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 NO. G114754-43D BY BETTY J. THAYER	))))	AMENDED FINDINGS, CONCLUSION AND ORDER ON REMAND

* * * * * * * *

The Proposal for Decision which recommended denial of the above-entitled matter was entered on November 1, 1990. The Applicant filed a timely exception to the Proposal and an Oral Argument hearing was held on June 11, 1991, in Red Lodge, Montana. The Final Order, issued on December 6, 1991, modified Conclusion of Law 7 and deleted Conclusion of Law 8, but denied the Authorization to Change on the basis that Applicant failed to provide substantial credible evidence the proposed appropriation works would be adequate. Applicant appealed the Final Order to District Court, Montana Thirteenth Judicial District, Carbon County, Cause No. DV 92-01.

Upon stipulation of the parties, the Court ordered that the administrative record be reopened to hear additional evidence on the adequacy of the proposed means of diversion, construction, and operation of the appropriation works. The record was reopened on May 13, 1992. Pursuant to an agreement reached during a telephone conference call, Applicant was to submit said evidence to the Hearing Examiner and copies to the Objector within 60 days. Objector could respond to evidence within 30 days. On June 23, 1992, at Applicant's request, the time period for submission of the evidence was extended to August 13, 1992.

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On August 12, 1992, Applicant submitted a headgate design, a Parshall flume design, a photocopy of the Parshall flume specifications sheet from Roscoe Steel, and a plot of the ditch survey with a listing of X, Y, and Z measurements for each survey stake. Objector's response was received by the Department on September 8, 1992. Objector did not believe Applicant's evidence was sufficient and requested the Application be dismissed. The Department agreed that Applicant's evidence was not sufficient. The Department sent a letter to R. Russell Plath, Applicant's counsel, on September 10, 1992, setting forth the information needed to meet the criterion set forth in Mont. Code Ann. § 85-2-402(2)(b). On September 15, 1992, the Department received a letter from Mr. Plath stating the necessary information would be forthcoming in six to eight weeks. On November 13, 1992, the Department received a report entitled "Study of Barlow Creek and Thayer Ditch System" prepared by Roger Perkins PE.

Objector Ellis did not submit written comments to the report by the due date of December 21, 1992. However, Mr. Ellis did telephone the Department on December 22, 1992, with three questions. Mr. Ellis first wanted to know the number of grade control structures to be placed in Barlow Creek. This subject is addressed in Additional Finding of Fact 7, *infra*. Mr. Ellis' second question was concerning a sediment movement rate of 7.5 ton and 3.5 ton a day. After careful review of the report, the Hearing Examiner can find no reference to that amount of sediment movement after the sediment control structures have been placed

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in Barlow Creek. On page 14 of the report, Mr. Perkins states that channel stabilization will keep the bed load close to what it has been in the past, even with the proposed irrigation releases. The third and final question posed by Mr. Ellis was whether there would be any protection for him if an Authorization to Change is granted to Mrs. Thayer and would that protection be to call the water commissioner. Water commissioners are appointed to admeasure and distribute the waters of a stream by priority thus protecting the senior water right owners from adverse effect by junior right owners. If a water commissioner is not appointed to the stream, the senior water right owner must make a call for the water to the junior water right owner.

Based upon the information in the above-mentioned report, the Department makes the following:

ADDITIONAL FINDINGS OF FACT

1. Applicant proposes to use Parshall flumes with a nine-inch throat width as measuring devices. The proposed flumes would have a gage depth of 0.69 feet at 1.75 cubic feet per second (cfs). These devices are capable of measuring flows up to 16 cfs. The measuring devices must be set in so that the downstream water surface in the ditch is 0.28 feet below the upstream surface to prevent submergence at flows of 1.75; 0.34 feet at 2.5 cfs.

2. The proposed conveyance ditches will be trapezoidal in shape when constructed with a one-foot bottom and one and one-half to one side slope. The ditches would be pulled with a

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ditcher on an eight-foot wide pad. Slope would be 0.0033 to maintain a velocity of 1.5 feet per second at a depth of 0.6 feet when aged and in need of maintenance. The 1.5 feet per second velocity is necessary to move silt but not cause erosion.

3. The proposed culvert crossings will be 15-inch annular corrugated metal pipe with a projecting inlet. The culverts would be installed on the slope of the ditch. Maximum capacity of a culvert would be 3.4 cfs just as water overtops the crown of the pipe. The culverts would be 20 to 25 feet in length.

4. Given the small size of the ditches and their short length, there is no need for a wasteway structure. After the banks of the ditches are grassed over, overflow would seek out low spots and flow harmlessly down the side slope. The drainage area above the ditches is small and the inflows would be low even during an unusual flood event.

5. The proposed diversion structure on Hogan Creek would be wide enough to pass a 100 year storm, 60 cfs, without overtopping the banks. The headgate structure would be a steel box inlet structure attached to two 30-inch culverts. The headgate would be 15-inch with a wood or timber headwall.

The proposed diversion on Barlow Creek is a small rock dam with an impermeable membrane in the center. The crest would be one foot above the streambed. The headgate would be 15-inch with a wood or galvanized steel headwall.

6. The reach of Barlow Creek which will be used as a carrier of Thayer's irrigation water has a mean annual natural

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flow of approximately 0.08 cfs. Flows are often zero in the late summer months. Snowmelt runoff, typically in March, produces a peak flow of seven to ten cfs. With the ditch diversion, Barlow Creek must accommodate approximately 350 acre-feet of canal inflow in addition to the 65 acre-feet it now accommodates. This change will increase the total stream power available to erode sediment.

7. Grade control structures are necessary in the reach of Barlow Creek used as a carrier of Thayer ditch water to reduce the gradient of the water flow and stabilize the existing headcuts in Barlow Creek. There are four large headcuts which will require grade control structures. The crest of the structures must extend across the active channel, with wing walls extending well into the banks to prevent flanking at high flows.

8. Although Applicant supplied the required information concerning the type of measuring devices to be installed and some information concerning the installation of the devices, there was no information as to the location of the measuring devices.

Based upon the foregoing Additional Findings of Fact, the Department makes the following:

AMENDED CONCLUSION OF LAW

Conclusion of Law 6 from the Proposal for Decision and as adopted into the Final Order is amended to read as follows:

The Department has the authority to issue an Authorization to Change Appropriation Water Right subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy

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the criteria set forth in Mont. Code Ann. § 85-2-402(2). See generally Mont. Code Ann. § 85-2-312(1). In order to assure Applicant is not diverting more water out of Barlow Creek than has been transported into Barlow Creek from Hogan Creek by Applicant, one measuring device must be placed in the ditch at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, where the water is diverted from Hogan Creek; a second measuring device must be placed in the ditch at a point in the S½SW¼NE¼ of Section 5, Township 7 South, Range 19 East, immediately before Thayer Ditch empties into Barlow Creek; and a third measuring device must be placed in the ditch at a point in the SE¼NW¼NE¼ of said Section 5 where water is taken from Barlow Creek. The total amount of water diverted must not exceed the amount of water placed in Barlow Creek at the second measuring device. This requirement does not consider any amount lost to evaporation and seepage since in the late summer months there is little or no natural flow in Barlow Creek and less water than discharged into Barlow Creek will reach the ditch diversions. See Additional Finding of Fact 6. In order to assure the measuring devices are installed properly and will accurately measure the water, Applicant must obtain approval from the Billings Water Resources Regional Office of the proposed measuring device sites before installation and approval of installation after the devices are installed to ensure the devices are installed correctly and will accurately measure the water diverted.

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Applicant has provided substantial credible evidence the proposed means of diversion, construction and operation are adequate. See Additional Findings of Fact 1 through 7.

All other Findings and Conclusions adopted into the Final Order are hereby adopted and incorporated into this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the exceptions, and oral argument, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Authorization to Change Appropriation Water Right is hereby granted for Application for Change of Appropriation Water Right G114754-43D by Betty J. Thayer to change the place of use of a portion, 1.75 cubic feet per second up to 630 acre-feet of water per year of the underlying water right, Statement of Claim W114754-43D. The changed places of use shall be 8.00 acres in the NW¼NE¼, 21 acres in the NE¼SE¼, 14 acres in the SE¼SE¼, and 15.8 acres in the W½SE¼ of Section 32, Township 6 South, Range 19 East, Carbon County, for a total of 58.8 acres. A new secondary diversion shall be located at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, to divert water out of Hogan Creek into Barlow Creek. One new diversion shall be constructed at a point in the SE¼NW¼NE¼ of Section 5, Township 7 South, Range 19 East, to carry the water from Barlow Creek for irrigation of the new places of use in Section 32 described above.

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The following 58.8 acres shall be taken out of irrigation: 20.1 acres in the NW¼SW¼ of Section 27 and 14.7 acres in the E½SE¼ plus 24 acres in the SW¼SE¼ of Section 28, both in Township 6 South, Range 19 East, Carbon County.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2 MCA, and 85-2-402(9), MCA.

B. The water right changed by this authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

C. This authorization is subject to the condition that the Appropriator shall install adequate measuring devices as follows: one measuring device must be placed in the ditch at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, where the water is diverted from Hogan Creek; a second measuring device must be placed in the ditch at a point in the S½SW¼NE¼ of Section 5, Township 7 South, Range 19 East, immediately before Thayer Ditch empties into Barlow Creek; and a third measuring device must be placed in the ditch at a point in the SE¼NW¼NE¼ of said Section 5 where water is taken from Barlow Creek. The total

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amount of water diverted at the third measuring device must not exceed the amount of water placed in Barlow Creek at the second measuring device. In order to assure the measuring devices are installed properly and will accurately measure the water, Applicant must obtain approval from the Billings Water Resources Regional Office of the proposed measuring device sites before installation and approval of installation after the devices are installed to ensure the devices are installed correctly and will accurately measure the water diverted. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105. This includes measuring the flow of water through each headgate after the flow has stabilized each time the system is turned on so that accurate measurements can be taken and keeping a record of the length of time the water is appropriated during each irrigation throughout the season.

D. This authorization is subject to the condition that the Appropriator shall install grade control structures in Barlow Creek at the locations of large headcuts. In order to assure the grade control structures are installed properly, Applicant must obtain approval from the Billings Water Resources Regional Office of the proposed grade control structure sites before installation and approval of installation to ensure the structures are installed correctly.

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E. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

F. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

Dated this 1st day of March, 1993.

Vivian A. Lighthizer
Hearing 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 Findings, Conclusions and Order on Remand was duly served upon all parties of record at their address or addresses this 1st day of March, 1993, as follows:

Betty J. Thayer
Rt 1, Box 20A
Luther, MT 59051

Ellis Cattle Company
Rt 1, Box 4840
Red Lodge, MT 59068

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Richard L. Thayer
844 Lewis Avenue
Billings, MT 59101

R. Russell Plath
Halverson Sheehy & Plath, P.C.
P.O. Box 1817
Billings, MT 59103-1817

John E. Stults,
Hearings Officer
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

Christopher Mangen, Jr
Attorney at Law
P.O. Box 2529
Billings, MT 59103-2529

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102

Faye Bergan, Attorney
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

Cindy G. Campbell

Cindy G. Campbell
Hearings Unit Legal Secretary

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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 NO. G114754-43D BY BETTY J. THAYER	))))	FINDINGS, CONCLUSION AND ORDER ON REMAND

* * * * * * * *

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Upon stipulation of the parties, the Court ordered that the administrative record be reopened to hear additional evidence on the adequacy of the proposed means of diversion, construction, and operation of the appropriation works. The record was reopened on May 13, 1992. Pursuant to an agreement reached during a telephone conference call, Applicant was to submit said evidence to the Hearing Examiner and copies to the Objector within 60 days. Objector could respond to evidence within 30 days. On June 23, 1992, at Applicant's request, the time period for submission of the evidence was extended to August 13, 1992.

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On August 12, 1992, Applicant submitted a headgate design, a Parshall flume design, a photocopy of the Parshall flume specifications sheet from Roscoe Steel, and a plot of the ditch survey with a listing of X, Y, and Z measurements for each survey stake. Objector's response was received by the Department on September 8, 1992. Objector did not believe Applicant's evidence was sufficient and requested the Application be dismissed. The Department agreed that Applicant's evidence was not sufficient. The Department sent a letter to R. Russell Plath, Applicant's counsel, on September 10, 1992, setting forth the information needed to meet the criterion set forth in Mont. Code Ann. § 85-2-402(2)(b). On September 15, 1992, the Department received a letter from Mr. Plath stating the necessary information would be forthcoming in six to eight weeks. On November 13, 1992, the Department received a report entitled "Study of Barlow Creek and Thayer Ditch System" prepared by Roger Perkins PE.

Objector Ellis did not submit written comments to the report by the due date of December 21, 1992. However, Mr. Ellis did telephone the Department on December 22, 1992, with three questions. Mr. Ellis first wanted to know the number of grade control structures to be placed in Barlow Creek. This subject is addressed in Additional Finding of Fact 7, *infra*. Mr. Ellis' second question was concerning a sediment movement rate of 7.5 ton and 3.5 ton a day. After careful review of the report, the Hearing Examiner can find no reference to that amount of sediment movement after the sediment control structures have been placed

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in Barlow Creek. On page 14 of the report, Mr. Perkins states that channel stabilization will keep the bed load close to what it has been in the past, even with the proposed irrigation releases. The third and final question posed by Mr. Ellis was whether there would be any protection for him if an Authorization to Change is granted to Mrs. Thayer and would that protection be to call the water commissioner. Water commissioners are appointed to admeasure and distribute the waters of a stream by priority thus protecting the senior water right owners from adverse effect by junior right owners. If a water commissioner is not appointed to the stream, the senior water right owner must make a call for the water to the junior water right owner.

Based upon the information in the above-mentioned report, the Department makes the following:

ADDITIONAL FINDINGS OF FACT

1. Applicant proposes to use Parshall flumes with a nine-inch throat width as measuring devices. The proposed flumes would have a gage depth of 0.69 feet at 1.75 cubic feet per second (cfs). These devices are capable of measuring flows up to 16 cfs. The measuring devices must be set in so that the downstream water surface in the ditch is 0.28 feet below the upstream surface to prevent submergence at flows of 1.75; 0.34 feet at 2.5 cfs.

2. The proposed conveyance ditches will be trapezoidal in shape when constructed with a one-foot bottom and one and one-half to one side slope. The ditches would be pulled with a

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ditcher on an eight-foot wide pad. Slope would be 0.0033 to maintain a velocity of 1.5 feet per second at a depth of 0.6 feet when aged and in need of maintenance. The 1.5 feet per second velocity is necessary to move silt but not cause erosion.

3. The proposed culvert crossings will be 15-inch annular corrugated metal pipe with a projecting inlet. The culverts would be installed on the slope of the ditch. Maximum capacity of a culvert would be 3.4 cfs just as water overtops the crown of the pipe. The culverts would be 20 to 25 feet in length.

4. Given the small size of the ditches and their short length, there is no need for a wasteway structure. After the banks of the ditches are grassed over, overflow would seek out low spots and flow harmlessly down the side slope. The drainage area above the ditches is small and the inflows would be low even during an unusual flood event.

5. The proposed diversion structure on Hogan Creek would be wide enough to pass a 100 year storm, 60 cfs, without overtopping the banks. The headgate structure would be a steel box inlet structure attached to two 30-inch culverts. The headgate would be 15-inch with a wood or timber headwall.

The proposed diversion on Barlow Creek is a small rock dam with an impermeable membrane in the center. The crest would be one foot above the streambed. The headgate would be 15-inch with a wood or galvanized steel headwall.

6. The reach of Barlow Creek which will be used as a carrier of Thayer's irrigation water has a mean annual natural

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flow of approximately 0.08 cfs. Flows are often zero in the late summer months. Snowmelt runoff, typically in March, produces a peak flow of seven to ten cfs. With the ditch diversion, Barlow Creek must accommodate approximately 350 acre-feet of canal inflow in addition to the 65 acre-feet it now accommodates. This change will increase the total stream power available to erode sediment.

7. Grade control structures are necessary in the reach of Barlow Creek used as a carrier of Thayer ditch water to reduce the gradient of the water flow and stabilize the existing headcuts in Barlow Creek. There are four large headcuts which will require grade control structures. The crest of the structures must extend across the active channel, with wing walls extending well into the banks to prevent flanking at high flows.

8. Although Applicant supplied the required information concerning the type of measuring devices to be installed and some information concerning the installation of the devices, there was no information as to the location of the measuring devices.

Based upon the foregoing Additional Findings of Fact, the Department makes the following:

AMENDED CONCLUSION OF LAW

Conclusion of Law 6 from the Proposal for Decision and as adopted into the Final Order is amended to read as follows:

The Department has the authority to issue an Authorization to Change Appropriation Water Right subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy

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the criteria set forth in Mont. Code Ann. § 85-2-402(2). See generally Mont. Code Ann. § 85-2-312(1). In order to assure Applicant is not diverting more water out of Barlow Creek than has been transported into Barlow Creek from Hogan Creek by Applicant, one measuring device must be placed in the ditch at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, where the water is diverted from Hogan Creek; a second measuring device must be placed in the ditch at a point in the S½SW¼NE¼ of Section 5, Township 7 South, Range 19 East, immediately before Thayer Ditch empties into Barlow Creek; a third measuring device must be placed in the ditch at a point in the SE¼NW¼NE¼ of said Section 5 where water is taken from Barlow Creek, and a fourth measuring device must be placed in the ditch at a point in the NE¼SW¼SE¼ of Section 32, Township 6 South, Range 19 East, where water is taken from Barlow Creek. The total amount of water diverted at the third and fourth measuring devices must not exceed the amount of water placed in Barlow Creek at the second measuring device. This requirement does not consider any amount lost to evaporation and seepage since in the late summer months there is little or no natural flow in Barlow Creek and less water than discharged into Barlow Creek will reach the ditch diversions. See Additional Finding of Fact 6. In order to assure the measuring devices are installed properly and will accurately measure the water, Applicant must obtain approval from the Billings Water Resources Regional Office of the proposed measuring device sites before installation and approval of

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installation after the devices are installed to ensure the devices are installed correctly and will accurately measure the water diverted.

Applicant has provided substantial credible evidence the proposed means of diversion, construction and operation are adequate. See Additional Findings of Fact 1 through 7.

All other Findings and Conclusions adopted into the Final Order are hereby adopted and incorporated into this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the exceptions, and oral argument, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Authorization to Change Appropriation Water Right is hereby granted for Application for Change of Appropriation Water Right G114754-43D by Betty J. Thayer to change the place of use of a portion, 1.75 cubic feet per second up to 630 acre-feet of water per year of the underlying water right, Statement of Claim W114754-43D. The changed places of use shall be 8.00 acres in the NW¼NE¼, 21 acres in the NE¼SE¼, 14 acres in the SE¼SE¼, and 15.8 acres in the W½SE¼ of Section 32, Township 6 South, Range 19 East, Carbon County, for a total of 58.8 acres. A new secondary diversion shall be located at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, to divert water out of Hogan Creek into Barlow Creek. Two new diversions shall be

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constructed. One at a point in the SE¼NW¼NE¼ of Section 5, Township 7 South, Range 19 East, and the other at a point in NE¼SW¼SE¼ of Section 32, Township 6 South, Range 19 East, to carry the water from Barlow Creek for irrigation of the new places of use in Section 32 described above.

The following 58.8 acres shall be taken out of irrigation: 20.1 acres in the NW¼SW¼ of Section 27 and 14.7 acres in the E½SE¼ plus 24 acres in the SW¼SE¼ of Section 28, both in Township 6 South, Range 19 East, Carbon County.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2 MCA, and 85-2-402(9), MCA.

B. The water right changed by this authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

C. This authorization is subject to the condition that the Appropriator shall install adequate measuring devices as follows: one measuring device must be placed in the ditch at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East, where the water is diverted from Hogan Creek; a second measuring

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device must be placed in the ditch at a point in the S½SW¼NE¼ of Section 5, Township 7 South, Range 19 East, immediately before Thayer Ditch empties into Barlow Creek; a third measuring device must be placed in the ditch at a point in the SE¼NW¼NE¼ of said Section 5 where water is taken from Barlow Creek, and a fourth measuring device must be placed in the ditch at point in the NE¼SW¼SE¼ of Section 32, Township 6 South, Range 19 East, where water is taken from Barlow Creek. The total amount of water diverted at the third and fourth measuring devices must not exceed the amount of water placed in Barlow Creek at the second measuring device. In order to assure the measuring devices are installed properly and will accurately measure the water, Applicant must obtain approval from the Billings Water Resources Regional Office of the proposed measuring device sites before installation and approval of installation after the devices are installed to ensure the devices are installed correctly and will accurately measure the water diverted. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105.

D. This authorization is subject to the condition that the Appropriator shall install grade control structures in Barlow Creek at the locations of large headcuts. In order to assure the grade control structures are installed properly, Applicant must

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obtain approval from the Billings Water Resources Regional Office of the proposed grade control structure sites before installation and approval of installation to ensure the structures are installed correctly.

E. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

F. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

Dated this 6th day of January, 1993.

Vivian A. Lighthizer,
Hearing 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 Findings, Conclusions and Order on Remand was duly

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served upon all parties of record at their address or addresses this 8th day of January, 1993, as follows:

Betty J. Thayer
Rt 1, Box 20A
Luther, MT 59051

Richard L. Thayer
844 Lewis Avenue
Billings, MT 59101

R. Russell Plath
Halverson Sheehy & Plath, P.C.
P.O. Box 1817
Billings, MT 59103-1817

John E. Stults,
Hearings Officer
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

Ellis Cattle Company
Rt 1, Box 4840
Red Lodge, MT 59068

Christopher Mangen, Jr
Attorney at Law
P.O. Box 2529
Billings, MT 59103-2529

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102

Faye Bergan, Attorney
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

Cindy G. Campbell
Cindy G. Campbell
Hearings Unit Legal Secretary

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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 NO. G114754-43D BY BETTY J. THAYER	))))	FINAL ORDER

* * * * * * * *

The Proposal for Decision in this matter was issued on November 1, 1990, and served on all parties on November 2, 1990. The Hearing Examiner proposed that Application for Change of Appropriation Water Right G114754-43D by Betty J. Thayer be denied. Applicant filed timely exceptions to the Proposal for Decision and requested an oral argument before the Department of Natural Resources and Conservation (Department). An oral argument hearing was held June 11, 1991, in Red Lodge, Montana, before John E. Stults, Department Hearings Officer, who has been appointed by the Department to make the final decision in this matter. Appearing at the oral argument hearing were: John Stults; Faye Bergan, Department Legal Counsel; Richard J. Thayer, Applicant's son, on behalf of Applicant; Alvin A. Ellis, Jr., on behalf of Objector Ellis Cattle Co.

A site visit was conducted on June 10, 1991, for the purpose of providing the decision-maker with a visual orientation of the general area, sources, facilities, etc. involved in this matter. Present throughout the site visit were John Stults, Faye Bergan, Alvin Ellis, Richard Thayer, and Tim Kuehn, Water Resources Specialist with the Department's Billings Water Resources

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evidence in the record supports this contention. The evidence in the record clearly shows the proposed place of use is adjacent to Barlow Creek and Barlow Creek enters Red Lodge Creek upstream from the confluence of Red Lodge Creek and Hogan Creek. Thus the proposed change would not adversely affect holders of water rights on Red Lodge Creek.

Facts adequately establishing this logic and conclusion are stated in some form in various Findings of Fact in the Proposal for Decision. Conclusion of Law 7 is incorrect, however, and must by revised. A revised Conclusion of Law 7 is provided on page six below.

II. Applicant contends the reduction of flows in Hogan Creek of eight miner's inches that would result from the proposed change would not adversely affect Objector because return flows from other rights would compensate. As an analysis of probable effects of the proposed change on Hogan Creek flows and diversions, the record in this matter is thorough and the Conclusions of Law and Proposed Order of the Hearing Examiner are correct. The effects on Hogan Creek, however, are not the primary issue of consideration because Hogan Creek is not the source of supply of the water in the proposed change either as the originally appropriated source or as the source by virtue of the appropriation of return flow water released into the natural channel of Hogan Creek from prior use.

Applicant proposes a change in the place of use of water originally appropriated from Burnt Fork Creek. The evidence in

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and that only owners of rights to Burnt Fork Creek water can divert the water flowing down the channel of Hogan Creek.

The principal question on the issue of the eight miner's inches of whether return flow that will no longer be in Hogan Creek will adversely affect Objector, however, is: Does Objector have a vested right in Applicant's imported water? The answer is: Objector's subsequent use of return flows from Applicant's imported water is essentially a windfall Objector can enjoy only so long as Applicant continues the activity that has augmented the natural flows. Objector cannot compel Applicant to continue the activity solely for Objector's benefit. See Newton v. Weiler, 87 Mont 164, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927). Applicant here is not proposing to capture and use previously abandoned return flows. Were that Applicant's proposal, then the law would call Objector's loss an adverse effect and the Department would be required to deny Applicant's application to change. Applicant here, however, is proposing to move the initial place of use of the imported water. Of essential importance in this matter is this: the exclusive use of imported water (water which would not in the natural course of events be available in the source, but which is in addition to natural flows through the action of man) belongs to the person whose labors have created this additional water. See generally McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 72; Thrasher v. Mannix-Wilson, 95 Mont. 273, 26 P.2d 370; Rock Creek Ditch &

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Department's file at the time it was entered into the record were the application form and supplement (Forms 600 and 600A) and maps depicting the existing system and the proposed system. The application supplement says at item 6 the system would be the existing ditch on Burnt Fork Creek, a concrete dam diverting water into a new ditch to Barlow Creek, and a new ditch to the new place of use. The application form in item 5 mentions the use of a ditch and pipeline and that the ditch would be surveyed in.

The record also contains evidence indirectly related to or implying how the system will be constructed and operated. Discussions about the many existing ditch systems and their operation plus exhibits showing the systems, particularly the photographs in Applicant's Exhibit 8 and the hydrological analysis conducted by Applicant's expert witness, imply that the proposed system would be similar to the existing ditch-based flood irrigation systems in the area. It is clear from the evidence in the record that these existing systems, and by implication the proposed system, can adequately divert, convey, and distribute water to irrigate parcels of land. Uncontested testimony of Betty Thayer, the Applicant, was she had many years of experience in operation of the existing system which implies that she has capability to construct and operate the proposed flood irrigation system adequately to accomplish the proposed purpose.

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specifically stated in Conclusion of Law 6, it appears the finding is that Applicant failed to prove the system would be capable of regulation. This is a logical assumption because the evidence does show that Applicant is capable of constructing and operating flood irrigation systems which adequately accomplish their purpose, the proposed system will be substantially the same as the existing systems, and is capable of delivering water from the source to the place of use and of distributing the water across the place of use. Taken together this is minimally sufficient prima facie evidence the system will be capable of fulfilling the proposed purpose.

While the record contains prima facie evidence the proposed project will be constructed and operated adequately to accomplish the proposed purpose, it does not contain evidence the system will include design features, such as specific ditch sizes, or structures, such as headgates and flumes, which will make it capable of regulation. Nevertheless, the Department may and does develop conditions to place on change authorizations to ensure that they meet the statutory criteria, such as requiring measuring devices and scheduling. See Mont. Code Ann. § 85-2-402(7) (1989); see, e.g., In re 68173-s41S and 68174-s41S by Floyd R. Blair. However, the Department cannot summarily devise a design for construction of a system and impose it on the Applicant, plus the Objector and all others on the stream, as adequate for regulation of the project in conformance with the system of priority on the stream. See generally In re Application No.

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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.

Dated this 6th day of December, 1991.

John E. Stults, Hearings Officer
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

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 6th day of December, 1991, as follows:

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Billings, MT 59102

Cindy G. Campbell
Hearings Unit Legal Secretary

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

FILMED
NOV 8 1990

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G114754-43D BY BETTY J. THAYER	))))	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 September 5, 1990, in Red Lodge, Montana.

Applicant Betty J. Thayer appeared at the hearing in person and by and through her son, Richard L. Thayer.

Roger Perkins, Consulting Hydrologist with Aquoneering, appeared as a witness for the Applicant.

Gregory Weast appeared as a witness for the Applicant.

David Boggio appeared as a witness for the Applicant.

Objector Ellis Cattle Co., hereafter Objector Ellis, appeared by and through Alvin A. Ellis, Jr.

Frank Cole III appeared as a witness for the Objector.

Tim Kuehn, Water Resource Specialist III with the Billings Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing and was called as a witness by the Applicant.

EXHIBITS

The Applicant offered 14 exhibits for inclusion into the record. The numbers indicate 15 exhibits were offered, however Applicant's Exhibit 14 was never offered.

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Applicant's Exhibit 1 is a chart identifying 14 water right owners on Hogan Creek and Burnt Fork Creek, their priority dates, claim numbers, original owners, current owners, source, type of water rights (decreed, filed, or use), amount of individual flow rate, acres irrigated, land description of places of use, and distribution of waste water. The numbers in the first column (Map Ditch No.) indicate priority of water rights.

Applicant's Exhibit 2 is a copy of a topographic map with natural streams represented by solid blue lines, the stream names are highlighted in yellow, man-made ditches are represented by dashed blue lines, and the irrigated areas are shaded in green. Objector Ellis claimed some of his irrigation was not shown on this exhibit and was allowed to add approximately 40 acres during the hearing as long as the record noted that Objector Ellis did not claim this acreage on any of his Statements of Claim. Objector Ellis also objected to a certain area marked as irrigated that he said was not. Applicant stated this would be discussed later in the testimony. The Hearing Examiner reserved a decision on the objection until later. The testimony later centered around the plant life existing in the area in question. There was testimony that Blue Bonnet grass, a plant that is not tolerant of irrigation was growing in the area. There was also testimony that there was a noticeable absence of Big Sage, a plant that is also not tolerant of irrigation. However, Applicant did include the area in Water Right Claim No. W114754-43D and there was testimony that there are ditches which indicate

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this area has been irrigated at some time. The acreage irrigated under this Water Right Claim will be ascertained by the Water Court of Montana during the adjudication process. Objection overruled.

Applicant's Exhibit 3 is a chart entitled Hogan Creek Irrigation Diagram. The chart is mounted on a piece of cardboard which is approximately three and one half feet wide and two and one half feet high. The diagram depicts, in schematic form, the water use from Hogan Creek, Burnt Fork Creek, Barlow Creek, Underwood Creek, West Fork of Hogan Creek, and Ellis Creek. The proposed diversion is shown in red.

Applicant's Exhibit 4 consists of two computer printouts entitled "Water Budget for Hogan Creek and Adjacent Drainages." These printouts represent a normal year with the present amount of irrigation. They are identical except one is burst (split into separate pages) and the other is not.

Applicant's Exhibit 5 consists of two computer printouts entitled "Water Budget for Hogan Creek and Adjacent Drainages". These printouts represent a normal year with the proposed Thayer change. They are identical except one is burst and the other is not.

Applicant's Exhibit 6 is an aerial photograph, approximately two feet square, taken September 6, 1980. The section corners are identified on a clear vinyl overlay.

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Applicant's Exhibit 7 is a copy of several joined USGS topographic maps with the boundaries of each stream drainage area shown with a solid black line.

Applicant's Exhibit 8 consists of 31 photographs. The photographs are marked for identification purposes as "8A" through "8X" then "8AA" through "8GG".

Applicant's Exhibit 9 consists of three parts. Exhibit 9A consists of 18 pages and is a copy of the Red Lodge decree. Exhibit 9B has four pages and is entitled "Red Lodge Water Decree". It lists all the water right owners, the amount of water decreed, the priority date, and the source. Exhibits 9C through 9E consist of three copies of USGS topographic maps that, when joined together, identify the decreed rights and their locations.

Applicant's Exhibit 10 is a list of Water Right Claims, the original water right owners, the rank in the decree, the priority date, the current owner and the flow rate claimed by each claimant.

Applicant's Exhibit 11 consists of six pages. The first two pages are the Applicant's discovery request. The next two pages are Objector Ellis' response to discovery. The fifth page is a copy of a Warranty Deed and the sixth page is a copy of a Notice of Water Right filed on February 24, 1893, by A. L. Slichter.

Applicant's Exhibit 12 is a translucent copy of USGS Quadrangle map, Roscoe, Montana, and a translucent copy of USGS

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Quadrangle map, Castagne, Montana which have been taped together. Certain land owners' properties are identified on this exhibit.

Applicant's Exhibit 13 is a copy of a geologic map of the Castagne Quadrangle, Carbon County, Montana, prepared by Henry L. Smith in 1963.

Applicant's Exhibit 15 consists of nine parts. There are 12 pages of ditch designs; 14 pages of corrugation water use computations, seven pages of field notes, five pages of hand written soils identification, two pages of runoff calculations, three pages of crop consumptive use calculated using the Blaney Criddle Procedure, two are for pasture grass or turf and one is for alfalfa, and two pages of crop consumptive use, one is for rushes and sedges, and the other is for cottonwood trees. There is one page of calculations used to determine the area between diversions that are occupied by phreatophytes, one page of pond evaporation calculations, and one page of ditch loss calculations. Exhibit 15 was offered to provide evidence of the method Mr. Perkins used to calculate the numbers used on other exhibits.

All of Applicant's exhibits were accepted into the record without objection with the exception of Applicant's Exhibit 2.

Objector Ellis offered three exhibits for inclusion into the record.

Objector's Exhibit 1 consists of three pages and is a copy of Objector's Statement of Claim No. W197755-43D including the supporting map filed with it.

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Objector's Exhibit 2 consists of three pages and is a copy of Objector's Statement of Claim No. 197754-43D, including the map and a copy of a Mortgage Release.

Objector's Exhibit 3 is a copy of a Warranty Deed.

All of Objector's exhibits were accepted into the record without objection.

All parties had opportunity to examine the Department file. There were no objections to any part of the Department file, therefore it was entered into the record in its entirety.

PRELIMINARY MATTERS

The record was left open until October 10, 1990, for submission of Applicant's brief and Objector's response to Applicant's brief.

The Applicant has identified all points of diversion and ditches on all exhibits and in testimony throughout the hearing by the numbers in the first column of Applicant's Exhibit 1. For simplicity purposes, the Hearing Examiner will also use these numbers in this proposal.

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

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2. Application for Change of Appropriation Water Right No. G114754-43D was duly filed with the Department on September 29, 1989 at 3:00 p.m. (Department file.)

3. The pertinent portions of the Application were published in the Carbon County News, a newspaper of general circulation in the area of the source, on January 11, 1990. (Department file.)

4. Applicant has possessory interest in the proposed place of use. (Department file.)

5. Betty J. Thiel and Betty J. Thayer are the same person. Betty J. Thiel filed Statement of Claim No. W114754-43D before the Water Court for the use of 150 miner's inches up to 750 acre-feet of water from Burnt Fork Creek for irrigation. The claimed places of use were 40 acres in the SW¼SE¼, 40 acres in the SE¼SE¼, 20.5 acres in Lot 1, 17.3 acres in Lot 14, and 18.3 acres in Lot 13 of Section 28; 20.5 acres in Lot 14 and 18.3 acres in Lot 16 of Section 27, both in Township 6 South, Range 19 East, Carbon County. This Statement of Claim was amended on May 26, 1988, to reduce the number of acres claimed from 175 acres to the following 126 acres: 37 acres in the NW¼SW¼ of Section 27; 59 acres in the E½SE¼ and 30 acres in the SW¼SE¼ of Section 28, both in Township 6 South, Range 19 East in Carbon County. (Department file and testimonies of Richard Thayer and Applicant.)

6. The water is presently diverted from Burnt Fork Creek by means of a common ditch for Applicant's No. 2 and Objector Ellis' No. 3 water rights. The ditch then carries the water to Hogan Creek which carries it to a point in the SE¼ of Section 5,

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Township 7 South, Range 19 East, where it is again diverted by a ditch which carries it to the place of use. The ditch runs along a ridge in Section 28, Township 6 South, Range 19 East, where the water is diverted to irrigate approximately 40 acres on the west side of the ditch and approximately 86 acres on the east side of the ditch. The waste water from the irrigation on the west side of the ditch runs into Underwood Creek. The waste water from the irrigation on the east side of the ditch collects in the borrow pit ditch of the county road where it flows into a short ditch that goes under the county road to Weast's No. 5A ditch which carries the water to the Phyllis Weast irrigation project. The waste water from the Weast irrigation enters Hogan Creek below Objector Ellis' No. 11 headgate but above Ellis' No. 14 headgate. (Testimony of Tim Kuehn, Department file, and Applicant's Exhibits 1 and 2.)

7. The Applicant proposes to change the place of use of a portion, 1.75 cubic feet per second (cfs) up to 630 acre-feet per year, of the underlying water right, Statement of Claim No. W114754-43D. The proposed places of use would be 8 acres in the NW¼NE¼, 21 acres in the NE¼SE¼, 14 acres in the SE¼SE¼, and 15.8 acres in the W½SE¼ of Section 32, Township 6 South, Range 19 East, Carbon County, for a total of 58.8 acres. A new secondary diversion would be located at a point in the SE¼NE¼NW¼ of Section 8, Township 7 South, Range 19 East. A new ditch would be constructed to carry the water to Barlow Creek which would carry it to the SE¼NW¼NE¼ of Section 5, Township 7, South, Range 19

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East, where it will be diverted into another new ditch to irrigate the above acreage in said Section 32. The waste water would enter Barlow Creek. (Department file, Applicant's Exhibit 3, and testimony of Roger Perkins.)

The Applicant proposes to take the following 58.8 acres out of irrigation: 20.1 acres in the NW¼SW¼ of Section 27 and 14.7 acres in the E½SE¼ plus 24 acres in the SW¼SE¼ of Section 28, both in Township 6 North, Range 19 East, Carbon County. (Testimony of Richard Thayer and Department file.)

8. Burnt Fork Creek and Hogan Creek are decreed as part of the Red Lodge Creek Decree. The underlying water right for Application for Change No. G114754-43D ranks second in priority. Objector Ellis has third priority to irrigate 80 acres in Section 33 which is upstream from Applicant's place of use. Objector Ellis has a use right with a priority date of 1910, which places this right eleventh in priority for the use of Hogan Creek waters. The point of diversion for this water right is located upstream from Weast's irrigation waste water discharge. Objector Ellis also has a use right with a priority date of June 25, 1963, which places this water right fourteenth in priority for the water use of Hogan Creek. This right is used on 54 acres in the E½ of Section 22 and the NW¼NW¼ of Section 23, Township 6 South, Range 19 East. (Applicant's Exhibit 1, Objector's Exhibits 1 and 2, Testimony of Objector Ellis and Applicant.)

9. Even though Ellis' No. 11 diversion is upstream from the Weast irrigation waste water discharge point, it could be

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affected by the proposed change. Objector Ellis maintains there is some "sub water" that returns to the creek and is available for appropriation at Ellis' No. 11 diversion. However Objector Ellis did not quantify the amount of "sub water" he thought would return to the stream and Roger Perkins stated during the hearing that an insignificant amount if any would return to the stream. (Testimony of Roger Perkins and Objector Ellis' reply to Applicant's Brief.)

10. There will be an increased demand on Hogan Creek as a result of the proposed change. Roger Perkins testified the net loss would be eight miner's inches. This was determined by incorporating several variables into a computer spreadsheet program to calculate the net loss that may occur as a result of the proposed change. (Testimony of Roger Perkins and Applicant's Exhibits 4 and 5.)

11. Most of the Statements of Claim filed before the Water Court claim larger diverted flow rates from Hogan Creek than is actually diverted. Mr. Perkins used the actual diverted flow rate in his calculations. (Testimony of Roger Perkins and Applicant's Exhibit 1.)

12. Under the current conditions there is a shortage of water at Objector Ellis' No. 14 diversion in August and September during average years. (Testimony of Roger Perkins and Applicant's Exhibits 4 and 5.)

13. Objector Ellis has made several changes in his water use in the last 10 years. Some of these changes involve

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additional acreage under irrigation which require additional water. Objector Ellis has not applied for or received Beneficial Water Use Permits or Authorizations to Change Appropriation Water Right for any of these projects. (Department records, testimonies of Objector Ellis, Roger Perkins, Applicant and Applicant's Exhibit 2.)

14. There are no planned uses or developments for which a permit has been issued or for which water has been reserved. (Department records.)

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

CONCLUSIONS OF LAW

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

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

3. The Department must issue an Authorization to Change Appropriation Water Right 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) Except for a lease authorization pursuant to § 85-2-436 that does not require appropriation

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

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

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

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

5. Applicant has possessory interest, or the written consent of the person with the possessory interest in the proposed place of use. See Finding of Fact 4.)

6. Applicant has not provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

In the Application Supplement, Form 606A, the Applicant very generally describes the proposed route the water will take and mentions ditches and a concrete dam, but there is no mention of the proposed size of ditches. There is also no mention of the proposed diversion dam specifications. There is no mention of headgates or other diversion and/or control structures. Neither the Applicant nor witnesses testified to the adequacy of the diversion, construction, or operation of the proposed project. See Finding of Fact 7.)

7. Applicant has not provided substantial credible evidence that the water rights of other appropriators will not be adversely affected by the proposed change. Applicant's witness testified there will be a net depletion of the stream, albeit a

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small depletion, nevertheless a depletion. While eight miner's inches appear to be inconsequential, eight miner's inches over 180 days equals 71.388 acre-feet of water.

Applicant pointed out in his brief that there are 26 water right owners down stream from Objector Ellis that have senior priority dates to Objector Ellis. It is conceivable that depriving those prior appropriators of 71.388 acre-feet of water could adversely affect them during a year with less than average precipitation.

8. Any depletion of the stream constitutes a new appropriation. If, by this proposed change, the demand on the stream would be greater than before the change, that demand would be a new appropriation which cannot be accomplished under an Authorization to Change Appropriation Water Right, but requires a Beneficial Water Use Permit.

9. It is true that the claimed diverted flow rates are larger that the actual use. See Finding of Fact 11. A Statement of Claim before the Water Court is prima facie evidence of a water right until the issuance of a final decree. For administrative purposes, the Statement of Claim remains intact unless facts presented at a hearing show otherwise. However, there is a chance some of the claimed flow rates will survive the adjudication process. If this does occur, the claimant would have a legal right to divert the claimed flow rate which could skew Mr. Perkins' calculations considerably.

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10. Objector Ellis is appropriating certain waters for irrigation purposes without a water right. However, Objector Ellis' water use is not at issue in the instant case and was not properly before the Hearing Examiner. The only issues in this case are the four criteria listed in § 85-2-402(2), MCA. See Finding of Fact 13.

11. The proposed use will not adversely affect other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 14.

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

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G114754-43D by Betty J. Thayer is hereby denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

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

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Dated this 1st day of November, 1990.

Vivian A. Lighthizer,
Hearing 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 2nd day of November, 1990 as follows:

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Hearings Unit Secretary

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