveyed nonspecifically by means of language such as "together with all tenements, hereditaments and appurtenances thereto" or "together with all water, water rights, ditches, dams, flumes and easements appurtenant thereto." Accordingly, absent evidence that a flow rate has been specified in the conveyance, the Examiner presumes that the water right was conveyed nonspecifically.

made for the differences in amount of carriage water necessary based on the user's distance from the point of diversion. Accordingly, certain shares of the 1st right (those furthest from the headgate) do not include sufficient flow to carry them independent of the carriage water included in the other portions of the original water right. That such is indeed the case here is well demonstrated by the fact that, if only Gramzas' pro rata share of 1st right water is diverted at the headgate (9.375 M.I. - see Finding of Fact 13), because there is a 15 M.I. carriage loss between the headgate and their place of use (Finding of Fact 29), no water will reach their field. Finding of Fact 30. (Of course, before the property was subdivided, the 15 M.I. carriage loss would have been supplied by the remainder of the right.)

Where parties acquire certain land in separate parcels from the owner of a water right which was appurtenant to the whole of the land, and no express division of the appurtenant water right was made, they each become vested with an interest in the water, measured in amount by the requirements in each case, whether they may technically be designated as tenants in common or not.

Bullerdick v. Hermsmeyer, 32 Mont. 541, 553 (1905) (wherein it was held that, upon subdivision of a tract of land with a water right appurtenant, the owner of parcel A, which had historically required more water per acre than parcel B, was entitled to receive more water per acre than the owner of parcel B); see also Anderson v. Cook, 25 Mont. 330 (1901) (where ownership of 2/3 of the water right did not entitle such owner to remove 2/3 of the

water diverted, but only 2/3 of the noncarriage water diverted). In other words, where there is no express division or reservation of water in the conveyance, the interest conveyed is the amount required to effect the purpose of the right.

Here, because not every pro rata portion of the 1st right contains sufficient carriage water in itself for its effective use, in order to meet the "requirements of each case" rule stated in Bullerdick, supra, each 1st right owner on the upper Burke Ditch must have the right to use as much of the whole of the 1st right carriage water as is necessary to convey his share of the noncarriage water through the common ditch to his place of use; in other words, in these circumstances, the Bullerdick rule requires there be "unity of user" in the carriage water.

Therefore, by the rule stated in Norman, supra, those owners of the 1st water right who irrigate out of the upper Burke Ditch hold the water required for carriage in that ditch as tenants in common, with all attendant rights and duties.⁵

Property held in common may not be partitioned without the consent of all the owners (unless the property can be equitably divided without destroying its character). Neither may one co-tenant appropriate to his sole use any portion of the common

⁵ Arguably, the existence of carriage requirements should be reflected in the Statements of Claim filed by the subdividees, perhaps by specification of the rotation scheme which has long been employed to meet these requirements, or otherwise. However, while only certain aspects of a water right are routinely set forth in a Statement of Claim, other unspecified aspects may be just as important to the operation of the right.

property. Applicant obviously does not have the consent of the other cotenants, and it appears that the commonly held 1st right carriage water cannot be partitioned without destroying its character as such, thereby adversely affecting the cotenants. Accordingly, all of the commonly held 1st right carriage water must continue to be available for use in the upper Burke Ditch. (No similar provision need be made in case of the changes to be made to Applicant's 4th rights because Objectors with 4th rights did not specifically aver adverse effect thereto due to loss of carriage water as a result of moving the 4th right.)

The evidence shows that about 15 M.I. of the amount diverted into the upper Burke Ditch is used for carriage. Accordingly, in order to prevent adverse effect to other 1st right users on the upper Burke Ditch, the Change Authorization must be conditioned, pursuant to the provisions of § 85-2-402(7), MCA, to compel Applicant to leave the proportion of said 15 M.I. of water that his right bears to the total 1st rights conveyed by the upper Burke Ditch undiverted at the new point of diversion, so that it is available to provide the carriage water relied on by his cotenants remaining on the upper Burke ditch, regardless of the amount of water available for the satisfaction of the right.

What percentage of the 1st right was historically conveyed in the upper Burke Ditch is unknown. Finding of Fact 11. The evidence is only sufficient to show that Applicant, Objectors Gramza, Knutson, and claimants McDaniel and Blatter presently utilize the upper Burke Ditch (above and below the divider box)

to convey 1st right water to their lands. Findings of Fact 6, 8, 13, 18, and 22. In other words, the total 1st right which this record shows to have been conveyed in the upper Burke Ditch is 1.28 cfs or 51.2 M.I.⁶ Applicant's proportion of the total equals 44.5%. Accordingly, it is concluded that Applicant contributes 44.5% of the carriage water, or 6.7 M.I. This flow, held in common for carriage with the other users on the Burke Ditch, must continue to be available for diversion by the other users at the old point of diversion. Therefore, Applicant may divert only 13.3 M.I. at the new point of diversion, the remaining 6.7 M.I. of his claimed 1st right to continue to be available to the remaining 1st right users of the upper Burke Ditch to provide carriage water for their 1st rights.

10. Regarding the question of adverse effect to Objector OML's water right due to alleged carriage losses, in the source itself, between the new point of diversion and the old point of diversion, Objector has the burden of producing facts sufficient to raise allegations of adverse effect to a level of plausibility, if such facts are not otherwise part of the record, or cannot be inferred therefrom. See In the Matter of the Application for Beneficial Water Use Permit No. 55749-g76LJ by Meadow Lake Country Club Estates, Final Order (January 27, 1988) at p. 5. There is no evidence that Sheafman Creek is a losing

⁶ If this is in fact an underestimate of the amount of 1st right water conveyed in the upper Burke Ditch, a disproportionately large burden is placed on the Applicant. However, as it is the Applicant who must prove no adverse effect, the only alternative would be denial of the Application.

stream between the old and new points of diversion (although a substantial portion of its flow may be subsurface in some reaches), and the mere fact, standing alone, that Applicant would divert upstream of the old point of diversion is insufficient to raise the issue of adverse effect due to carriage water losses in the source itself. Mere speculation does not fulfill Objector's burden of production; accordingly, there is no burden on Applicant to disprove the allegation.

11. Regarding the allegation of adverse effect to groundwater wells in the vicinity of the present place of use due to the reduction in seepage into the underlying aquifers, which seepage is allegedly attendant to the irrigation of the present place of use, even if Applicants irrigation of said place of use in fact contributes water to the aquifer(s) on which Objectors rely, the water thus contributed is waste water. (It is neither return flow to the aquifer, as it was originally diverted from Sheafman Creek, nor can it be considered an appropriation from a natural groundwater source, as it has been added to the aquifer by artificial means.) The appropriator of waste has no right to its continued supply, and thus cannot compel the generator of said waste to continue generating same. Newton v. Weiler, 87 Mont. 164 (1930). As Objector's groundwater rights thus do not include the right to continued waste water augmentation of the aquifer, deprivation thereof hereunder does not constitute an adverse effect to their groundwater rights.

12. Having to view desolate waterless property, infested with knapweed, or having to live next to dry property which may perhaps even be a fire danger, is not an adverse effect to a water right of the person concerned. Accordingly, the Authorization cannot be denied on such bases. Section 85-2-402, MCA.

13. Regarding the alleged adverse effect due to deprivation of subsurface return flow to the source, the Examiner holds that where seepage of water into the ground does not occur immediately above the subterranean side flow of the surface source from which the water was initially taken, i.e., where irrigation is not immediately adjacent to the source, it is the burden of the person asserting that the seepage returns to the source to produce evidence establishing the plausibility of same.

It has long been the rule in Montana that there is no presumption that any subsurface water is tributary to any stream; one who asserted this to be fact had the burden of proving it. Ryan v. Quinlan, 45 Mont. 521, 534, 124 P. 512 (1912). Although the Water Use Act has since placed the burden on the Applicant in a change proceeding to prove no adverse effect to existing water rights will be caused by the change, such adverse effect including deprivation of return flows, the Department has ruled that an Objector asserting an adverse effect must present facts which raise his assertion to the level of plausibility. See Conclusion of Law 10, supra.

This Examiner has previously held that the fact of irrigation of lands immediately adjacent to the source is sufficient to justify the inference that there is subsurface return flow to the source. See In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston, Proposal for Decision (May 11, 1989). This, because irrigation immediately adjacent to the source occurs above the area of subterranean side flow, i.e., the lateral extensions of water bearing material on each side of the surface channel. Although the extent of this lateral extension is a question of fact, it appeared probable to the Examiner that water entering the ground immediately adjacent to a stream would enter the region of subterranean side flow, and thus once again become part of the source.⁷

On the other hand, the further the irrigated property is from the source, because of the complexity of subsurface geology, the more potential intervening factors there are, e.g., faults, permeable strata, etc., which could interrupt any flow back to the source. Accordingly, the Examiner holds that the mere fact of irrigation of lands which are not adjacent to the source,

⁷ The subsurface supply of a stream, flowing through porous soil and rocks constituting the bed of the stream, is as much a part of the stream as is the surface flow and is subject to the same rules. Smith v. Duff, 39 Mont. 382, 390, 102 P. 984 (1909). The underflow of a stream often includes water moving in lateral extensions of the water bearing material on each side of the surface channel. Larson v. Apollonio, 5 Cal.2d 440, 444, 55 P.2d 196 (1936).

standing alone, is not sufficient to justify the inference that there is subsurface return flow.

The locale of the irrigation in this case is not adjacent to the source; therefore, an inference of subsurface return flow is not justified pursuant to the analysis set forth above. There is no data in the record which otherwise raises the assertion of subsurface return flow from the irrigated locale above mere speculation. Therefore, the Examiner holds that the Objectors alleging reliance on subsurface return flow have not met their burden of production and, accordingly, that Applicant bears no burden of proof regarding this allegation.

14. Because any Authorization granted pursuant hereto will require that carriage water continue to be diverted into the upper Burke Ditch, the issue of adverse effect predicated on Objector's purported reliance on return flows resulting from seepage from the upper Burke Ditch, is moot. See Conclusion of Law 9, supra.

15. The evidence shows there has been no surface return flow resulting from the exercise of Applicant's rights (Finding of Fact 31); therefore, the allegation of adverse effect due to loss thereof is without basis.

16. The proposed means of diversion, construction, and operation of the appropriation works are adequate. Finding of Fact 33.

WHEREFORE, based on the foregoing, the Examiner propounds the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change of Appropriation Water Right No. G15928-76H be granted to Samuel T. and Virginia Allred to change the point of diversion and place of use of 13.3 M.I. up to 84.92 acre-feet per annum of Sheafman Creek water claimed pursuant to Statements of Claim Nos. W17858-76H and W19709-76H, and to change the point of diversion and place of use of 20 M.I. up to 162.75 acre-feet per annum of Sheafman Creek water claimed pursuant to Statements of Claim Nos. W15928-76H and W19708-76H, and to change the point of diversion and place of use of all water claimed pursuant to Statement of Claim No. W15930-76H, as follows: the point of diversion from the headgate of the upper Burke Ditch located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 7 North, Range 21 West to a point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, of said Township and Range; the place of use from 20 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 20 acres located in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 7 North, Range 21 West to 35 acres located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, and 5 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, all in said Township and Range.

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.

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 authorize and allow the remaining 1st water right appropriators, who remove water from the upper Burke Ditch at a point below the divider box therein, to divert the 6.7 M.I. of 1st right water, claimed under Statements of Claim Nos. 17858-76H and 19709-76H, but for which no authorization to change has here been granted, at the original point of diversion for continued use by said appropriators as carriage water for their water rights.

E. Appropriator shall maintain an adequate flow measuring device at or near the headgate of the new point of diversion, and shall record each date on which water is diverted pursuant hereto, the rate at which said water is diverted, and the length of time water is diverted on that date. Appropriator shall supply such records to the Department on demand.

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.

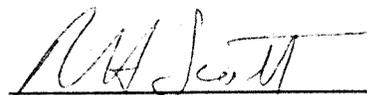
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the 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 8 day of June, 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 9th day of June, 1989, as follows:

Samuel and Virginia Allred
P.O. Box 66
Pinesdale, MT 59841

Dwayne and Evelyn Klinger
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Sharon K. Mathews
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