

Office of Administrative Hearings
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**MONTANA FIFTEENTH JUDICIAL DISTRICT
DANIELS, SHERIDAN AND ROOSEVELT COUNTIES
WATER COURT, LOWER MISSOURI RIVER DIVISION**

**IN THE MATTER OF CHANGE
APPLICATION NO. 41S 30147282 BY
FRED W. COLVER**

) Cause No. _____
)
) CERTIFICATION UNDER
) § 85-2-309, MCA, TO WATER
) JUDGE DAVID J. CYBULSKI

Pursuant to §§ 85-2-309(2) and 3-7-501, MCA, the Montana Department of Natural Resources and Conservation (DNRC) may in its discretion certify to the district court for determination by a water judge all factual and legal issues involving the adjudication or determination of the water rights at issue in a hearing, including but not limited to, issues of abandonment, quantification, or relative priority dates.

On December 6, 2019, Fred W. Colver submitted Application to Change Water Right No. 41S 30147282 to change Provisional Permit No. 41S 4374-00 to the DNRC (“Application”). This Application seeks authorization to change the point of diversion, add storage and reduce the irrigated place of use for Provisional Permit No. 41S 4374-00 which is located in the Lower Missouri River Division as established under § 3-7-102, MCA.

The Application received eleven valid objections pursuant to § 85-2-308, MCA, two of which were subsequently dismissed for failure to appear. All of the objections assert in part that

the Application should not be granted due to abandonment of Provisional Permit No. 41S 4374-00. Seven of the nine objectors filed a Motion to Certify Issues to the District Court pursuant to § 85-2-309(2), MCA, pursuant to which they seek a determination that Provisional Permit No. 41S 4374-00 has been abandoned. This Hearing Examiner granted the motion on December 8, 2020.

Accordingly, the DNRC hereby exercises its discretion pursuant to § 85-2-309(2), MCA, and certifies to this Court the following issue:

- Has Provisional Permit No. 41S 4374-00 been abandoned?

The DNRC requests that the Court take evidence presented by the parties to resolve the certified issue.

Upon determination of the certified issue, the matter is to be remanded to the DNRC for further processing of the Application

The following exhibits are included and made part of this certification:

Exhibit 1 – Copy of General Abstract for Provisional Permit No. 41S 4374-00. (2 pp.)

Exhibit 2 – Copy of Order Granting Motion to Certify to District Court. (6 pp.)

Dated this 14th day of December 2020.

/Original signed by David A. Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this **CERTIFICATION UNDER § 85-2-309, MCA, TO WATER JUDGE DAVID J. CYBULSKI** was served upon all parties listed below on this 14th day of December 2020 by first class United States mail and/or by electronic mail (e-mail).

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STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O. BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 41S 4374-00 PROVISIONAL PERMIT
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners: FRED W COLVER
42039 MT HWY 81
LEWISTOWN, MT 59457
LESLIE L COLVER
42039 MT HWY 81
LEWISTOWN, MT 59457

Priority Date: DECEMBER 11, 1974 at 03:45 P.M.
Enforceable Priority Date: DECEMBER 11, 1974 at 03:45 P.M.

Purpose (Use): IRRIGATION

Maximum Flow Rate: 550.00 GPM

Maximum Volume: 70.00 AC-FT

Maximum Acres: 116.90

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENE	35	17N	18E	FERGUS

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: WELL

Well Depth: 39.00 FEET

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER

Volume: 70.00 AC-FT

Period of Use: APRIL 1 to NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	116.90		NE	35	17N	18E	FERGUS

Total: 116.90

Geocodes/Valid: 08-2685-35-1-01-01-0000 - Y

Remarks:

ASSOCIATED RIGHT

EXHIBIT 1

THIS WATER RIGHT AND WATER RIGHT 41S W048825-00 ARE ASSOCIATED. THEY HAVE OVERLAPPING PLACES OF USE.

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE 608 # 10210 RECEIVED 07/23/2002.

OWNERSHIP UPDATE TYPE DOR # 207766 RECEIVED 05/07/2020.

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

IN THE MATTER OF CHANGE APPLICATION } ORDER GRANTING MOTION TO CERTIFY
NO. 41S-30147282 BY COLVER, FRED W. } TO DISTRICT COURT

On December 6, 2019, Fred W. Colver (Applicant) submitted Application to Change Water Right No. 41S 30147282 to change Provisional Permit No. 41S 4374 to the Lewistown Regional Office of the Department on Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, MCA, dated February 6, 2020. The Applicant responded with information dated March 16, 2020. The Application was deemed to be correct and complete on May 4, 2020. An Environmental Assessment for the Application was completed on May 21, 2020.

The Department issued a Preliminary Determination to Grant Change (PD) on May 21, 2020 and the Department provided public notice of the PD through service to interested parties on June 2, 2020, and by publication in the Lewistown News-Argus on June 3, 2020.

The public notice resulted in the Application receiving eleven objections which were deemed valid by the Department on August 19, 2020. As a result of the valid objections, this matter was scheduled for a contested case hearing pursuant to § 85-2-309(1), MCA. Through the course of preliminary proceedings before this Hearing Examiner two of the objectors were dismissed on September 28, 2020, for failure to appear. A contested case hearing in this matter is scheduled for December 15-17, 2020.

On November 12, 2020, counsel for Objectors filed a "Motion to Certify Issues to the District Court & Brief in Support of Motion" (herein "Motion") for seven of the nine remaining objections filed in this matter (Balas Obj. # 89111, Kolar Obj. # 89114, Folda Obj. # 89115, Keller Obj. # 89116, Mickelsen Obj. # 89117, Shipman Obj. # 89119, and Vogl Obj. # 89121).

Objectors maintain that the Applicant abandoned Provisional Permit No. 41S 4374 and request that the Hearing Examiner certify Provisional Permit No. 41S 4374 to the District Court for an abandonment determination pursuant to § 85-2-309(2)(a), MCA, which, provides in part:

At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified issues must be given priority by a water judge over all other adjudication matters.

While Provisional Permit No. 41S 4374 started out as a post-1973 application for a beneficial water use permit, upon issuance of the permit it became an inchoate water right as contemplated under Montana law. See § 85-2-102(32), MCA. (“Water Right” means the right to appropriate water pursuant to . . . a permit, a certificate of water right . . .”). In 2001, the Department conducted a verification of Provisional Permit No. 41S 4374 which included analysis of information provided by the permittee and review of the existing record. Information submitted by the permittee included a Water Use Permit Questionnaire outlining the type of equipment historically used, operating schedule, type of crop irrigated and the place of use. The Department verified the Permit documenting its findings on a Permit Verification Abstract. As a result of the verification process, the Department issued a “Draft Certificate of Water Right for Perfected Permit to Appropriate Water” on April 17, 2002. (PD ¶ 10)

Each of the seven objections at issue in the Motion raise the question of either abandonment or non-use, or both, of Provisional Permit No. 41S 4374. In addition, during discovery in this matter, Objectors obtained additional information regarding non-use of Provisional Permit No. 41S 4374.

In support of this contention, Objectors provided two affidavits, one from Objector Alan Folda and one from Objector Gloria Keller. The Folda affidavit asserts that Colver “discontinued irrigating the 41S 4374 place of use with the big squirt sprinkler at some point in the late 1970’s and that he never saw irrigation occur on the place of use from that point until the Applicant installed a center pivot in 2017.” The Keller affidavit asserts that she recalls 1976 as being the last year she saw irrigation out of the well on the place of use until installation of the center pivot in 2017.

In addition, Fred W. Colver was deposed as part of discovery in this matter. In that deposition he admits that 1976 was probably the last time the big squirt sprinkler was used for irrigation although they did use it on some grass in 1982.

Finally, during processing of this Application, the Department found zero acres irrigated on a 1979 aerial photograph.

Applicant's "Response in Opposition to Objectors' Motion to Certify" filed November 24, 2020, focuses on whether Objectors have standing in the form of valid objections in this matter and whether the Objectors have established that they will in fact be adversely affected.

An objector need not prove its water right or interests will be adversely affected to establish standing, or to state a valid objection. A correct and complete determination that the "property, water rights, or interests of the objector would be adversely affected by the proposed" change in use satisfies the threshold standing requirement. § 85-2-308 (3) and (6), MCA; Admin. R. Mont. 36.12.117(10). The Department determined that the Objectors have standing in this matter when it issued each of its letters dated August 19, 2020 wherein it states "[t]he objections are valid for those checked 'Yes' on the attached Objection Validity Forms." Accordingly, this Hearing Examiner is tasked with determining whether the Applicant has met the required statutory criteria of § 85-2-402, MCA, that are subject to a valid objection. § 85-2-309(1), MCA ("If the department determines that an objection to an application for a permit under 85-2-311 or a change in appropriation right under 85-2-402 states a valid objection, it shall hold a contested case hearing . . . on the objection . . . unless the department certifies an issue to the district court for determination by a water judge under subsection (2)").

Nothing cited by Applicant provides a legal or factual basis upon which this Hearing Examiner could ignore the Department's validity determination regarding Objectors' standing pursuant to § 85-2-308(3), MCA. Accordingly, this Hearing Examiner rejects Applicant's argument that certification is precluded by a lack of standing.

Similarly, the Applicant's argument that this matter should not be certified because the Objectors' adverse effect objections are invalid is not supported by the record. This argument is largely premised on the Applicant's legal theory of adverse effect applied to its interpretation of the Objectors' evidence.

Like its standing determination, the Department determined that the Objectors' adverse effect objections are valid. (Change Objection Validity Form, August 19, 2020). The purpose of

the contested case hearing is to consider the evidence and arguments regarding whether a preponderance of the evidence establishes that the Applicant can change Provisional Permit No. 41S 4374 without adversely affecting other water users pursuant to those objections. It is clear from the parties' briefing that the law and evidence regarding adverse effect is disputed by the parties. However, that dispute does not invalidate the objections or preclude certification pursuant to § 85-2-309(2)(a), MCA.

Under Montana law, a prolonged period of non-use can result in abandonment of a water right. Ten years of successive non-use results in a statutory presumption of abandonment. § 85-2-404(2), MCA; *79 Ranch, Inc. v Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983). The Objectors provide sufficient evidence to raise the question regarding whether the Applicant abandoned Provisional Permit No. 41S 4374 through non-use. The Applicant's response to the Motion to Certify does not refute the evidence of non-use provided by the Objectors. Provisional Permit No. 41S 4374 cannot be changed if it has been abandoned. Thus, it is appropriate to certify the question of abandonment of the underlying water right for resolution before proceeding to a contested case regarding the § 85-2-402, MCA, adverse effect criterion.


Also pending before this Hearing Examiner are Applicant's "Motion to Dismiss Objections or alternatively Motion for Summary Judgment" and Applicant's "Motion in Limine" filed on November 13, 2020. Both motions relate to the sufficiency of the evidence to sustain the objections related to the criteria of adverse effect and/or that some of Objectors' evidence is irrelevant, immaterial or unduly prejudicial and should be excluded. These motions relate to the evidence and statutory criteria found under § 85-2-402, MCA. However, those issues need not be reached if the Applicant abandoned Provisional Permit No. 41S 4374. Therefore, it is appropriate to defer ruling on the Applicant's motions until the certified question of abandonment is resolved.

This Hearing Examiner finds and concludes that Objectors adequately raise the issue of abandonment of Provisional Permit No. 41S 4374 and certification of that issue to the District Court is appropriate. Additionally, because determination of the abandonment issue is potentially dispositive in this matter, the Hearing Examiner will defer any ruling regarding the Applicant's pending Motion in Limine and Motion to Dismiss Objections or alternatively Motion for Summary Judgment until after an order on the certified question is entered. Therefore, it is **ORDERED** as follows:

Objectors "Motion to Certify Issues to the District Court" is **GRANTED** and the Department certifies for determination by the District Court all factual and legal issues related to whether Provisional Permit No. 41S 4374 has been abandoned pursuant to § 85-2-309(2)(a), MCA.

In light of the foregoing, it is further **ORDERED** that the hearing scheduled for December 15 – 17, 2020 is hereby **VACATED** and this matter is **CONTINUED** until such time as the District Court makes its ruling on abandonment at which time the Hearing Examiner will address all pending motions.

Dated this 8th day of December 2020.



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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER GRANTING MOTION TO CERTIFY TO DISTRICT COURT was served upon all parties listed below on this 8th day of December 2020 by first class United States mail and/or by electronic mail (e-mail).

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