

Change

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
RIGHT 41I G(W)001042-00 BY NEIL W.) ORDER
AND DONNA MOLDENHAUER)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the January 26, 2001, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 41I-G(W)001042 is hereby GRANTED to Neil W. and Donna Moldenhauer to change their portion of 41I W-001042. This authorization is to change 360 gallons per minute up to 52 acre-feet to a point of diversion in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana, and to change the place of use to 8 acres in the S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, 9.4 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$, and 1.3 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, for a total of 18.7 acres, all in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana.

A. The appropriator shall install a Department approved water measuring device at a point approved by the department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the

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Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. 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 Mont. Code Ann. Title 85, Chapter 2, Part 2 and §85-2-404.

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

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 this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 20th day of March, 2001



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

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CERTIFICATE OF SERVICE

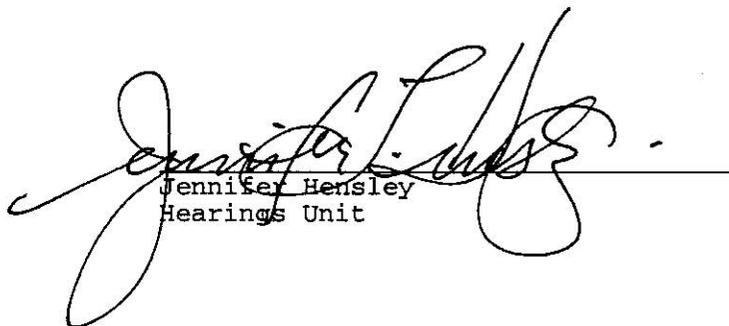
This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 23rd day of March, 2001, as follows:

NEIL W & DONNA MOLDENHAUER
39 EAST TREMPER RD
EAST HELENA MT 59635-3459

M.O. POTTER
6450 HWY 12 EAST
EAST HELENA MT 59635

TERRI MCLAUGHLIN, MANAGER
KATHY ARNDT, WRS
21 N LAST CHANCE GULCH
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HELENA MT 59620-1601

CURT MARTIN, CHIEF
48 N LAST CHANCE GULCH
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HELENA MT 59620-1601


Jennifer Hensley
Hearings Unit

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Crush

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

* * * * *

IN THE MATTER OF APPLICATION TO)
CHANGE APPROPRIATION WATER RIGHT) PROPOSAL
41I-G(W) 001042-00 BY NEIL W AND) FOR
DONNA MOLDENHAUER) DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on October 30, 2000, in Helena, Montana, to determine whether an authorization to change appropriation water right should be issued to the Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-402 (2) (1999)

APPEARANCES

Applicant appeared at the hearing in person. Alfred Myles, testified for the Applicant. Objector M. O. Potter, appeared by and through counsel Holly Franz. John Potter, testified for the Objector.

Kathy Arndt, Water Resources Specialist, and Jim Beck, Acting Regional Manager, both with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department) were called to testify by the Objector.

EXHIBITS

Both Applicant and Objector offered exhibits for the record.

Applicant offered two exhibits for the record; both were accepted into the record.

Applicant's Exhibit 1 is a copy of *Water Rights Analysis* by David Schmidt dated April 5, 1999 consisting of eleven pages.

Applicant's Exhibit 2 is a copy of an aerial photograph showing the former ditches in the proposed place of use (pink highlight), and Tract 3 (green highlight).

Objector offered three exhibits for the record; all were accepted into the record.

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Objector's Exhibit 1 is a copy of five pages from the *Montana Irrigation Guide*.

Objector's Exhibit 2 consists of six pages containing copies of eleven photographs.

Objector's Exhibit 3 is a USGS map, CANYON FERRY, SW, MONT.

The Hearings Examiner took administrative notice of the elements of Objector's water rights 41I W-089788 and 41I W089790.

PRELIMINARY MATTERS

At the hearing there was discussion of the current ownership of the water right being changed. The original place of use of this right has been subdivided and now has multiple co-owners according to Department records. The extent of the historic use was determined by the former owner and the Helena Water Resources Regional Office in the statewide water adjudication activities. Western Equities, Inc. is listed as a co-owner. By letter of June 12, 2000, Neil and Donna Moldenhauer request that the application be listed in their personal names rather than that of their business, Western Equities, Inc. This application deals only with the Applicant's portion of the historic right.

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

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 41I W-001042 in the name of Neil W. and Donna Moldenhauer and signed by Neil Moldenhauer was filed with the Department on May 25, 1999.
(Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department file)
3. Applicant seeks to change the point of diversion for their 360 gallon per minute portion of the existing water right to a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana. Applicant also seeks to change their portion of the historic right to 8 acres in the S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, 9.4 acres in

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the N~~1~~S~~1~~NE~~1~~4, and 1.3 acres in the SE~~1~~NE~~1~~NW~~1~~4 for a total of 18.7 acres all in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana. (Department file)

4. Applicant's portion of the right being changed is identified in a remark on a Department *Water Right Ownership Update* form as "(13) 360 gpm". The Helena Water Resources Regional Office is tracking portional ownership and size of the original water right that this application is a part of as it is being subdivided, transferred, and changed to news ownership and use. The Regional Office tracking serves to show the historic right is not enlarged. Proof of conveyance of the original water right from an owner of the historic place of use is critical to show a portion of the right will not be claimed and used by the new owner and continue to be used by the owner of the historic place of use. Conveyance of this water right is acknowledged by the seller's signature on the Department form. Applicant purchased a portion of the historic right and by this application is severing it from the historic development. (Department file, Department records, testimony of Applicant, Alfred Myles, Kathy Arndt, Jim Beck)

5. Applicant has proven the proposed change will not adversely affect the use of existing 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 when the water diverted is measured.

Eighteen and seven tenths acres at the historic place of use will no longer be used. Applicant did not purchase a portion of the historic place of use, and was unable to designate the exact acres being removed from irrigation. The Department is tracking the cumulative effects of this water right subdivision to prevent enlargement of the historic right.

The proposed place of use has no boundary and is laid out such that the right could be expanded to cover more than the 18.7 acres requested in the application. Measurement of the water diverted will prevent expansion of the right.

Applicant applied to change up to 156.6 acre-feet per year, but provided no information to show this volume would not be an

enlargement of the historic use. Objector contends changing a volume of 156.6 acre-feet for 18.7 acres would be an enlargement of the historic use, and have an adverse affect on his use of water by subjecting him to calls he does not now face.

The Department estimated the amount needed to irrigate 18.7 acres at 80 acre-feet for crop consumptive needs and field efficiency of forty-five percent for a full irrigation season. At the hearing the Department revised it's estimate to 52 acre-feet for irrigation through July 31 per the decreed limits of this water right. Applicant did not offer evidence to contradict the Department's prehearing estimate of 80 acre-feet, nor it's hearing estimate of 52 acre-feet. A reasonable volume for the period of use of this right is 52 acre-feet based on the consumptive needs of the crop and the field efficiency of forty-five percent.

Applicant's 360 gallons per minute portion of the existing right will convey fifty-two acre-feet in about 33 days. Measurement at monthly intervals would prevent expansion of the right. (Department file, testimony of Alfred Myles, John Potter, Jim Beck)

6. Applicant has proven the proposed diversion, construction, and operation of the appropriation works are adequate. The diversion works and conveyance ditch, historically used for another water right, at the proposed location, are not now in working condition. Applicant purchased the proposed place of use without any appurtenant water rights. Applicant will rehabilitate the diversion works and ditch system used in the past under another water right to irrigate the proposed place of use. Applicant contends water will flow east to west on the proposed place of use according to his hand level measurements. The former owner and irrigator of the place of use stated that the ditches ran west to east across the proposed place of use to irrigate the field. The greater weight goes to the former irrigator's testimony in this instance. The field has been irrigated in the past under a different right, and the diversion works are adequate when rehabilitated to a working condition. (Department file, testimony of Neil Moldenhauer, Alfred Myles)

7. Applicant has proven the proposed irrigation use of water is a beneficial use of water when limited to 52 acre-feet. Applicants are successors to a portion of a water right which historically was used to flood irrigate 175 acres. The existing right has a flow rate which includes, but does not specify, water for the historic field efficiency and ditch loss. Applicant asserted the Department estimates of the volume necessary to irrigate the proposed 18.7 acres was not sufficient, but offered no evidence to support his asserted volume. A reasonable volume for the period of use of this right is 52 acre-feet based on the consumptive needs of the crop and the field efficiency of forty-five percent. (Department file, testimony of Neil Moldenhauer, Kathy Arndt, Jim Beck, Finding Of Fact 5 [above])

8. Applicant has proven he 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. (Department file, testimony of Neil Moldenhauer)

9. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit

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 to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (1999).
2. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Mont. Code Ann. § 85-2-402 (8) (1999).
3. Applicant has met the criteria for issuance of an authorization to change an appropriation water right. See Findings of Fact 5 through 8. Mont. Code Ann. §85-2-402 (8) (1999).

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 41I-G(W)001042 is hereby GRANTED to Neil W. And Donna Moldenhauer to change their portion of 41I W-001042. This authorization is to change 360 gallons per minute up to 52 acre-feet to a point of diversion in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana, and to change the place of use to 8 acres in the S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, 9.4 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$, and 1.3 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, for a total of 18.7 acres, all in Section 21, Township 9 North, Range 1 West, Broadwater County, Montana..

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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. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

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

Dated this 26th day of January, 2001.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

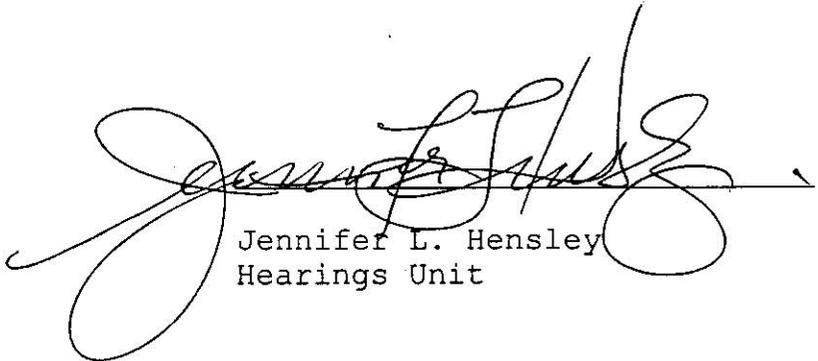
This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 29th day of January, 2001.

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