

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

\* \* \* \* \*

IN THE MATTER OF APPLICATION TO	)	
CHANGE APPROPRIATION WATER RIGHT	)	FINAL
76LJ-00796599 BY LOUISIANA LAND &	)	ORDER
LIVESTOCK, LLC	)	

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on September 10, 2002. Applicant filed timely exceptions to the Proposal. Applicant did not request an oral argument hearing. No other Party filed exceptions or responses to Applicant's exceptions.

The Proposal consists of three sets of findings and conclusions for an application to change three of Applicant's water rights. The Proposal recommended granting in part the change to add a point of diversion, change a portion of the purpose, and change a portion of the place of use for water right Permit 76LJ-00796501. The Proposal recommended denying the change of point of diversion for water right Claim 76LJ-01805500. The Proposal recommended granting the change of place of use for water right Claim 76LJ-10325700.

The Proposal shows the incorrect Permit number 76LJ-018505500 on pages 2, 12 (two times), 14, 16, 17 (two times); the correct Permit number is 76LJ-01805500. Copies of the five pages with the corrected permit number are enclosed with this Order to replace the incorrect pages in the Proposal.

**Change of Permit 76LJ-00796501**

Applicant excepted to Finding of Fact No. 19 of the Proposal stating Applicant already has a Department of Fish, Wildlife and Parks (DFWP) pond stocking permit. Applicant would have the Proposal indicate such in Findings of Fact No. 19. The Department file indicates that DFWP is "currently allowing fish ponds to be stocked only with west-slope cutthroat in northwest Montana." It does not indicate Applicant has acquired a pond stocking permit, nor was a copy introduced at hearing. The record was closed at the end of the hearing

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and new evidence cannot be introduced into the closed record without reopening the record. Admin. R. Mont. 36.12.234 (1) (1994). Finding of Fact No. 19 will not be changed.

Applicant excepted to Finding of Fact No. 22 and Paragraph F. of the Proposed Order. The exception states a water use permit exists to supply the fishery exchange rate outside the period of appropriation of Permit 76LJ-00796501 and would have the Proposal reflect that. Applicant attached a copy of the permit to the exception. Witness Roger Noble testified at hearing that Applicant "has an Interim Permit and has applied for a 600" [Form No. 600 is an Application For Beneficial Water Use Permit]. The issued permit was not introduced into the record at hearing. The record was closed at the end of the hearing and new evidence cannot be introduced without reopening the record. Admin. R. Mont. 36.12.234 (1) (1994). Finding of Fact No. 22 and Paragraph F. of the Proposed Order will not be changed.

Applicant excepted to the lack of a statement in the Proposed Order indicating the Applicant has not abandoned the use of the 122.7 acre-feet not authorized by the Proposal. Applicant suggests a new paragraph stating the Applicant has not abandoned the use of 122.7 acre-feet of water and may make additional application in accordance with applicable statute and regulations. Here, the Hearing Examiner did not need to address that issue to make his decision. The Hearing Examiner properly set forth in his findings and conclusions the basis of his decision. As the Montana Supreme Court recently stated in *In Re The Marriage Of Marvin Phillip Drake*, 2002 MT 127, \_\_\_ Mont \_\_\_, \_\_\_ P.3d \_\_\_:

...the district court is not required to make specific findings on every fact presented or every piece of evidence offered. It need only include "the essential and determining factors upon which [its] conclusions rest." *Moseman v. Moseman* (1992), 253 Mont. 28, 31, 830 P.2d 1304, 1306.

The new paragraph will not be added.

#### Change of Permit 76LJ-01805500

Applicant has three exceptions to Finding of Fact No. 10. Applicant seeks to clarify that an additional 1000 gallons per minute

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(gpm) above what was historically diverted is not requested, that the requested 1000 gpm will produce the water originally permitted, and that the aquifer recharge to Bowser Spring Creek remains the same regardless of where the water originated.

Regarding the first issue, Finding of Fact No. 5 makes clear what is available to change and discusses the limit of the two permits, 1000 gpm, so adding clarifying language to Finding of Fact No. 10 is unnecessary.

In the second issue, the Examiner found the historic use is as permitted in Finding of Fact No. 6. So the 100 acre-foot volume of water for this permit is not questioned. Applicant's exception on this matter attempts to mix findings for Permit 00796501 and Permit 01805500, and then does not make use of the flow and volume discussion in the proposed revised Finding of Fact No. 10. Adding any discussion of volume capability of the existing system to Finding of Fact No. 10 is unnecessary.

The third point made in the exception to Finding of Fact No. 10 regarding recharge to Bowser Spring Creek is discussed in Finding of Fact Nos. 7, 8, 9, 10. Applicant's proposed revised Finding of Fact No. 10 entirely misses the point the Examiner is making in Finding of Fact No. 10: *The effect on flows of Bowser Spring Creek at the county road immediately below Bowser Spring and upstream of other appropriators of this change is unknown. The effect on all existing downstream appropriators of diverting an additional 1000 gpm at this point of diversion is unknown and was not studied [emphasis added].* The Examiner's Finding of Fact No. 10 finds the applicant did not evaluate the effect of moving the point of diversion of 1000 gpm by showing *the proposed change...will not adversely affect the **use of existing water rights of other persons...***, not just the Objectors. Mont. Code Ann. § 85-2.402(2)(a). Finding of Fact 10 will not be changed.

Applicant also excepts to Conclusion of Law Nos. 3 and 4 for the same reasons cited in their exception to Finding of Fact No. 10. Specifically Applicant wants the Examiner to conclude the use of existing water rights of other persons will not be adversely affected

by the proposed change. Finding of Fact No. 10 states there is not evidence in the record upon which the Examiner can make this conclusion. Conclusion of Law No. 3 will not be changed.

Conclusion of Law No. 4 correctly concludes that new appropriations cannot be made under the guise of a change, and then concludes that only 1000 gpm can be diverted at any time the two permits (each for 1000 gpm) are being exercised. Had this change been authorized Conclusion of Law No. 4 would have made necessary a condition capping the combined diversion of the two permits at 1000 gpm. Conclusion of Law No. 4 will not be changed.

Applicant excepts to Conclusion of Law No. 9 for same reasons stated in their exception to Conclusion of Law No. 3. Because Conclusion of Law No. 3 has not been changed, it remains a correct reference in Conclusion of Law No. 9. Conclusion of Law No. 9 will not be changed.

#### Change of Claim 76LJ-10325700

Applicant wishes to revise Finding of Fact No. 6 to include additional evidence and testimony of Witness Hafferman regarding Big Lost Creek Canal. Why this additional evidence is important is not made clear. The Examiner did not rely upon this portion of Hafferman's testimony to make his conclusions and proposed order. The Hearing Examiner properly set forth in his findings and conclusions the basis of his decision. As the Montana Supreme Court recently stated "...the district court is not required to make specific findings on every fact presented or every piece of evidence offered. It need only include 'the essential and determining factors upon which [its] conclusions rest.'" *Id.* at 127. The new sentence will not be added to Finding of Fact No. 6.

The Applicant had no other exceptions.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1999) and Mont. Admin. R. 36.12.229 (1999). The Department has

considered the exceptions and reviewed the record under these standards. The Department finds the Proposal is supported by the record and the facts were properly applied to the law.

**THEREFORE**, the Department of Natural Resources and Conservation hereby adopts the September 10, 2002, Proposal for Decision in this matter, with the foregoing correction of clerical errors, as its Final Order.

Based on the record in this matter, the Department makes the following Orders:

**ORDER - Permit 76LJ-00796501**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right Permit 76LJ-00796501 is hereby **GRANTED** to Louisiana Land & Livestock to change Applicant's portion of water right Permit 76LJ-00796501 as follows:

The water right being changed is limited to 96.3 gpm up to 52.34 acre-feet per year to be diverted between May 15 and September 15 of each year at an additional point of diversion at a groundwater cistern located in the ~~SW~~~~SE~~ Section 34, Township 29 North, Range 22 West. The place of use of 1.42 acres is changed to a new 1.42 acre pond with a volume of 14.05 acre-feet located in the ~~E~~~~W~~~~SE~~ Section 34, Township 29 North, Range 22 West. The purpose of use of 96.3 gpm up to 52.34 acre-feet per year is changed from irrigation to a fishery. These amounts include 3.7 gpm up to 2.01 acre-feet for evaporative losses, and 92.6 gpm up to 50.33 acre-feet per year for a fisheries use in a new place of use, a pond, located in the ~~E~~~~W~~~~SE~~ Section 34, Township 29 North, Range 22 West.

- A. Pond outflow must match or exceed pond inflow minus 3.7 gallons per minute evaporative loss.
- B. Pond outflow must remain tributary to the East Fork of Bowser Spring Creek at all times.

C. Irrigation of 22.42 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 34, Township 29 North, Range 22 West must be discontinued.

D. Water cannot be diverted to Permits 76LJ-00796500 and 76LJ-01805500 at the same time.

E. Applicant must receive a Department of Fish, Wildlife and Parks pond stocking permit and stock the pond with fish prior to diversion of water to the pond under this authorization. The permittee must stock the pond with fish quantities allowed in the private fish pond license, within two years of completion of pond construction. Copies of the license and stocking purchase invoices are required to show project completion.

F. If the pending groundwater permit for non-irrigation season fish flow is not issued, this authorized change of purpose is revoked.

**ORDER - Permit 76LJ-01805500**

Application for Change of Appropriation Water Right Permit 76LJ-01805500 is hereby **DENIED**.

**ORDER - CLAIM 76LJ-10325700**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right Claim 76LJ-10325700 is hereby **GRANTED** to Louisiana Land & Livestock, LLC to change water right Claim 76LJ-10325700.

Applicant is authorized to change the place of use of 80 acres of irrigation from E $\frac{1}{2}$ SW $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West to 70 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West both in Flathead County, Montana. The amount of water to be changed is 700 gpm up to 179.2 acre-feet.

A. This authorization is limited to the amount of the historic use recognized by the department for the 70 acres involved in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings

pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

B. Acreage to be removed from irrigation under this right is 80 acres of irrigation from E~~1~~SW~~1~~ Section 34, Township 29 North, Range 22 West, Flathead County, Montana.

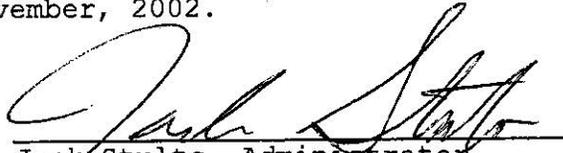
C. The appropriator shall install a department approved in-line flow meter at a point in the delivery line approved by the Department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a monthly written records of the flow rate and volume measurements and shall submit the records by November 30<sup>th</sup> of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit. The records must be submitted to the Water Resources Regional Office. Contact the regional office to obtain their current address. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

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 oral proceedings to the district court.

Dated this 19<sup>th</sup> day of November, 2002.



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

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the Final Order was served by First Class United States Mail upon all parties listed below on this 19th day of November, 2002.

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\_\_\_\_\_  
Jill Wilkinson  
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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF APPLICATION TO CHANGE )                    PROPOSAL  
APPROPRIATION WATER RIGHT 76LJ-00796599 )                    FOR  
BY LOUISIANA LAND & LIVESTOCK, LLC )                    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, a hearing was held on August 1, 2002, in Kalispell, 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).

APPEARANCES

Applicant appeared at the hearing by and through counsel Dale R. Cockrell. Roger Noble, Hydrogeologist, Land and Water Consulting, testified for the Applicant. Charlene O'Neil appeared for Objector Montana Forest Products Limited Partnership. Objector Montana Forest Products called Kurt Hafferman, Regional Manager, Kalispell Water Resources Regional Office; and Bob Borden as witnesses. Objector Colin and Kathy Andrews appeared at the hearing by and through counsel John M. Shontz. Colin Andrews testified for Objector Andrews.

EXHIBITS

Applicant offered exhibits for the record; the Objectors did not offer exhibits. The exhibits are admitted into the record to the extent noted below.

Applicant offered thirteen exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits 1-13.

Applicant's Exhibit 1 is an 8½" x 11" Geologic Map.

Applicant's Exhibit 2 is an 11" x 17" Combined Topographic And Water Table Map.

Applicant's Exhibit 3 is an 11" x 17" Hydrogeologic Cross Section.

**Applicant's Exhibit 4** is a one page *Hydrograph Of Bowser Springbox Vs Precipitation*.

**Applicant's Exhibit 5** is a one page tabular *Summary of Precipitation of 2001 and 2002, Kalispell, Montana*.

**Applicant's Exhibit 6** is a five page copy of a December 6, 1976 memorandum from Tom Patton.

**Applicant's Exhibit 7** is a nine page copy of a February 23, 1978 memorandum from Tom Patton.

**Applicant's Exhibit 8** is an 8½" x 11" *Map For 76LJ P007965*.

**Applicant's Exhibit 9** is an 8½" x 11" *Map For 76LJ P018055*.

**Applicant's Exhibit 10** is an 8½" x 11" *Map For 76LJ W103257*.

**Applicant's Exhibit 11** is an 8½" x 11" *Map Of Points Of Diversion And Montana Forest Products Points Of Use*.

**Applicant's Exhibit 12** is an 8½" x 11" copy from: *Soil Survey-Upper Flathead Valley Area, U.S.D.A., 1960*.

**Applicant's Exhibit 13** is an 8½" x 11" copy from: *Soil Survey-Upper Flathead Valley Area, U.S.D.A., 1960*.

#### PRELIMINARY MATTERS

Applicant is proposing to change three existing water rights under this application (Permit 76LJ-00796501, Permit 76LJ-01805500, Claim 76LJ-10325700). In order to analyze the different changes proposed for these water rights the Hearing Examiner has evaluated each proposed change individually and has written individual findings, conclusions, and orders for each water 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 Permit 76LJ-00796501

##### General

1. Application for Change of Appropriation Water Right Permit 76LJ-00796501 in the name of Louisiana Land & Livestock, L.L.C. was filed with the Department on October 4, 2001. (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 has purchased land to which a portion of this water right is appurtenant; the historic point of diversion is on land not owned by the Applicant. Applicant's portion of the water right and what is being changed is 583 gallons per minute (gpm) up to 175 acre-feet per year to irrigate 70 acres between May 15 and September 15 of each year. Applicant proposes to add a point of diversion at a groundwater cistern located SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West. Applicant proposes to change the purpose of 96.3 gpm up to 52.34 acre-feet per year. These amounts include 3.7 gpm up to 2.01 acre-feet for evaporative losses, and 92.6 gpm up to 50.33 acre-feet per year to a nonconsumptive fishery use in a new 1.42 acre lined pond with a volume of 14.05 acre-feet located in the E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West. Applicant proposes to not use the balance of the water right for irrigation use on the 70 acre place of use in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 34, Township 29 North, Range 22 West to make up for 3.7 gpm up to 2.01 acre-feet of evaporative losses from the fish pond. (Department file, testimony Roger Noble, Finding of Fact No. 9 below)

#### Adverse Effect

4. Applicant will use a pump in the cistern at the proposed added point of diversion in the West Fork of Bowser Spring Creek to divert water to a new pond in the E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$  Section 34. The pond overflow drains to the East Fork of Bowser Spring Creek. The pond and overflow channel between the pond and the East Fork of Bowser Spring Creek will be lined to minimize seepage. The pond outflow will match pond inflow minus the evaporative loss. Water flows from the pond overflow channel through the existing natural East Fork of Bowser Spring Creek. Applicant has installed valves to control flows to the pond, and can shut off the pump so water will flow to downstream seniors in the event of a valid call for water from a downstream appropriator. (Department file, testimony of Roger Noble)

5. The right being changed has been used by Applicant's predecessors for irrigation of the seventy acres purchased. A pipeline existing under a county road between the point of diversion and the seventy acre field carried water to the acreage. The water right purchased by Applicant was apportioned by flow rate and volume to allow both appropriators to pump at the same time. The original water right has been used each year since 1976 to irrigate 120 acres, which includes the 70 acres purchased by Applicant. (Department file, testimony of Roger Noble)

6. Two of the rights sought to be changed, Permits 76LJ-00796500 and 76LJ-01805500 used one 1000 gpm pump at the historic point of diversion for the two Water Use Permits being changed under this application. The two permits individually have 1000 gpm flow rates on paper, but have not appropriated water at the same time through different pumps. Therefore, the maximum withdrawal rate from the two permits at any one time is limited to 1000 gpm. (Department file, testimony of Roger Noble)

7. The flow rate of 583 gpm and 175 acre-feet per year (2.5 acre-feet per acre per year) volume are typical for 70 acres in this climactic area. (Department file, testimony of Roger Noble)

8. Applicant intends to install an instantaneous and cumulative flow meter on the primary discharge pipe at the pumphead. (Department file)

9. The Applicant estimated April through September evaporative loss from the pond at 2.99 acre-feet using evaporation data for this area. This volume equates to 3.7 gpm flowing on a continuous basis for 182 days, or 2.01 for the 123 day period of appropriation of the right being changed. (Department file, testimony of Roger Noble)

10. To be nonconsumptive, pond evaporative losses must be made up by removing water from another use such as discontinuing irrigation, or providing water from another source. As with evaporation, seepage losses must be made up or prevented somehow such as lowering the pond level, lining the pond, or providing water from another source. (Department file)

11. Applicant proposes that not using the 70 acres of irrigation will make up for the 3 acre-feet of evaporative loss from the pond and assure there is no adverse affect to downstream Bowser Spring Creek appropriators. Applicant does not intend to abandon the remaining 122.7 acre-feet of the right<sup>1</sup>; just not use it at this time. Applicant believes another application for change of appropriation to the Department is needed prior to using any of the unused 122.7 acre-feet of water. (Testimony of Roger Noble)

12. Water diverted from the historic point of diversion, the Grosswiler Pit, is water which if not diverted eventually ended up in Bowser Spring Creek in the form of springs along the Bowser Spring Creek channel downstream of Applicant's proposed point of diversion at Bowser Spring. These springs are upstream of Objectors' points of diversion. (Department file, testimony of Roger Noble)

13. The water flowing from Bowser Spring at the head of the West Fork of Bowser Spring Creek comes from the same aquifer feeding the historic Grosswiler Pit point of diversion. (Testimony of Roger Noble)

14. There are appropriators on Bowser Spring Creek immediately downstream of Bowser Spring that are upstream of the tributary springs which put the aquifer water into Bowser Spring Creek. (Testimony of Roger Noble)

15. The difference between Bowser Spring Creek flows at the county road immediately below Bowser Spring from the change of purpose will be evaporative losses from the proposed pond. Evaporative losses will not exceed 3.7 gpm. (Department file, testimony of Roger Noble)

#### Adequacy of Appropriation Works

16. Applicant has tested the pump in the steel cistern at Bowser Spring to be used to withdraw water for this proposed change at 800 gpm. Eight hundred gpm is sufficient flow to pump 100 gpm to the pond in this proposed change, and the 700 gpm historically diverted at this point of diversion (See change of water right for Claim 76LJ-10325700, on page 18 below). (Testimony of Roger Noble)

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<sup>1</sup> 175 af minus 3 af minus 49.34 af = 122.7 af  
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17. Water is conveyed from the cistern to the fish pond in a 3-inch diameter SDR pipeline that is butt-fusion welded to prevent seepage. (Department file)

18. The pond and outlet channel from the pond have been lined with a 30 mil PVC liner selected by a professional to prevent seepage losses. (Testimony of Roger Noble)

#### **Beneficial Use**

19. Applicant will stock the pond with westslope cutthroat trout which are allowed in stocked ponds by the Montana Department of Fish, Wildlife and Parks (DFWP) pond stocking permit. (Department file, testimony of Roger Noble)

20. Significant limiting conditions occurring in fish ponds related to rearing and sustaining a cutthroat population are water temperature and dissolved oxygen content of the water. These variables can be managed by controlling the pond water exchange rate. (Department file, testimony of Roger Noble)

21. Applicant desires a stocking rate of 300 pounds of fish. A general minimum inflow can be calculated using flow models developed for this purpose. When the model is applied to this project and stocking rate, 92.6 gpm up to 50.33 acre-feet are required for 123 days of fishery needs only. Pond evaporative losses are in addition to this amount. (Department file, testimony of Roger Noble)

22. Applicant has a pending groundwater application from a deeper aquifer to supply the exchange rate outside the period of appropriation of this water right. The deep aquifer is not connected to area surface water. An interim permit has been issued for the use requested in the pending application. The combination of this changed right and the pending application will provide the year round water needed to sustain the fishery. (Testimony of Roger Noble)

**Possessory Interest**

23. 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. (Department file)

**Water Quality Issues**

24. 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 Permit 76LJ-00796501**

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.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, 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; if the change in appropriation right involves salvaged water, the proposed

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water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Applicant has proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected when the point of diversion, place of use, and purpose of use of 96.3 gpm up to 52.34 acre-feet of water is changed,, and water diverted under this right and permit 76LJ-01805500 is not increased. To be nonconsumptive, pond outflow must match or exceed pond inflow minus the evaporative loss made up by discontinued irrigation and the pond must be lined to eliminate seepage from the pond. Here, Applicant requested their entire portion of the water right be changed but only provided evidence relative to the 96.3 gpm amount proposed for the change of purpose. Applicant provided the necessary information for the Hearing Examiner to calculate that discontinuing irrigation of twenty-one (21) acres will supply the 52.34 acre-feet<sup>2</sup> needed for the change of purpose. In addition, 1.42 acres is being changed from the historic place of use to the new pond site for a total of 22.42 acres to be removed from the historic 70 acres of irrigation. Applicant did not show there would be no adverse affect if the balance of the flow rate not being changed to the fishery purpose were diverted from the point of diversion added in this application. Contrary to Applicant's assumption, if the change were authorized as requested, no additional application to the Department would be necessary to divert Applicant's entire portion of the right from the Bowser Spring point of diversion. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 4, 5, 6, 7, 9, 11, 12, 13, 14, 15.

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<sup>2</sup> (52.34 acre-feet)/(2.5 acre-feet per acre)=20.9 acres

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4. An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. Thus, because there was only one 1000 gpm pump for the Grosswiler Pit water use permits any diversion under one of the permits precludes use under the other. See Mont. Code Ann. § 85-2-301; see also Spokane Ranch & Water Co. v. Beatty, 96 P. 727, 731. See Finding of Fact No. 6.

5. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate to divert 96.3 gpm up to 52.34 acre-feet of water of this right. Applicant provided evidence of a diversion adequate to divert 800 gpm. Approximately 100 gpm is allocated for use in the fish pond and 700 gpm is intended for the irrigation use discussed in the change of water right Claim 76LJ-10325700 (on page 18 below) Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 16, 17, 18.

6. The Applicant has proven by a preponderance of evidence that the quantity of water proposed for use in a fish pond (96.3 gpm up to 52.34 acre-feet) is the reasonable amount necessary for the proposed beneficial use of rearing and sustaining 300 pounds of westslope cutthroat trout in a pond. To stock a pond a DFWP stocking permit is required. Any water diverted when there are no fish in the pond is not a beneficial use and would be wasteful. There is no evidence the fishery is viable without water from the pending groundwater permit to provide non-irrigation season flows. Applicant has not proven that changing the point of diversion for an irrigation right that will not be used is a beneficial use of water. Mont. Code Ann. §§ 85-2-102 (19), 402(2)(c), 87-4-603. See Finding of Fact Nos. 11, 19, 20, 21, 22.

7. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 23.

8. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a

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discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f), (g). See, Finding of Fact No. 24.

9. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the 85-2-402 criteria by a preponderance of the evidence. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change an appropriation water right. Mont. Code Ann. §§ 85-2-402(2), (8). See Conclusion of Law Nos. 3, 6 above.

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

**PROPOSED ORDER Permit 76LJ-00796501**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right Permit 76LJ-00796501 is hereby **GRANTED** to Louisiana Land & Livestock to change Applicant's portion of water right Permit 76LJ-00796501 as follows:

The water right being changed is limited to 96.3 gpm up to 52.34 acre-feet per year to be diverted between May 15 and September 15 of each year at an additional point of diversion at a groundwater cistern located SW~~1~~SW~~1~~SE~~1~~ Section 34, Township 29 North, Range 22 West. The place of use of 1.42 acres is changed to a new 1.42 acre pond with a volume of 14.05 acre-feet located in the E~~1~~W~~1~~SE~~1~~ Section 34, Township 29 North, Range 22 West. The purpose of use of 96.3 gpm up to 52.34 acre-feet per year is changed from irrigation to a fishery. These amounts include 3.7 gpm up to 2.01 acre-feet for evaporative losses, and 92.6 gpm up to 50.33 acre-feet per year to a fisheries use in a new place of use, a pond, located in the E~~1~~W~~1~~SE~~1~~ Section 34, Township 29 North, Range 22 West.

- A. Pond outflow must match or exceed pond inflow minus 3.7 gallons per minute evaporative loss.
- B. Pond outflow must remain tributary to the East Fork of Bowser Spring Creek at all times.

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C. Irrigation of 22.42 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 34, Township 29 North, Range 22 West must be discontinued.

D. Water cannot be diverted to Permits 76LJ-00796500 and 76LJ-01805500 at the same time.

E. Applicant must receive a Department of Fish, Wildlife and Parks pond stocking permit and stock the pond with fish prior to diversion of water to the pond under this authorization. The permittee must stock the pond with fish quantities allowed in the private fish pond license, within two years of completion of pond construction. Copies of the license and stocking purchase invoices are required to show project completion.

F. If the pending groundwater permit for non-irrigation season fish flow is not issued, this authorized change of purpose is revoked.

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FINDINGS OF FACT Permit 76LJ-01805500

General

1. Application for Change of Appropriation Water Right Permit 76LJ-01805500 in the name of Louisiana Land & Livestock, L.L.C. was filed with the Department on October 4, 2001. (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.
3. Applicant has purchased land to which this water right place of use is appurtenant; the historic point of diversion is on land not owned by the Applicant. The water right being changed is 1000 gpm gallons per minute (gpm) up to 100 acre-feet per year to irrigate 120 acres. Applicant proposes to change the point of diversion from a groundwater pit, known as the Grosswiler Pit, in the SW~~4~~SE~~4~~SE~~4~~ in Section 33, Township 29 North, Range 22 West, to a groundwater cistern located SW~~4~~SW~~4~~SE~~4~~ Section 34, Township 29 North, Range 22 West, Flathead County, Montana. (Department file, testimony Roger Noble)

Adverse Effect

4. Applicant plans to use a pump in the cistern at the proposed added point of diversion in the West Fork of Bowser Spring Creek to divert water to the historic place of use. Applicant has installed valves to control flows from the pump to the distribution pipes, and can shut off the pump so water will flow to downstream seniors in the event of a valid call for water from a downstream appropriator. (Department file, testimony of Roger Noble)
5. Two of the rights sought to be changed, Permits 76LJ-00796500 and 76LJ-01805500 used one 1000 gpm pump at the historic point of diversion for the two Water Use Permits being changed under this application. The two permits individually have 1000 gpm flow rates on paper, but have not appropriated water at the same time through different pumps. Therefore, the maximum withdrawal rate from the two permits at any one time is limited to 1000 gpm. (Department file, testimony of Roger Noble)

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6. Applicant states that 120 acres are currently and will continue to be irrigated under this proposal. Diversion occurs from May 1 to October 1 at 1000 gpm up to 100 acre-feet. (Department file, testimony of Roger Noble)

7. The water in the cistern at the proposed point of diversion at the head of the West Fork of Bowser Spring Creek comes from the same aquifer feeding the historic point of diversion in the Grosswiler Pit in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 33, Township 29 North, Range 22 West. (Testimony of Roger Noble)

8. Water diverted from the historic point of diversion, the Grosswiler Pit, is water that would have eventually ended up in Bowser Spring Creek in the form of springs along the Bowser Spring Creek channel downstream of Applicant's proposed point of diversion at Bowser Spring. These springs along the stream channel are upstream of Objectors' points of diversion. (Department file, testimony of Roger Noble)

9. There are existing appropriators on Bowser Spring Creek immediately downstream of Bowser Spring that are upstream of the tributary springs which put the aquifer water into Bowser Spring Creek. (Testimony of Roger Noble)

10. This change proposes to divert an additional 1000 gpm from Bowser Spring at the headwaters of Bowser Spring Creek. The effect on flows of Bowser Spring Creek at the county road immediately below Bowser Spring and upstream of other appropriators of this change is unknown. The effect on all existing downstream appropriators of diverting an additional 1000 gpm at this point of diversion is unknown and was not studied. (Testimony of Roger Noble)

#### Adequacy of Appropriation Works

11. Applicant has tested the pump in the steel cistern to be used to withdraw water for this proposed point of diversion at 800 gpm. Eight hundred gpm is sufficient flow to cover the 100 gpm to be pumped to the pond under the change proposed under water right Permit 76LJ-00796501 (on page 2 above), and the 700 gpm which has historically

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been diverted at this point of diversion (See change of water right for Claim 76LJ-10325700, on page 18 below). There is no evidence supporting the adequacy to divert more than 800 gpm from this point of diversion. (Testimony of Roger Noble)

#### **Beneficial Use**

12. The Water Resources Regional Office issued the water right permit for 1000 gpm up to 100 acre-feet and this is a reasonable amount of water for 120 acres of supplemental irrigation. (Department file)

#### **Possessory Interest**

13. 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)

#### **Water Quality Issues**

14. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permitholder 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 Permit 76LJ-01805500**

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.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when

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authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, 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; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected when 1000 gpm is withdrawn from the proposed point of diversion. The adverse affect criterion applies to existing rights of other persons, not just rights of those who object to the application. Here Applicant acknowledged there are rights downstream of Bowser Spring and upstream of where the water from the aquifer is tributary to Bowser Spring Creek. The Objectors may not see an effect of changing the point of diversion, but those above the springs may. Any analysis of effect on the appropriators above where the aquifer puts water into Bowser Spring Creek was not provided. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 4, 5, 6, 7, 8, 9, 10, 11.

4. An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. Thus, because there was only one 1000 gpm pump for the Grosswiler Pit water use permits any diversion under one of the permits precludes use under the other. See Mont. Code Ann. § 85-2-301; see also Spokane Ranch & Water Co. v.

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Beatty, 96 P. 727, 731. See Finding of Fact No. See Finding of Fact No. 5

5. The Applicant has not proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. These applications collectively propose to divert 100 gpm for fish (Permit 76LJ-00796501), 1000 gpm for irrigation (Permit 76LJ-01805500), and 700 gpm for irrigation (Claim 76LJ-10325700), for a total withdrawal of approximately 1800 gpm. The means of diversion can pump 800 gpm; it has not been shown it can pump 1800 gpm. Applicant did prove 800 gpm can be pumped from the proposed point of diversion, but this 800 gpm appears destined for use under other rights (Permit 76LJ-00796501, Claim 76LJ-10325700). Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 11.

6. The Applicant has proven by a preponderance of evidence that the quantity of water proposed for irrigation use is beneficial. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 12.

7. Applicant has proven 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 Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 13.

8. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f), (g). See, Finding of Fact No. 14.

9. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the 85-2-402 criteria by a preponderance of the evidence. Applicant has not met the criteria for issuance of an authorization to change an appropriation water right. See Conclusion of Law Nos. 3, 5 above. Mont. Code Ann. §§ 85-2-402(2), (8).

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

PROPOSED ORDER Permit 76LJ-01805500

Application for Change of Appropriation Water Right Permit 76LJ-01805500 is hereby **DENIED**.

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FINDINGS OF FACT CLAIM 76LJ-10325700

General

1. Application for Change of Appropriation Water Right Claim 76LJ-10325700 in the name of Louisiana Land & Livestock, L.L.C. was filed with the Department on October 4, 2001. (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.
3. Applicant seeks to change the place of use of 80 acres of irrigation from E $\frac{1}{2}$ SW $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West to 70 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West both in Flathead County, Montana. The amount of water to be changed is 700 gpm up to 179.2 acre-feet. Acreage to be removed from irrigation under this right is 80 acres of irrigation from E $\frac{1}{2}$ SW $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West, Flathead County, Montana.  
(Department file, testimony of Roger Noble)

Adverse Effect

4. Applicant plans to use a pump in the Bowser Spring cistern at the point of diversion in the West Fork of Bowser Spring Creek to divert water to the place of use. Applicant has installed valves to control flows from the pump to the distribution pipes of the various uses, and can shut off the pump so water will flow to downstream seniors in the event of a valid call for water from a downstream appropriator.  
(Department file, testimony of Roger Noble)
5. Objector Montana Forest Products opined the Amended Water Right Claim 76LJ-10325700 needs to be certified to the district court because the earlier priority date is not correct. The priority date of the right being changed was amended from 1956 to 1885 in a 1987 amendment to the claimed water right. The change will be subject to the Water Court's ultimate determination of the priority date.  
(Department file, testimony of Charlene O'Neil)

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6. The documentary evidence submitted with the water right claim indicates that water was used to irrigate the claimed place of use prior to 1960. The claimed place of use includes the eighty acres applicable to this application. (Department file, testimony of Kurt Hafferman)

7. The underlying right has been used at a 700 gpm flow rate up to 384 acre-feet between May 1 and September 1. The historic place included 240 acres. The application rate is 2.56 acre-feet per acre. A 700 gpm flow rate can only pump 384 acre-feet during the 123 day period of use. This is less than 2.56 acre-feet per acre application rate times 240 acres (614.4 acre-feet). Thus, the maximum historic use of this right is limited to that volume the flow rate can produce, or 384 acre-feet. How this volume has been historically allocated to the 240 acre place of use is not known. The application implies the future place of use of this right will only include 150 acres rather than 240. The Department EA states that irrigation of 80 acres in the N $\frac{1}{2}$  of Section 34 under this right has ceased because the 80 acres are irrigated under a new groundwater permit. This suggests Applicant's intent is to apply 2.56 acre-feet per irrigated acre to 150 acres. How, or if this place of use reduction was formalized is not known. (Department file, testimony of Roger Noble, Kurt Hafferman)

8. The flow rate and volume of water historically diverted will not change. Historically 700 gpm up to 2.56 acre-feet per acre has been applied. The Application states 179.2 acre-feet is being changed. Seventy (70) acres at 2.56 acre-feet per acre is 179.2 acre-feet. Eighty (80) acres at 2.56 acre-feet per acre is 204.8 acre-feet. (Department file, testimony of Roger Noble)

9. Applicant intends to install an instantaneous and cumulative flow meter on the primary discharge pipe at the pumphead. (Department file)

#### Adequacy of Appropriation Works

10. Applicant has tested the pump in the steel cistern to be used to withdraw water for this point of diversion at 800 gpm. Eight hundred gpm is sufficient flow to cover the 100 gpm to be pumped to the pond

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under the change proposed under water right Permit 76LJ-00796501, and 700 gpm which has historically been diverted at this point of diversion (See change of water right for Permit 76LJ-00796501, on page 2 above). (Department file, testimony of Roger Noble)

11. Irrigation will be by five Kifco water reels; four that use 150 gpm and one that uses 100 gpm for a total irrigation capacity of 700 gpm. The means of conveyance is 6 inch and 8 inch fused buried pipeline between the point of diversion and place of use to prevent seepage losses. (Department file)

#### **Beneficial Use**

12. The irrigation application rate of 2.56 acre-feet per acre is not more than the amount recommended by the *Montana Irrigation Guide* for alfalfa during a dry year (2.74 acre-feet/acre); thus, 179.2 acre-feet per year is a reasonable amount of water for 70 acres of irrigation. (Department file)

#### **Possessory Interest**

13. 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. (Department file)

#### **Water Quality Issues**

14. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permitholder 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 CLAIM 76LJ-10325700**

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.

2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed

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change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, 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; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Applicant has proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected when the flow rate and volume of water diverted is measured and recorded to assure the historic right is not enlarged when the place of use is changed. The Applicant has agreed to measure and record the flow rate and volume of water diverted. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 4, 5, 6, 7, 8, 9.

4. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 10, 11.

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5. The Applicant has proven by a preponderance of evidence that the quantity of water proposed to be used is the reasonable amount necessary for the proposed beneficial use. The Applicant is using a volume slightly less than that the Department believes is needed to successfully irrigate the proposed place of use without waste. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 12.

6. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 13.

7. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f), (g). See, Finding of Fact No. 14.

8. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for authorization to change a water right. Mont. Code Ann. § 85-2-402(8).

9. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the 85-2-402 criteria by a preponderance of the evidence. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change an appropriation water right. Mont. Code Ann. §§ 85-2-402(2), (8). See Conclusion of Law No. 3 above.

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

**PROPOSED ORDER CLAIM 76LJ-10325700**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right Claim 76LJ-10325700 is hereby **GRANTED** to Louisiana Land & Livestock, LLC to change water right Claim 76LJ-10325700.

Applicant is authorized to change the place of use of 80 acres of irrigation from E½SW¼ Section 34, Township 29 North, Range 22 West to

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70 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West both in Flathead County, Montana. The amount of water to be changed is 700 gpm up to 179.2 acre-feet.

A. This authorization is limited to the amount of the historic use recognized by the department for the 70 acres involved in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

B. Acreage to be removed from irrigation under this right is 80 acres of irrigation from E $\frac{1}{2}$ SW $\frac{1}{4}$  Section 34, Township 29 North, Range 22 West, Flathead County, Montana.

C. The appropriator shall install a department approved in-line flow meter at a point in the delivery line approved by the Department to record the flow rate and volume of water diverted. 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 monthly written records of the flow rate and volume measurements and shall submit the records by November 30<sup>th</sup> of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit. The records must be submitted to the Water Resources Regional Office. Contact the regional office to obtain their current address. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

#### NOTICE

This Proposal for Decision 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 and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by October 2, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

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Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by October 22, 2002, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of timely oral argument requests, exceptions, responses, and briefs.

Dated this 10<sup>th</sup> day of September, 2002.



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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 by First Class United States Mail upon all parties listed below on this 12th day of September, 2002.

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