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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 20736-s41H BY THE CITY OF BOZEMAN AND IN THE MATTER OF THE APPLICATION TO SEVER OR SELL APPROPRIATION WATER RIGHT NO. 20737-s41H	)	NOTICE OF CORRECTION

* * * * * * * * * *

Please be notified of the following errors in the Final Order in the above-captioned matter. This will serve as your only notification, so to complete your record, you are advised to attach this document to your copy of your Final Order.

A. The miner's inches listed for each right for which a change was authorized are correct in the total, but incorrect as among the various rights. The miner's inches on p. 4 of the Final Order should read as follows:[1]

Amount: 300 miner's inches

Priority: <u>50</u> inches as of <u>October, 1869</u>;
<u>100</u> inches as of July 1866;
<u>50</u> inches as of October 1869;
<u>100</u> inches as of July 1873.

---

[1] The corrected numbers and dates are underlined.

CASE # 20736

B. The priority date for the first water right listed on P. 5 of the Final Order should read:

Priority Date: .95 cfs as of October 1869; . . . .

C. The past place of use, also described on p. 4 of the Final Order, should read:

Place of Use: S½S½ and N½SE¼, Section 10. . . .

D. The past point of diversion, also described on p. 4 of the Final Order should read:

Point of Diversion: SW¼SE¼NW¼, Section 14. . . .

Attached for reference are the statement of claims upon which these water rights are based, and which verify that the above information is correct.

DONE this 16 day of April, 1985.

Teresa McLaughlin

Teresa McLaughlin
Processing Supervisor
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444-6611

CASE # 20736

Form No. 76 I R2/80

41 H

151135

STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

IRRIGATION

For the Water Courts of the State of Montana

RECEIVED
APR 28 1982
MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

4-6A-U

1. Owner of Water Right: Lichtenberg (Last) / F. (First) / D. (Middle Initial)

Co-Owner or Other Interest Owner: Lichtenberg (Last) / Borghild (First) / (Middle Initial)

Address: 103 Commercial Drive

City: Bozeman State: MT Zip Code: 59715

Home Phone No: 587-3201 Business Phone No.: 587-0409

2. Person completing form: (Last) / (First) / (Middle Initial)

Address:

City: State: Zip Code:

Home Phone No: Business Phone No.:

3. Name of ditch, creek or river: Middle Creek

Use: X Irrigation

4. Method of Irrigation Use: ☐ Sprinkler ☐ Furrow X Flood

5. Source of Water: (Check Only One)

Spring Name

Well Name

X Stream Name Middle Creek (Hyalite Cr) Tributary of East Gallatin

Lake Name Stream

Tributary of

Reservoir Name Stream

Tributary of

6. Point of Diversion: County Gallatin

NW ¼ NE ¼ SW ¼ Section 14 T 3 S/S R 5 E/W

Lot Block Subdivision

7. Means of Diversion:

Pump Capacity gpm

X Headgate and ditch or pipe

Flood and dike

8. Means of Conveyance:

X Ditch

Pipeline

Other Explain

CASE # 20736

9. Place of use and acres irrigated. County Gallatin

300	acres	Lot	Block	¼	¼	S½	Section	10	T	3	N/S	R	5	E/W
120	acres	Lot	Block	¼	¼	SW	Section	11	T	3	N/S	R	5	E/W
300	acres	Lot	Block	¼	¼	N½	Section	15	T	3	N/S	R	5	E/W
80	acres	Lot	Block	¼	N½	S½	Section	15	T	3	N/S	R	5	E/W
	acres	Lot	Block	¼	¼	¼	Section		T		N/S	R		E/W

800 **Total acres.** Subdivision

10. Flow rate claimed: 100

- [ ] cubic feet per second
- [ ] gallons per minute
- [x] miner's inches

11. Volume claimed: 765 acre-feet per year

12. Period(s) of use: May / 1 to Sept. / 30
Month Day Month Day

13. Check one:

- [x] Decreed Water Right
- [ ] Filed Appropriation Right
- [ ] Use Water Right

Priority date or date of first use
Hour / Month / Day / 1866 Year

14. Attach copies of the Decree, Record of Filing or Proof of Use Right.

15. Attach copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. Notarized Statement signed by claimant.

STATE OF MONTANA)
:ss.
County of Gallatin)

I, F. D. Lichtenberg, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Items 1, 4, 6, 9 completed 9/27/82
[signature]

[signature]

Subscribed and sworn before me, this 27th day of April 1982

[signature]
Notary Public for the State of Montana

Residing at Bozeman, Mt.
My Commission expires 11-13-83

CASE #20736

154135

Form No. 76 A 2

ADDENDUM TO STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

For the Water Courts of the State of Montana

ADDITIONAL POINT OF DIVERSION SHEET

Use this sheet if you have more than one point of diversion from a single source. List your primary point of diversion on the claim form.

03 County Gallatin
SW ¼ SE ¼ NW ¼, Section 14, T 3 N/S R 5 E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

Use additional sheets if necessary

CASE # 20736

Form No. 76 I R2/80

414

STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

IRRIGATION

For the Water Courts of the State of Montana

RECEIVED
APR 2 8 1982
MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

151134
4-GA-U

1. Owner of Water Right: Lichtenberg (Last) / F. (First) / D. (Middle Initial)

Co-Owner or Other Interest Owner: Lichtenberg (Last) / Borghild (First) / (Middle Initial)

Address: 103 Commercial Drive

City: Bozeman State: MT Zip Code: 59715

Home Phone No: 587-3201 Business Phone No.: 587-0409

2. Person completing form: Same (Last) / (First) / (Middle Initial)

Address:

City: State: Zip Code:

Home Phone No.: Business Phone No.:

3. Name of ditch, creek or river: Middle Creek

Use: X Irrigation

4. Method of Irrigation Use: ☐ Sprinkler ☐ Furrow X Flood

5. Source of Water: (Check Only One) DJFC

Spring	Name		
Well	Name		
X Stream	Name (Middle Creek) Tyrrell Cr.	Tributary of	East Gallatin R.
Lake	Name	Stream	
	Tributary of		
Reservoir	Name	Stream	
	Tributary of		

6. Point of Diversion: County: Gallatin

NW ¼ NE ¼ SW ¼, Section 14, T 3 ☐N/S, R 5 E☐

Lot , Block , Subdivision

7. Means of Diversion:

☐ Pump Capacity gpm

X Headgate and ditch or pipe

☐ Flood and dike

8. Means of Conveyance:

X Ditch

☐ Pipeline

☐ Other Explain

CASE # 20736

9. **Place of use and acres irrigated.** County Gallatin

300	acres	Lot	Block	¼	¼	S½	¼	Section 10	T 3	N/S	R 5	E/W
120	acres	Lot	Block	¼	¼	SW	¼	Section 11	T 3	N/S	R 5	E/W
300	acres	Lot	Block	¼	¼	N½	¼	Section 15	T 3	N/S	R 5	E/W
80	acres	Lot	Block	¼	N½	¼	S½	Section 15	T 3	N/S	R 5	E/W
	acres	Lot	Block	¼	¼	¼	¼	Section	T	N/S	R	E/W

800 **Total acres.** Subdivision

10. **Flow rate claimed:** 50
- ☐ cubic feet per second
- ☐ gallons per minute
- ☒ miner's inches

11. **Volume claimed:** 382.5 acre-feet per year

12. **Period(s) of use:** May / 1 (Month / Day) to Sept. / 30 (Month / Day)

13. **Check one:**
- ☒ Decreed Water Right
- ☐ Filed Appropriation Right
- ☐ Use Water Right

Priority date or date of first use > ___ / ___ / ___ / 1869 (Hour / Month / Day / Year)

14. **Attach** copies of the Decree, Record of Filing or Proof of Use Right.

15. **Attach** copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. **Notarized Statement signed by claimant.**

STATE OF MONTANA)
:ss.
County of Gallatin)

I, F. D. Lichtenberg, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Items 1, 4, 6 + 9 completed 4/27/82

F D Lichtenberg

Subscribed and sworn before me, this 27th day of April 1982

Van Waddleton
Notary Public for the State of Montana

Residing at Bozeman Mt.

My Commission expires 11-13-83

CASE # 20736

Form No. 76 A 2

151134

ADDENDUM TO STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

For the Water Courts of the State of Montana

ADDITIONAL POINT OF DIVERSION SHEET

Use this sheet if you have more than one point of diversion from a single source. List your primary point of diversion on the claim form.

03 County Gallatin
SW ¼ SE ¼ NW ¼, Section 14, T 3 N/S R 5 E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

County _____
_____ ¼ _____ ¼ _____ ¼, Section _____, T _____ N/S R _____ E/W
Lot _____, Block _____, Subdivision _____

Use additional sheets if necessary

CASE # 20236

Form No 761 R2/80

41H

151138

4-GA-W

STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS
IRRIGATION
For the Water Courts of the State of Montana

RECEIVED
APR 26 1982
MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

1. Owner of Water Right: Lichtenberg (Last) / F. (First) / D. (Middle Initial)

Co-Owner or Other Interest Owner: Lichtenberg (Last) / Borghild (First) / (Middle Initial)

Address: 103 Commercial Drive

City: Bozeman State: MT Zip Code: 59715

Home Phone No: 587-3201 Business Phone No: 587-0409

2. Person completing form: Same (Last) / (First) / (Middle Initial)

Address:

City: State: Zip Code:

Home Phone No: Business Phone No:

3. Name of ditch, creek or river: Middle Creek

Use: X Irrigation

4. Method of Irrigation Use: Sprinkler [ ] Furrow [ ] Flood [X]

5. Source of Water: (Check Only One)

Spring	Name		
Well	Name		
X Stream	Name (Middle Creek) (Hyalds CF)	Tributary of	East Gallatin River
Lake	Name	Stream	
	Tributary of		
Reservoir	Name	Stream	
	Tributary of		

6. Point of Diversion: County: Gallatin

NW ¼ NE ¼ SW ¼ Section 14 T 3 [N]/S R 5 [E]/W

Lot Block Subdivision

7. Means of Diversion:

[ ] Pump Capacity gpm

[X] Headgate and ditch or pipe

[ ] Flood and dike

8. Means of Conveyance:

[X] Ditch

[ ] Pipeline

[ ] Other Explain

CASE # 20736

9. **Place of use and acres irrigated.** County Gallatin

300	acres	Lot	Block	¼	¼	S½	Section 10	T 3	N/S	R 5	E/W
120	acres	Lot	Block	¼	¼	SW	Section 11	T 3	N/S	R 5	E/W
300	acres	Lot	Block	¼	¼	N½	Section 15	T 3	N/S	R 5	E/W
80	acres	Lot	Block	¼	N½	S½	Section 15	T 3	N/S	R 5	E/W
	acres	Lot	Block	¼	¼		Section	T	N/S	R	E/W

800 **Total acres.** Subdivision

10. **Flow rate claimed:** 50
- [ ] cubic feet per second
- [ ] gallons per minute
- [x] miner's inches

11. **Volume claimed:** 382.5 acre-feet per year

12. **Period(s) of use:** May / 1 (Month / Day) to Sept. / 30 (Month / Day)

13. **Check one:**
- [x] Decreed Water Right
- [ ] Filed Appropriation Right
- [ ] Use Water Right

Priority date or date of first use: Hour / Month / Day / 1869 (Year)

14. **Attach** copies of the Decree, Record of Filing or Proof of Use Right.

15. **Attach** copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. **Notarized Statement signed by claimant.**

STATE OF MONTANA)
:ss.
County of Gallatin)

I, F. D. Lichtenberg, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Items 1, 4, 6 & 9 completed 9/27/82 [signature]

[signature]

Subscribed and sworn before me, this 27th day of April 1982

[signature]
Notary Public for the State of Montana

Residing at Bozeman, Mt.
My Commission expires 11-13-83

CASE # 20736

151138

Form No. 76-A-2

ADDENDUM TO STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

For the Water Courts of the State of Montana

ADDITIONAL POINT OF DIVERSION SHEET

Use this sheet if you have more than one point of diversion from a single source. List your primary point of diversion on the claim form.

03 County Gallatin
SW ¼ SE ¼ NW ¼, Section 14, T 3 N/S R 5 E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

County ____
____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W
Lot ____, Block ____, Subdivision ____

Use additional sheets if necessary

CASE # 20736

Form No. 76 I R2/80

41 H

151137

A-GA-Y

STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

IRRIGATION

For the Water Courts of the State of Montana

RECEIVED
APR 2 8 1982
MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

1. Owner of Water Right: Lichtenberg (Last) / F. (First) / D. (Middle Initial)

Co-Owner or Other Interest Owner: Lichtenberg (Last) / Borghild (First) / (Middle Initial)

Address: 103 Commercial Drive

City: Bozeman State: MT Zip Code: 59715

Home Phone No: 587-3201 Business Phone No.: 587-0409

2. Person completing form: Same (Last) / (First) / (Middle Initial)

Address:

City: State: Zip Code:

Home Phone No: Business Phone No.:

3. Name of ditch, creek or river: Middle Creek

Use: Irrigation

4. Method of Irrigation Use: Sprinkler ☐ Furrow ☒ Flood

5. Source of Water: (Check Only One)

Spring Name

Well Name Hurlitz CR.

X Stream Name (Middle Creek) AKA Tributary of Sn + Gallatin Rv

Lake Name Stream

Tributary of

Reservoir Name Stream

Tributary of

6. Point of Diversion: County Gallatin

NW ¼ NE ¼ SW ¼, Section 14 T 3 S/S, R 5 E/W

Lot Block Subdivision

7. Means of Diversion:

☐ Pump Capacity gpm

☒ Headgate and ditch or pipe

☐ Flood and dike

8. Means of Conveyance:

☒ Ditch

☐ Pipeline

☐ Other Explain

CASE # 20736

9. **Place of use and acres irrigated.** County Gallatin

300	acres	Lot	Block	¼	¼ S½	Section	10	T	3 N/S	R	5 E/W
120	acres	Lot	Block	¼	¼ SW	¼ Section	11	T	3 N/S	R	5 E/W
300	acres	Lot	Block	¼	¼ N½	Section	15	T	3 N/S	R	5 E/W
80	acres	Lot	Block	¼	N½ S½	Section	15	T	3 N/S	R	5 E/W
	acres	Lot	Block	¼	¼	¼ Section		T	N/S	R	E/W

800 Total acres. Subdivision

10. **Flow rate claimed:** 100
- ☐ cubic feet per second
- ☐ gallons per minute
- ☒ miner's inches

11. **Volume claimed:** 765 acre-feet per year

12. **Period(s) of use:** May / 1 (Month / Day) to Sept. / 30 (Month / Day)

13. **Check one:**
- ☒ Decreed Water Right
- ☐ Filed Appropriation Right
- ☐ Use Water Right

Priority date or date of first use: / / / 1873 (Hour / Month / Day / Year)

14. **Attach** copies of the Decree, Record of Filing or Proof of Use Right.

15. **Attach** copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. **Notarized Statement signed by claimant.**

STATE OF MONTANA)
:ss.
County of Gallatin)

I, F. D. Lichtenberg, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Items 1, 4, 6 + 9 complete 9/27/82

F. D. Lichtenberg

Subscribed and sworn before me, this 27th day of April 1982.

Jan Meddleton
Notary Public for the State of Montana

Residing at Bozeman, Mt.

My Commission expires 11-13-83

CASE # 20736

Form No. 76 A 2

151137

ADDENDUM TO STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

For the Water Courts of the State of Montana

ADDITIONAL POINT OF DIVERSION SHEET

Use this sheet if you have more than one point of diversion from a single source. List your primary point of diversion on the claim form.

03 County Gallatin

SW ¼ SE ¼ NW ¼, Section 14, T 3 N/S R 5 E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

County ____

____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S R ____ E/W

Lot ____, Block ____, Subdivision ____

Use additional sheets if necessary

CASE # 20736

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 16, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by City of Bozeman, Application No. 20736-s41H, for an Application for Beneficial Water Use Permit, and in the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H addressed to each of the following persons or agencies:

City of Bozeman
c/o Dick Holme
P.O. Box 640
Bozeman, Montana 59715

Department of Fish, Wildlife & Parks
Attn: Richard Vincent
1240 EAst Sixth
Helena, MT 59620

Montana Power Company
40 East Broadway
Butte, Montana 597 01

James T. Paugh
1691 Hulbert East Road
Bozeman, Montana 59715

Einar & Harold Lindvig
6767 Fowler Lane
Bozeman, Montana 59715

George I. & Nancy J. Westland
Route 3, Box 168
Bozeman, Montana 59715

Lester C. Gee
P.O. Box 473
Bozeman, Montana 59715

Frank R. Doney
11258 Cottonwood Road
Bozeman, Montana 59715

CASE # 20736

Hoy Ditch Company
c/o James Boyd
6465 S. 19th Road
Bozeman, Montana 59715

Middle Creek Ditch Company
c/o Lloyd Ratferty
220 West Lamme
Bozeman, Montana 59715

Middle Creek Water Users Association
c/o Margaret Dusenberry
Route 3
Bozeman, Montana 59715

Donald A. Nash
Attorney at Law
Drawer 1330
Bozeman, Montana 59715

Richard J. Boylan
1812 Willow Way
Bozeman, Montana 59715

Charles & Mary Sales
1755 Elk Lane
Bozeman, Montana 19715

C. Glenn Johnson
Box 228, Route 3,
Bozeman, Montana 59715

James C. Boyd
6465 South 19th Road
Bozeman, Montana 59715

Earl C. Kraft
R.R. #1 Box 19
Belgrade, Montana 59714

Joseph M. Caprio
808 South 8th Ave.
Bozeman, Montana 59715

J. Charles Kraft
7777 South 8th Ave.
Bozeman, Montana 59715

C.E. Louise Cline
3840 South 19th Road
Bozeman, Montana 59715

CASE # 20736

Montana Agricultural Experiment Station
Montana State University
Bozeman, Montana 59717

George & Frances Dunsberry
5170 Johnson Road
Bozeman, Montana 59717

Lloyd Raffety
P.O. Box 2
Bozeman, Montana 59715

Paul F. Boylan
3747 South 19th Road
Bozeman, Montana 59715

John & Martha Bos
10066 Cottonwood Road
Bozeman, Montana 59715

Robert J. Planalp
Box 609
Bozeman, Montana 59715

K. Paul Stahl
Attorney for MPC
P.O. Box 1715
Helena, Montana 59624

Gerald R. Moore
Office of the Solicitor
U.S. Department of Interior
P.O. Box 1538
Billings, Montana 59103

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 16th day of April, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

CASE # 20736

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Fohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-88

CASE # 20736

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 20736-s41H BY THE CITY OF BOZEMAN AND IN THE MATTER OF THE APPLICATION TO SEVER OR SELL APPROPRIATION WATER RIGHT 20737-s41H	))))))	FINAL ORDER

* * * * * * * * * * *

The time period for filing exceptions to the Proposal for Decision of June 4, 1984 (hereafter, "Proposal") has expired. Two timely submissions were received from James Paugh, and from the United States Department of Interior, Bureau of Reclamation (hereafter, "the Bureau"). Having given the exceptions full consideration, the Department of Natural Resources and Conservation (hereafter, "Department") accepts and adopts, incorporating herein by reference, the Proposal for Decision as its Final Order, with the exception of the modifications and corrections below.

Mr. Paugh

Mr. Paugh's exceptions are premised largely upon the mistaken notion that the Proposal intended to reserve 5,399 acre-feet of water for Bozeman. On the contrary, the Proposal indicates, albeit somewhat round-aboutly, that Bozeman's claim for future

CASE # 20736

needs failed as an evidentiary matter, and further that the Department has jurisdiction over only Bozeman's present needs. For easy reference, the operative language is in the Order. The following Order grants a new right to divert only 190 acre-feet per month between September 15 and April 15. Also, the discussion of how the figure was arrived at appears on pages 1-3 of the memorandum entitled New Water Use Permit, Beneficial Use. The discussion regarding the issuance of the change for the period September 15 - October 16 is on Pages 31-33 of the Memorandum.

With regard to the Conclusions of Law and Findings of Fact dealing with amounts greater than those within the Department's jurisdiction, explanation therefore is on Page 12 of the Proposal. Because the evidence presented supported those Findings and Conclusions, they were included to make a full record, and to offer evidentiary foundation for the Board of Natural Resources and Conservation, for any future proceedings before it and involving the same issues.

The Bureau

The Bureau timely filed an objection incorporating its exceptions and objections to the Proposal for Decision in Application on Don L. Brown. The Department responded to those in the Final Order for Don Brown, and incorporates those arguments herein by reference.

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Corrections

The Department notes a typographical error in the Proposed Order; the second segment of the period of appropriation should read October 16 - November 15, inclusive.

WHEREFORE, based upon the foregoing, and on the Proposal for Decision, incorporated herein by reference, now being fully advised in the premises, the Department hereby issues the following:

ORDER

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 20736-s41H is hereby granted to the City of Bozeman to appropriate 190 acre-feet of water from September 15 - October 15, inclusive; 190 acre-feet from October 16 - November 15, inclusive; and 190 acre-feet of water from November 16 - December 15, inclusive; and 190 acre-feet of water from December 16 - January 15, inclusive; and 190 acre-feet from January 16 - February 15, inclusive; and 190 acre-feet from February 16 - March 15, inclusive; and 190 acre-feet of water from March 16 - April 15, inclusive. All such waters shall be used to provide a supplemental municipal water supply for the City of Bozeman, and at no time shall such waters be diverted at a rate in excess of 3.2 cfs. The waters provided for herein shall be diverted from Middle Creek, also known as

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Hyalite Creek, at a point in the NE¼NE¼NW¼ of Section 23, Township 3 South, Range 5 East, all in Gallatin County, Montana. The priority date for rights granted herein shall be October 23, 1978, at 3:30 p.m.

> Provided that nothing herein shall be construed to authorize the City of Bozeman to divert water to the injury of any senior appropriator. All rights granted herein are subject to all existing and senior rights, and to any final determination of such rights as provided by Montana Law.
>
> Provided further that in no event shall the City divert water except at times for such water, and at all other times the City shall cause and otherwise allow the waters provided for herein to remain in the source of supply provided further that Bozeman is authorized to divert the waters provided for herein out of the Middle or Hyalite Creek drainage into the East Gallatin drainage.

Subject to the terms, limitations, and restrictions described below, Application for Sever or Sell Appropriation Water Right No. 20737 by Del Lichtenberg to City of Bozeman is hereby granted to change the following described rights:

Amount:	300 miners' inches
Priority:	75 inches as of March 11, 1897; 75 inches as of July 1866; 75 inches as of October 1869; and 75 inches as of July 1873.
Purpose of Use:	Irrigation
Place of Use:	S½S½ and N½SE¼ Section 23, Towhship 3 South, Range 5 East and NE¼ Section 15, Township 3 South, Range 5 East, all in Gallatin County, Montana.
Point of Diversion:	SW¼SE¼NW¼ Section 23, Township 3 South, Range 5 East, in Gallatin County, Montana.
Source of Supply:	Hyalite or Middle Creek

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Said rights are changed in their point of diversion, place of use, purposes of use and means of diversion, in the particulars noted below.

Amount:	3.8 cfs up to 301 acre-feet annually
Priority Date:	.95 cfs as of March 11, 1897; .95 cfs as of July, 1866; .95 cfs as of October, 1869; .95 cfs as of July 1873.
Purpose of Use:	Municipal
Place of Use:	City of Bozeman
Point of Diversion:	NE¼NE¼NW¼ of Section 23, Township 3 South, Range 5 East, in Gallatin County, Montana.
Source of Supply:	Hyalite or Middle Creek

Provided that diversions and use hereunder shall be confined to May 25-June 10, June 25-July 10, and August 1-August 10, all inclusive in any given year;

Provided further that no diversions shall take place hereunder if water is being diverted to the historic place of use defined above for agricultural purposes under a priority date senior to July 1, 1973;

Provided further that no diversions take place hereunder unless and until Bozeman files water transfer forms indicating that Bozeman is successor in interest to the historic water use described above;

Provided further that Bozeman is authorized to divert the waters provided for herein out of the Hyalite Creek drainage into the East Gallatin drainage.

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 9th day of January, 1985.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 14, 1985, she deposited in the United States mail, Certified mail, an order by the Department on the Application by City of Bozeman, Application No. 20736-s41H, for an Application for Beneficial Water Use Permit, and in the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H addressed to each of the following persons or agencies:

City of Bozeman
c/o Dick Holme
P.O. Box 640
Bozeman, Montana 59715

Department of Fish, Wildlife & Parks
Attn: Richard Vincent
1240 EAst Sixth
Helena, MT 59620

Montana Power Company
40 East Broadway
Butte, Montana 59715

James T. Paugh
1691 Hulbert East Road
Bozeman, Montana 59715

Einar & Harold Lindvig
6767 Fowler Lane
Bozeman, Montana 59715

George I. & Nancy J. Westland
Route 3, Box 168
Bozeman, Montana 59715

Lester C. Gee
P.O. Box 473
Bozeman, Montana 59715

Frank R. Doney
11258 Cottonwood Road
Bozeman, Montana 59715

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Hoy Ditch Company
c/o James Boyd
6465 S. 19th Road
Bozeman, Montana 59715

Middle Creek Ditch Company
c/o Lloyd Rafferty
220 West Lamme
Bozeman, Montana 59715

Middle Creek Water Users Association
c/o Margaret Dusenberry
Route 3
Bozeman, Montana 59715

Donald A. Nash
Attorney at Law
Drawer 1330
Bozeman, Montana 59715

Richard J. Boylan
1812 Willow Way
Bozeman, Montana 59715

Charles & Mary Sales
1755 Elk Lane
Bozeman, Montana 19715

C. Glenn Johnson
Box 228, Route 3,
Bozeman, Montana 59715

James C. Boyd
6465 South 19th Road
Bozeman, Montana 59715

Earl C. Kraft
R.R. #1 Box 19
Belgrade, Montana 59714

Joseph M. Caprio
808 South 8th Ave.
Bozeman, Montana 59715

J. Charles Kraft
7777 South 8th Ave.
Bozeman, Montana 59715

C.E. Louise Cline
3840 South 19th Road
Bozeman, Montana 59715

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Montana Agricultural Experiment Station
Montana State University
Bozeman, Montana 59717

George & Frances Dunsberry
5170 Johnson Road
Bozeman, Montana 59717

Lloyd Raffety
P.O. Box 2
Bozeman, Montana 59715

Paul F. Boylan
3747 South 19th Road
Bozeman, Montana 59715

John & Martha Bos
10066 Cottonwood Road
Bozeman, Montana 59715

Robert J. Planalp
Box 609
Bozeman, Montana 59715

K. Paul Stahl
Attorney for MPC
P.O. Box 1715
Helena, Montana 59624

Gerald R. Moore
Office of the Solicitor
U.S. Department of Interior
P.O. Box 1538
Billings, Montana 59103

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of January, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jan P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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RECEIVED
JUN 21 1984
MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

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

* * * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 20736-s41H BY THE CITY OF) PROPOSAL FOR DECISION
BOZEMAN AND IN THE MATTER OF THE)
APPLICATION TO SEVER OR SELL)
APPROPRIATION WATER RIGHT 20737-s41H)

* * * * * * * * * * * * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matters was held in Bozeman, Montana. The hearings were consolidated because of the similarity in parties.

Statement of the Case

Bozeman seeks a new water use permit for the use of 14.9 cubic feet per second up to 5,399 acre feet annually out of Middle Creek for municipal purposes from October 15 through April 15, inclusive, of each year. The pertinent portions of this application were duly published for three successive weeks in the Bozeman Daily Chronicle, a newspaper of general circulation printed and published in Bozeman, Montana. Objections were filed to this application on behalf of the Bureau of Reclamation, the Department of Fish, Wildlife and Parks, the Montana Power Company, James Paugh, Einar and Harold Lindvig, George and Nancy Westland, Lester Gee, Frank Doney, the Middle Creek Ditch Company, the Hoy Ditch Company, the Middle Creek Water Users

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Association, Richard J. Boylan, Charles and Mary Sales, C. Glen Johnson, James Boyd, Earl Kraft, Joseph Caprio, J. Charles Kraft, C. E. Kline, the Montana Agricultural Experiment Station, George and Frances Dusenberry, Lloyd Raffety, Paul Boylan, and John and Martha Bof. All of these objections complain or allege generally that there is insufficient water available for Bozeman's proposed use and/or that Bozeman's proposed use would work injury to these objectors' respective water rights.

Bozeman also seeks in these proceedings to change a water right heretofore decreed out of Middle Creek for agricultural purposes. Bozeman seeks to change the purpose of use, the place of use, the means of diversion, and the point of diversion of this asserted water right. The pertinent portions of this application were duly and regularly published for 3 successive weeks in the Bozeman Chronicle, a newspaper of general circulation printed and published in Bozeman, Montana. Objections to this change application were filed by the Department by Einar and Harold Lindvig, Ramon White, the Middle Creek Ditch Company, the Hoy Ditch Company, the Middle Creek Water Users' Association, Richard J. Boylan, Charles and Mary Sales, J. Charles Kraft, Joseph Caprio, Earl C. Kraft, James C. Boyd, C. Glen Johnson, C.E. and Louise Kline, the Montana Agricultural Experiment Station, George E. Dussenberry, and George I. and Nancy J. Westland.

Out of all these objectors to both these matters, only the Middle Creek Ditch Company, the Hoy Ditch Company, the Middle

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Creek Water Users' Association, Richard J. Boylan, James Paugh, and the Department of Fish, Wildlife and Parks, the Bureau of Reclamation, and the Montana Power Company actually appeared and presented evidence. Montana Power Company was represented by counsel, Paul Stahl, Middle Creek Ditch Company and Hoy Ditch Company and Middle Creek Water Users Association appeared to counsel Donald Nash. All other persons appeared personally.

At the close of the proceedings in this matter, the deposition of Wayne Treers, a Bureau of Reclamation official, was taken. Mr. Treers was not available to testify during the hearing on this matter, and pursuant to agreement of the parties, the deposition was made part of the record.

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PRELIMINARY MATTERS

Future Use

The application for a water use permit by Bozeman is largely premised on demand for water attendant to continuing municipal growth. That is to say, the need for water Bozeman asserts is largely reflective of future need. At common law, cities and towns were typically accorded deference to their claims for water attendant to future growth. See Beus v. Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940), Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939), Denver v. Northern Colorado Water Conservancy Dist., 276 P.2d 992 (1954), Holt v. Cheyenne, 22 Wyo. 212, 137 P. 876 (1913).

The courts recognized that a water supply for a city must keep a step ahead of growth, it being unfeasible to promote water development on a day-to-day basis. Thus, cities were allowed to appropriate a quantity of water solely for future need. The courts adopting this deferential stance explicitly noted that such a result was a departure from the ordinary rule that insists on actual application of the water to beneficial use in order to perfect an appropriation, or at least such result indicated a substantial relaxation of the doctrine of reasonable diligence as applied to other appropriators.

No Montana court has explicitly passed upon this issue of water for future need, however. Indeed, the Montana courts have never treated the municipal appropriator in any fashion different from any appropriator. See generally, Custer v. Missoula Public

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Service Co., 91 Mont. 136, 6 P.2d 131 (1931), Gwynn v. City of Philipsburg, 156 Mont. 194, 478 P.2d 855 (1970), Lokowich v. City of Helena, 46 Mont. 575, 129 P. 1063 (1913), Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938), Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 P.2d 301 (1968). In Gwynn and Whitcomb, the court decided that a city was wasting water and that a city was exercising a new junior appropriation, without reference to whether the increment of water representing waste or expanded use was instead part of an earlier appropriation for future use.

It is not necessary to decide, however, how the Montana courts would treat this issue at common law. The Montana Water Use Act, enacted by the legislature in 1973, refabricated the structure of protecting a water supply for future use. In short, the legislative scheme added a reservation process to the historic water allocation scheme reflected in the permit process to explicitly provide a mechanism for earmarking quantities of water for future use.

MCA 85-2-316 provides that "[t]he state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates." The Applicant herein is clearly a political subdivision within the meaning of the statute. See MCA 17-1-4121(15). Therefore, Bozeman may secure a claim for water for future municipal growth from the

Board of Natural Resources and Conservation pursuant to the reservation process, to the extent it otherwise qualifies under the statute.

Since statutes must be read and considered in their entirety so as to coordinate the provisions thereof, see Hostelter v. Inland Development Corp., 172 Mont. 167, 561 P.2d 1323 (1977), Montana Power Co. v. Cremer, 182 Mont. 277, 596 P.2d 483 (1979), Wynia v. City of Great Falls, 600 P.2d 802 (1979), State v. Meader, 601 P.2d 386 (1979), it follows that the reservation process must be construed to the exclusive procedure providing legal protection for future uses. It would be incongruous to assume that the legislature provided two alternative schemes toward the same end, with one directed to the Department of Natural Resources and Conservation and the other to the Board of Natural Resources and Conservation. Moreover, if such was the construction, the reservation process would be rendered nugatory, as any rational appropriator would prefer the priority date attendant to the filing of an application for a new permit rather than a date corresponding with the time of the Board's order designating the reservation. Compare MCA 85-2-402(2) with MCA 85-2-316(8). Thus when the legislature expressly limited the amount of water that might be provided for by permit to that quantity of water that could be beneficially used, MCA 85-2-312(1), it might current beneficial use as countenanced by common law, except in the case of public agencies who may use water by reservation. See MCA 85-2-102(2).

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Moreover, the permit scheme is ill-suited to the peculiar issues attendant to claims for future use. The permit process is a codification of common law principles regulating the procedures for initiating and perfecting an appropriation. The application for a permit sets the priority date for the prospective appropriation, provided that the intent to appropriate reflected therein is bona fide, and provided further that the prospective appropriator proceed with reasonable diligence in actually completing his appropriation by applying the water to beneficial use. Compare MCA 85-2-312 with MCA 85-2-314 (certificate of water right granted when water actually applied to beneficial use provided for in permit), see also, MCA 85-2-310(3) (application for permit may be dismissed where no bona fide intent to appropriate), see, Green River Development Co. v. FMC Corp., 660 P.2d 339 (Wyo. 1983).

The permit scheme thus is the contemporary counterpart of RCM 89-810 (repealed), the former statutory provision providing for and regulating the process of appropriating water where the appropriator desired to relate his completed appropriation back to the initiation of the same. See Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897), Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912), Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935). The process the permit scheme relates to does not affect any of the historical attributes of an appropriation.

Thus, while an appropriation may be prospective, see Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922), St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926), O'Shea v. Doty, 68 Mont. 316, 218 P.

658 (1923), Warren v. Senecal, 71 Mont. 210, 228 P. 71 (1924), that prospective component is defensible only within the confines of the doctrine of "relation back." Because water developments necessarily take varying amounts of time to complete, the appropriation doctrine in the western states uniformly recognize a sort of conditional water right. The conditional water right reified in the permit to appropriate at issue herein authorizes a prospective appropriator to secure a priority date, and to relate his completed project back to that priority date if he proceeds with reasonable diligence in actually applying the water to beneficial use. See Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d 1110 (1976), MCA 85-2-312(2) (Permit may limit time for completion of appropriation), Anaconda National Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1929), see also Four Counties Water Users Ass'n v. Colorado River Water Conserv. Dist. 159 Colo. 499, 414 P.2d 469 (1966), Taussig v. Moffat Tunnel Water & Dev. Co., 106 Colo. 384, 106 P.2d 363 (1940), Rocky Mtn. Power Co. v. White River Elec. Ass'n., 151 Colo. 45, 376 P.2d 158, Denver v. Northern Colo. Water Conserv. Dist., 130 Colo. 375, 276 P.2d 992 (1954). It is obvious that without such protection, much water development would be stultified, as a prospective appropriatior would be reluctant to invest resources to appropriate a quantity of water that may be drained off by the actions of other appropriators before his diversion works were complete.

Nothing in the relation-back doctrine, however, goes so far as to authorize a prospective appropriator to bootstrap a claim

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for future need into a current priority date. The relation-back doctrine recognizes that water developments that provide for current need are to be protected to the extent necessary to construct the diversion works to satiate that need; it does not accord the prospective appropriator the further luxury of escrowing an additional quantity of water for water needed in future years. See generally, Dewsnup, Assembling Water Rights a New Use, 17 Rocky Mtn. Mineral L. Inst., 613, 616 (1971).

This result is implicit in the requirement that reasonable diligence be employed in order to invoke the privilege of relation-back. The contours of reasonable diligence are defined in terms of the complexities involved in providing for the water development. Thus, the cost and magnitude of the project and the engineering and physical features that may be encountered are the key inquiry in determining the amount of time reasonably required to complete an appropriation. See MCA 85-2-312, Dept. Nat. Res. v. Intake, supra, 79 Ranch, Inc. v. Pitsch, ____ Mont. ____ 666 P.2d 215 (1983), Smith v. Duff, 39 Mont. 382, 102 P. 1984 (1909), Bailey v. Tintinger, supra, Anderson v. Spear Morgan Livestock Co., 107 Mont. 18, 79 P.2d 667 (1938), Wheat v. Cameron, supra, Colorado River Water Conserv. Dist. v. Twin Lakes Res. & Land Co., 468 P.2d 853 (Colo. 1970), Denver v. Northern Colo. Water Conserv. Dist., supra, Taussig v. Moffat Tunnel Water Co., supra. Notably absent is any factor relating to when the need arises. While MCA 85-2-312 refers generally to gradual development of water in terms of reasonable diligence, such gradual development in the statutory context it is used in can

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only mirror the progressive use of water as relatively extensive diversion facilities unfold. See generally, Smith v. Duff, supra, Metropolitan Suburban Water Users Association v. Colorado River Water Conservancy District, 148 Colo. 173, 365 P.2d 273 (1961), Four Counties Water Users Association v. Colo. River Water Conservation District, 159 Colo. 517, 414 P.2d 469 (1966), City and County of Denver v. Northern Colorado Water Conservation District, 130 Colo. 375, 276 P.2d 992 (1954), but see generally, Wright v. Cruse, 37 Mont. 177 95 P. 370 (1908) (construction of three ditches virtually simultaneously led to three priority dates).

The foregoing result is firmly rooted in Bailey v. Tintinger, supra. Therein, the court carved out an exception to the rule that an appropriation is only perfected upon beneficial use of the water, and held that a public service corporation appropriating water for sale or rental completes its appropriation upon completion of the diversion facilities therefore. The court noted that to hold otherwise would subject such an appropriator to the frustration of his enterprise solely because of the acts of others. Importantly, the court excused the requirement of actual application of the water to benefical use in the Bailey circumstances. Such reasoning implicitly notes that the concept of reasonable diligence is not broad enough to account for the acts of others, and instead is geared only to the physical difficulties attendant to water development.

Bozeman is not otherwise entitled to the Bailey sanctuary. Bailey is grounded on the need to give impetus to private

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developments in order to allow for the reclamation of this state's arid lands. Therein, the court thought that a failure to accord a priority date consistent with completion of the diversion works would frustrate such developments. Even assuming that such concerns are integral to Bozeman's planned water developments, however, it is enough to observe that they can find expression in the reservation process. This alternative legislative scheme abrogates the need for an exception to the common law rule.

More central to the present issue, however, is the observation that Bailey did not involve an application for future need. The court therein observed that there were presently irrigable lands that could be served by the proposed project. By contrast, Bozeman here asserts a need for water that cannot arise until subsequent growth occurs to create it.

Bailey expressly reaffirms that an appropriator must in all events have a bona fide intent to appropriate water. See also, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), Power v. Switzer, 21 Mont. 423, 55 P. 32 (1898), Woolman v. Garringer, 1 Mont. 535 (1892), Miles v. Butte Electric Co.,. 32 Mont. 56, 77 P.2d 1041 (1938). That intent is reflected in a present need or use for water. Applications for future need are necessarily speculative. See Colorado River Water Conservation Dist. v. Vidler Tunnel Co., 594 P.2d 566 (Colo. 1979), see also, Rocky Mtn. Power Co. v. Colorado River Water Conservation District, 646 P.2d 383 (Colo. 1982), City and County of Denver v. Northern Colorado Water Conservancy

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District, 276 P.2d 992 (Colo. 1954), see generally in re Brown, Dept. Order 4/84 (Proposal for Decision incorporated therein) (criticism of Bailey rule in its impact on subsequent appropriators), Green River Development Co. v. FMC Corp. 660 P.2d 339 (Wyo. 1983).

Due diligence requirements are not devices to ferret out speculative claims; the intent to appropriate must exist in order to invoke the benefits of relation-back. It is noteworthy in this general regard that the initiation of an appropriation at common law was predicated on the actual commencement of construction of the diversion works. See Murray v. Tingley, 37 Mont. 177, 95 P. 370 (1908), Wright v. Cruse, 37 Mont. 177, 95 P. 370 (1908), Bailey v. Tintinger, supra, Gilcrest v. Bowen, 95 Mont. 44, 24 P.2d 141 (1933), Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918), Holbrook Irr. Dist. v. Fort Lyon Canal Co., 84 Colo. 174, 269 P. 574 (1928), New Loveland & Greeley Irr. and Canal Co. v. Consolidated Home Supply Ditch, 27 Colo. 525, 62 P. 366 (1900). Obviously commencement of construction of the diversion works is a weighty index of present intent to appropriate some measure of water. See also RCM 89-810 (repealed 1973) (Notice of appropriation must be placed at point of diversion and must include quantity claimed, purpose of use and place of use), see also MCA 85-2-402(8) (Permits, "conditional rights", can be changed. Without a specific description of the water use, it would be impossible to determine adverse affect to other appropriators, MCA 85-2-402, since the water use pattern for the historic use is nebulous).

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The existence of diversion works, while instructive as to the presence of intent to appropriate to some degree, does not end the analysis, since such diversion works merely echo the upper-most limit of the appropriation. Bailey, supra. Present need and intent to appropriate is the touchstone of the boundaries of the limit of the appropriation. Changes in that intent that yield a demand for additional quantities of water reflect a new and independent intent to appropriate again, with a concomitant change in the relevant priority date. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).

Thus present need is critical in marking the boundaries of the measure of the appropriation. Providing for future need in setting the appropriative limit necessarily involves one in the vagaries of forcasting that need over whatever period of future need is deemed permissible. While some common law courts devised the limitation of a reasonable future use over a reasonable period of time, See Denver v. Sheriff, supra, there appears to be no objective criteria defining what it is that one should consider "reasonable" in this context. Without more flesh to the scope of the inquiry, what is reasonable depends on whose ox is gored; Bozeman's water supply or that of future appropriators.

The insistence on need and use in the appropriative system is a deliberate one. See, Dewsnup, supra. The "first in time, first in right" talisman of the system is often incredibly harsh on subsequent appropriators. Only the requirement that such prior claim be strictly limited to the amount required for the prior use advocates its impact. Such concepts acting together

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implement the broad directive of the appropriation system; the economic development of the arid West. See In Re Brown, Dept. Order, 4/84 (footnote 10), but see generally, The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development, Williams, Natural Resources Journal, Vol. 23, p. 6 (1983).

Awarding Bozeman a claim for future use tends to insist upon the priority advantages of the system while negating that feature that assures wide-spread use of the water. Moreover, an error in the most efficient allocation of the water cannot be corrected by the marketplace. Ordinarily, the priority system depends on the marketplace to transfer water to its most productive uses. See generally, MCA 85-2-402. A claim for future use frustrates this allocating mechanism as private appropriators would be disabled from holding such a claim. While the reservation process shares to some degree the same difficulty (only public bodies can hold reservations - ARM 36.16.112), the Board nonetheless retains continuing authority over whether a reservation is meeting its purposes, and can thus make the reserved water available to others if the public purposes inherent in the reservation are not fulfilled.

For all these reasons, the Hearings Examiner concludes that the Board of Natural Resources and Conservation has sole jurisdiction over that portion of Bozeman's claim that seeks water for future use. The reservation process is best suited to the peculiar problems attendant to claims for future uses. Under the broad powers enumerated in the statute, the Board can tailor Bozeman's claim to all of the interests served by the water

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resource, and can monitor any disposition to assure that its objectives are being met. See MCA 85-2-316(9). More particularly, the Board can more closely dovetail Bozeman's admittedly important claim for future use with other issues such as the potentially competing claims of other future appropriators for water development, with an eye toward what sources of water supply are best suited to serve each. See MCA 85-2-316(d) (reservation must be in public interest).

Notwithstanding, the generality of the foregoing, however, it will be observed that the findings and conclusions reach issues connected with Bozeman's claim for future use. The Hearings Examiner reaches such issues in order to make a full record, and thus avoid remand in case of error. Further, it strikes the hearings examiner that such findings may have an evidentiary significance in any future proceeding before the Board. The jurisdictional error implicit in Bozeman's claim was obviously not apparent to any of the parties hereto, and at lest the issues of unappropriated water and adverse affect to prior appropriators have been fully and fairly litigated. The nature of the hearing argues for the accuracy of the evidence, and the entire adversarial process argues for the trustworthiness of the findings based thereon. See MRE 803(24), 804(b)(1), see also MRE 804(b)(1), but see In re Colbert's Estates, 51 Mont. 455, 153 P. 1022 (1915). Indeed, it may appear to the Board that the present parties and those in privity of interests therewith should be collaterally estopped from relitigating any matters relating to adverse affect and unappropriated water. See generally, Brault v. Smith et al., ___ Mont. ____, 41 St. Rep. 527 (1984),

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Intermountain Telephone & Power Co. v. Mid-Rivers Telephone, Inc. ____ Mont. ____ 39 St. Rep. 2226 (1982). These questions, and indeed the materiality of the critieria of MCA 85-2-311 to the reservation process, are for the Board.

For these reasons, the disposition herein on Bozeman's application for a new water use permit will reflect only that quantity of water the evidence shows is currently needed. "Current need" in this context would doctrinally extend to the date of this disposition. In light of the considerations prompting a distinction between present and future need, it is not sensible to limit a prospective appropriator whose intent is otherwise bona fide to that quantity of water needed at the initiation of the appropriation where the evidence shows that additional need will arise by the time the diversion facilities can be constructed. Although Bozeman does not need to construct additional diversion facilities, the same reasoning argues persuasively that Bozeman's claim should embrace current need, and insofar as the record permits, the disposition provides such a quantity of water.

The Hearings Examiner is also aware that the foregoing conclusion is at odds with some of the language in In re Plentywood, Dept. Order. However, the issue herein was not exhaustively analyzed therein, and such former disposition is thus not compelling authority. Moreover, the underlying problem has jurisdictional overtones, and it is inappropriate to defer to unwarranted extensions of this Department's authority.

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The Hearings Examiner accepts jurisdiction over the quantity of water presently needed notwithstanding the statutory language providing for the reservation of water for "existing beneficial uses." In context, that language probably was meant to embrace only reservations for fish and wildlife purposes or other flows (such as preservation of water quality) that are inherently "public" uses of the water resource. See Paradise Rainbow v. Fish and Game Comm., 148 Mont. 412, 421 P.2d 717 (1966). While the legislature might reasonably conclude that only public agencies should hold claims to water for "public purposes," see MCA 85-2-223, it cannot reasonably be supposed that the legislature intended that an otherwise valid common law appropriation should lose its marketablility solely because its holder is a public entity. See ARM 36.16.112. Alternatively, "existing beneficial use" should be construed to provide a convenient remedy to a public entity that seeks both a current and future water use. The convenience provided for in a single proceeding can of course be waived by one not electing such benefits. But see ARM 36.16.105 (2)(a), see also ARM 36.16.110

HYALITE RESERVOIR

Some of the testimony herein relates to water that could be released from Hyalite Reservoir as a source of supply for Bozeman's water claim. This testimony is not necessary to determine the existence of unappropriated water for Bozeman, and it has not been relied upon in working the material determinations herein.

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In In re Monforton, Dept. Order (1983), rev'd on other grounds, 1st Jud. Dist. (1983) (appeal pending), the Department specifically addressed the concern that the permit process not become a shield or barrier insulating unlawful or wasteful uses of water from the legitimate claims of new appropriators. Therein, it was noted that where an applicant for a permit makes a prima facie showing of waste, and the amount of that waste is pivotal to the issue of unappropriated water or adverse affect to other appropriators, a permit should issue subject to the express condition precedent that the prospective appropriator enjoin such waste in a court of competent authority.

Here, the amount of water from Hyalite is not pivotal to the issues, since there is otherwise available water for Bozeman's claim subject to its junior priority. However, to avoid remand in case of error, the Hearings Examiner would otherwise conclude that Bozeman has made a prima facie showing that Hyalite Reservoir utilizes and does utilize an unreasonable means of diversion, and hence wastes water within the meaning of Monforton. See generally, In re Brown, Dept. Order, 4/84, State ex rel. Crowley v. District Court, 108 Mont. 89, P.2d 23 (1939).

The evidence establishing such waste is derived from Department employees, and it is given weight because the Department claims ownership of Hyalite water. Generally, such evidence (Exhibit 8) establishes that the refill schedule at Hyalite commences around November 1 of any given year and progresses steadily through May 1, with rapid acceleration of refill thereafter through the spring run-off months of May and

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June. See Figure 4, Exhibit 8. Since Hyalite is upstream from Bozeman's diversion point, the practice of storing in winter months limits the availability of water downstream throughout such wintertime periods.

The evidence shows that there is a 99% chance in any given year that inflows to Hyalite in May, June and July will exceed 5063 acre feet. (In 50% of the years inflows will exceed 14,961 acre feet). The average annual deliverly of water out of Hyalite is 5060 acre feet. Table 2, Exhibit 8. More than 90% of the time there is enough storable inflow to Hyalite Reservoir to fill the structure even if it was dry. However, in at least 50% of the years there has been at least 2600 acre feet in storage at the start of the refill season, and in 99% of the years there has been at least 1,000 acre feet. Thus, Hyalite reservoir is rarely, if ever, dry.

These figures demonstrate conclusively that Hyalite could simply forego winter time diversions with no adverse affect to its operations. In virtually every year, spring-time run-off is sufficient to replenish all available storage capacity. This is so even if the Department had delivered in the prior year the maximum qunatity of water it has historically delivered. (Such maximum quantity is 7100 acre feet. Table 2, Exhibit 8. In 90% of the years, storable inflows at Hyalite will exceed 8334 acre feet. Table 3, Exhibit 8). Since the demand out of Hyalite is predominantly, if not exclusively, summer-time irrigation, and since Hyalite virtually always has some carry-over storage, it will be seen that a cessation of winter time storage will have

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virtually no impact on Hyalite operations, even in tne odd year where irrigation demands may predate by a month or so the onset of spring runoff.

While the Department report (Exhibit 8) acknowledges the foregoing, it fallociously assumes that the waters that are physically available in wintertime by such a change of storage can only become available by means of contract with the Department out of a water use permit in the Department's name. As exhaustively explained in In Re Brown, a storage right, like all water rights, is a product of that quantity of water reasonably required to fulfill the historic use. Merely because a reservoir has sufficient capacity to store water does not mean that such reservoir has a right to store water as against the claims of others. While Bozeman may need to contract with the Department in the manner suggested in the report if it desires to regulate the winter flows, and if it cannot otherwise purchase or condemn an easement in the existing storage facility so as to regulate flows in its own right, see generally, Cocanoughor v. Zeigler, 112 Mont., 76, 112 P.2d 1058 (1941), Bozeman may insist on this record that the natural flow of Hyalite Creek be left undisturbed by the Hyalite storage facility. On this record, Hyalite can reasonably exercise its rights under the "changed condition" of no wintertime storage, and Hyalite cannot therefor insist that Bozeman purchase water that Hyalite has no right to. In re Brown, supra; MCA 85-2-401.

Such wintertime flows amount to 4000 acre feet in good water years (Exhibit 8). While this calculation is based on November

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through April Middle Creek flows, it is still reasonably accurate for Bozeman's slightly varying time of use. See Exhibit 8, Figure 3. Thus, without consideration of any other evidence, Bozeman has made a prima facie case to 4,000 acre feet of water in its claim for a new water use permit.

If the disposition made herein is otherwise erroneous in whole or part, Bozeman is entitled to at least a 4,000 acre foot claim, subject to an express condition that Bozeman "enjoin" or otherwise provide satisfactory assurances that Hyalite will not in fact disturb wintertime flows. See In re Monforton, supra, In re Anderson Ranch, supra. This Department has no authority to order an existing water user to do anything. More generally, since this is not an action directly involving the Department as an appropriator the conclusion herein regarding Hyalite Reservoir practices is obviously not binding on the Department. There may be concerns not indicated herein that fully establish Hyalite diversion practices as fully reasonable. Indeed, Bozeman may decide that it furthers its interest to allow wintertime storage to encourage spring spills that may satiate competing priorities at that time. Finally, in keeping with Monforton and assuming that these wintertime flows are the only waters available, Bozeman cannot simply begin diversions that injure downstream users and insist that such users' remedy lies with Hyalite. Thus, a condition similar to that referred to above must be appended to any disposition premised on Hyalite reservoir practices. The prima facie showing made by Bozeman herein would be sufficient to allow Bozeman to seek to secure such flows, and still protect its priority date.

BUREAU OF RECLAMATION AND MONTANA POWER COMPANY

The objections of the Montana Power Company and the Bureau of Reclamation are identical to those objections previously filed with the Department concerning other applications for new permits attendant to proposed development upstream from Canyon Ferry. Bozeman is identically situated to such other applicants. In re Brown, Dept. Order, 4/84 and In re Anderson Ranch, 4/84, together with their progency, establish that, as a matter of law, the objections of MPC and BR state no cognizable claim to any criteria in MCA 85-2-311. In particular, such dispositions establish that notwithstanding MPC and BR claims, there is unappropriated water within the meaning of the statute available to new permittees without adverse affect to these entities' senior claims.

The Hearings Examiner feels fully warranted in concluding that such former dispostions warrant striking the present objections of MPC and BR insofar as they relate to Bozeman's appropriation for a new water use permit. See Structuring Discretion through Precedents, K. David Administrative Law, 2d. Ed. 8:9-8:12, Greyhound Corp. v. ICC, 551 P.2d 414, (D.C. Cir. 1977), Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978), Contractors Transport Corp. v. United States, 537 F.2d 1160 (4th Cir. 1976), Brault v. Smith, ____ Mont. ____, 41 St. Rep. 527 (1984), Intermountain Telephone & Power Co. v. Mid-Rivers Telephone, Inc., ____ Mont. ____, 39 St. Rep. 2226 (1982).

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However, the record herein is fully sufficient to support such prior dispositions, and findings have been made regarding the MPC and BR objections. Reference should be had, however, to In re Brown, supra, and In re Anderson Ranch, for an exhaustive treatment of Montana Power Company's and the Bureau of Reclamation's evidence. The Hearing Examiner will not duplicate his reasoning regarding such rights herein.

In re Brown does not dispose, however, of MPC and BR claims in change proceedings. For the reasons detailed elsewhere herein, change proceedings demand a different focus on BR and MPC claims in their status as junior appropriators. Unlike the situation with a new permit, such circumstances demand an accounting of BR and MPC vested rights to maintenance of the stream conditions. The rule of priority is perforce inadequate to address this impact.

MPC moved to intervene in the change proceeding. MPC claims no actual notice of the pendency of the change proceeding. MPC motion was granted, subject to Bozeman's claims of prejudice due to unfair surprise attendant to MPC's evidence. No evidence was in this regard unfairly surprising. MPC relies solely on its evidence introduced in opposition to the new permit.

DITCH COMPANIES AND BR

Nothing herein should be construed as determining the ownership of water rights as between the "carrier entities" noted above and those who use water through them. For the reasons given in IX Ranch, Dept. Order, 1983, such entities are

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recognized as having standing to assert the interest(s) of all water uses attendant to the respective projects. See also In re Rights to Use Waters of Yakima River, (Wash. 1983), 674 P.2d 160.

ADJUDICATION INTER SESE

The ditch companies are apparently concerned that the results herein may somehow be construed to "adjudicate" their water rights as against the Bureau of Reclamation and the Montana Power Company. This is, as a matter of law, impossible. The present proceedings do not adjudicate any right. The adjudication of these objectors' rights even as against this Applicant is a matter for the water court. A fortiori, no objector's right is "adjudicated" as against other objectors' rights. While the objectors hereto may have differing interests which are potentially antagonistic under other circumstances, insofar as the narrow focus of the present proceedings are concerned, such objectors are uniformly aligned against the Applicant. See In re Monforton, supra, In re Brown, supra, for a full discussion of the nature and scope of a new permit proceeding and its relation to the adjudication process.

NOTICES OF APPROPRIATION

The notices of appropriation propounded herein are given no effect. Such notices do not supplant the need of proof of beneficial use of a reasonable period of time. See In re Brown

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for an exhaustive discussion, see also Griffel v. Cove Ditch Co., 41 St. Rep. 1 (1984), 79 Ranch, Inc. v. Pitsch, ____ Mont. ____, 666 P.2d 215 (1983). They are redundant to other evidence in the record.

For the reasons given in In re Brown, the case of Montana Power Company v. Broadwater-Missouri Water User's Ass'n, 50 F. Supp. (Montana 1942), is immaterial and irrelevant to the present matter. The Broadwater case is also redundant of MPC's other evidence.

FISH AND GAME OBJECTIONS

Fish and Game introduced hearsay in opposition to Bozeman's application for a new water use permit. Fish and Game claims no appropriation that may be affected by Bozeman's proposed use. The materiality of Fish and Game's claims, therefore, depend on whether MEPA, MCA 75-1-101 et seq., supplements the "exclusive" criteria in MCA 85-2-311, see MCA 75-1-105, and whether a party may introduce environmental evidence even where the Department has not prepared an EIS, see MCA 85-2-124(1), MCA 75-1-103(2) (an agency shall use all practical means), and whether the Fish and Game has standing to assert a fish and wildlife impact where it has not sought an appropriation, MCA 85-2-223, Paradise Rainbows, supra; or a reservation. See MCA 85-2-316.

None of these questions need be resolved herein, however. The "evidence" of Fish and Game is naked heresay. More importantly, this heresay is conclusionary in tone. No supporting facts, measurements or reasoning is given in support

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of the naked allegations. Such evidence is not reliable, probative and substantial. See MCA 2-4-702, Hert v. J.J. Newberry, supra.

Moreover, much in Fish and Game's allegations is otherwise immaterial. Those matters that raise concerns about the effects of water levels in Hyalite Reservoir have nothing to do with this Department's authority in this proceeding. As previously detailed herein, this examiner has no authority to direct the operations of Hyalite to any degree. The concerns echoed by Fish and Game may become relevant if, and only if, Bozeman hereafter asserts any rights against Hyalite. As previously indicated, the evidence herein indicates that under water law principles Hyalite is wasting water as against the claims of Bozeman. However, as also previously noted, this observation is not and cannot be an adjudication of waste. Fish and Game's allegations are therefore premature. To the extent they state a cognizable claim, they may be heard at any time Hyalite actually changes operations for Bozeman demand.

The testimony of Mr. Bolan, District Ranger, is likewise immaterial. He also merely notes concerns about the future operation of Hyalite. These concerns aren't evidence, and if they are to find expression, they must await an actual change in operation at Hyalite.

Overall, the testimony of Fish and Game appears directed toward whether the issuance of the permit constitutes major state action significantly affecting the human environment, thereby triggering the EIS requirement. I do not perceive that this

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issue is before me and accordingly, no conclusions are made thereon. For this reason, it is not necessary to decide whether the 10,000 acre foot or 15 cfs threshold in MCA 85-2-124 merely describes when an applicant must pay for EIS, or whether the section proscribes an EIS review for applications under the stated quantities. Nor, for these reasons, is it necessary to inquire into the permissible constitutional reach of the EIS process into the exercise of the right to change an existing right. Finally, it is immaterial whether MEPA can be used to maintain instream flows where Fish and Game, as the exclusive representative of the pyublic (MCA 85-2-223) has failed to assert or claim an appropriation or reservation, where the permit scheme is legislatively declared to be the exclusive method of acquiring rights to water use. MCA 85-2-301.

FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has subject matter jurisdiction over so much of Bozeman's application for a new water use permit as seeks a quantity of water for present need.

2. The Department of Natural Resources and Conservation has no subject matter jurisdiction over so much of Bozeman's application that seeks a permit for future need.

3. The Applicant Bozeman has a present need for the following quantities of water: 190 acre feet annually from September 15 through October 15; 190 acre feet annually from October 16 through November 15; 190 acre feet annually from

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November 16 through December 15; 190 acre feet annually from December 16 through January 15; 190 acre feet annually from January 16 through February 15, 190 acre feet annually from February 16 through March 15; and 190 acre feet from March 16 through April 15. Bozeman has no current need for water at any other time of the year on annual basis. Any other quantity of water in excess of the designated quantities can only supply future need. Bozeman has a bona fide intent to appropriate the quantities of water designated, and it is not attempting to speculate in the water resource insofar as it intends to divert and use these quantities of water.

4. Bozeman has a present need for water notwithstanding that other sources of supply currently relied upon may yield additional quantities of water in some years. Bozeman's need extend to the greatest quantity of water it reasonably needs at the current time. Bozeman's current water needs embrace and extend to a requirement for a reliable water supply throughout the years.

5. Bozeman intends to divert the waters claimed herein by means of a relatively small earth filled dam on the source of supply. A headgate on that structure diverts water into a pipeline. The headgate can be operated to regulate the quantity of water diverted into the pipeline. The pipeline itself is equipped with a device that measures current flow rate and accrued volume. The waters so diverted are piped into the mouth of Bozeman Creek. At a point further downstream on Bozeman Creek, such waters are diverted again into pipes that connect to

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a relatively small reservoir, from which such waters are finally routed to the City's distribution system. "Return flows" from municipal uses are collected in the Applicant's waste water treatment plant, and are ultimately returned to the East Gallatin River.

These diversion works are presently in place, and are of a sufficient capacity to accommodate or transport the full amount of water claimed by Bozeman in these proceedings.

6. During the wintertime, the water use by Bozeman will be 85% to 90% efficient, meaning that ony 10% to 15% of the amount diverted will be consumed and lost to the Missouri drainage. However, all water uses by Bozeman out of Hyalite will be practically 0% efficient for those users on Hyalite downstream of the diversion point, as the point of return flows is on the East Gallatin River.

7. The use of those quantities of waters reflected in Finding of Fact #3 would be of material benefit to the Applicant and its inhabitants. The use of such waters for municipal purposes is a beneficial use.

8. The Applicant duly and regularly filed its application for beneficial water use permit with the Department of Natural Resources and Conservation on October 23, 1978, at 3:30 p.m.

9. The Applicant intends to divert the waters claimed in these proceedings at a point in the NE¼NE¼NW¼ of Section 23, Township 35, Range 5 E, all in Gallatin County.

10. The Applicant intends to use the waters claimed within the City of Bozeman.

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11. A municipality is an entity entitled to appropriate water.

12. The diversion works for Bozeman's water are reasonable and adequate for their intended purposes and said works will not result in the waste of the water resource.

13. Montana Power Company's Cochrane facility has a capacity to use 10,000 cubic feet per second for the production of electrical power for sale, and MPC has historically prior to 1973 used such quantity of water for such purpose. The Montana Power Company at its Cochrane facility also maintains and controls a reservoir with an approximate capacity of 5,750 acre-feet. The Montana Power Company fills, refills, and otherwise successively fills this reservoir throughout the year.

14. The Montana Power Company does not typically run Cochrane at full capacity. Cochrane is for planning purposes loaded and run to 8,200 cfs. There is virtually no chance that Cochrane will spill during the time of use proposed by Bozeman in its application for a new water use permit. Cochrane uses the flows of the Missouri River.

15. If Cochrane spills, it is a practical certainty that each of MPC's other dams will spill, due to such other facilities' relatively small capacities.

16. If water is not used at Cochrane or stored at Cochrane, such waters will spill over Cochrane Dam.

17. Montana Power Company also stores quantities of water at its Hauser Lake facility, at its Holter Lake facility, at its Black Eagle facility, at its Ryan facility, and at its Marony

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facility. All of these hydroelectric units also produce power for sale by use of the direct flows of the Missouri River.

18. The Missouri River flows in quantities in excess of 10,000 cubic feet per second only from approximately April 15 to July 15 in relatively good water years. In some years, the Missouri River will never exceed 10,000 cfs. The Missouri River flows in excess of 10,000 cfs on a reliable basis only at times of spring run-off.

19. Montana Power Company's hydroelectric facilities are largely run of the river power facilities. The storage attended to these facilities is only sufficient to augment the direct flows of the Missouri at times of peak demand of electrical power or to offset periodic fluctuations in the flows of said river. Said storage also provides head for power production.

20. A flow rate of 3.2 cfs is a reasonable estimate of Bozeman's requirement to divert the quantity of water provided for in Finding of Fact #3.

21. The Bureau of Reclamation uses waters of the Missouri River at its Canyon Ferry facility. Said waters are used in the production of electrical power for sale. The maximum turbine capacity at Canyon Ferry is 6,390 cubic feet per second.

22. The Bureau of Reclamation also diverts waters of the Missouri River to the Helena Valley Irrigation District for agricultural purposes. The Bureau diverts 800 cubic feet per second for these uses.

23. Canyon Ferry has a reservoir capacity of 2,051,000 acre-feet. The top three feet of the storage are operated by the

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Army Corps of Engineers, and the Bureau of Reclamation claims no right or interest in the waters accumulating thereon.

24. The Applicant's proposed use will not alter the historic pattern of water availability at Montana Power Company's hydroelectric facilities.

25. The Applicant's use of 14.9 cfs up to 5399 acre feet annually will not capture water otherwise ineviatbly required for downstream demand. The diversion of said waters will not, as a practical matter, inevitably and necessarily deprive seniors' of their water at their historic time and place of need.

26. There are unappropriated waters available for the Applicant's use in the amounts of 14.9 cfs up to 5399 annually throughout the period of October 15 through April 15, inclusive, in at least some years.

27. If the Bureau of Reclamation maintained its historic practice of diverting water at Canyon Ferry, there would be virtually no years in which water would be available for upstream consumptive use after August 9. Moreover, if the Bureau should maintain its current and customary method of operation, in most years there will be water available for new upstream uses after the beginning part of July. Indeed, under the present practices of the Bureau of Reclamation, in many years (approximately 40%), there will be no water available for upstream consumptive use throughout the year.

28. The Bureau of Reclamation does not release water in the operation of its Canyon Ferry facilities in recognition of downstream prior rights, except that transfers of water and/or

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energy may be made by agreement between Montana Power Company and the Bureau of Reclamation. The Bureau of Reclamation in the late winter or early spring of any given year spills by drafting from storage an amount equivalent to a conservative estimate of anticipated snow-melt runoff.

29. The return flow from Bureau of Reclamation uses provides the only source for flows of the Missouri River immediately downstream from Canyon Ferry, except in instances when the Bureau deliberately spills water in bypassing storage waters derived from upstream MPC facilities or otherwise, and except in those months, if any, where the flows of the Missouri are in excess of the Bureau's storage capacity and direct flow needs.

30. The water uses of the Bureau of Reclamation provide a net increase in Missouri River flows during substantial protions of most years. That is, the return flow from the Bureau of Reclamation uses will often exceed that volume of water represented by the natural flow of the Missouri measured at the entrance point to Canyon Ferry.

31. The Applicant's use of 14.9 cfs up to 5399 acre feet will not adversely affect the rights of prior appropriators.

32. The storage of water at Canyon Ferry provides marked and substantial recreational benefits.

33. The use of 14.9 cfs up to 5399 acre feet by the Applicant will have no material effect on the water uses of the Bureau of Reclamation.

34. No water use of the Bureau of Reclamation has ever been curtailed by reason of a water shortage. Instead, the Bureau

voluntarily and purposefully curtails present use to maintain storage. The Bureau of Reclamation fills, refills, and otherwise successively fills the storage structure throughout the year insofar as water is available.

35. The Bureau of Reclamation operates Canyon Ferry to maintain carry-over storage for the driest period of record. This "critical period" is roughly the low flow period from March of 1934 to August of 1938. Primary reliance is made on direct flows of the Missouri. The Bureau's practices of saving storage waters for potential use in future years of low flow is an unreasonable one, and results in the waste of the water resource as against the claim of upstream users seeking permission for new water uses.

36. The Bureau of Reclamation diverts and otherwise controls a quantity of water in excess of its needs.

37. The Bureau of Reclamation is wasting the water resource by demanding an unreasonable quantity of water merely to extract and use an unreasonable small proportion thereof.

38. The only uses of water of Hyalite Creek during the period of use proposed by Bozeman for the new water use permit in virtually all years are stockwatering uses, and the hydroelectric uses of the Bureau of Reclamation and the Montana Power Company.

39. Approximately 40,000 acre feet on an average annual basis is evaporated from Canyon Ferry.

40. Canyon Ferry maintains and operates at an average head substantially greater than 100 feet.

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41. Hyalite Creek or Middle Creek is a tributary of the East Gallatin River, which in turn is a tributary of the Gallatin River, which in turn is a tributary of the Missouri River.

42. Bozeman's use attendant to its new water use permit will result in a depletion to the water stored or used at Canyon Ferry.

43. The diversion facility of Bozeman is administratible in deference to downstream senior demand.

44. The use by Bozeman of the Lichtenberg right as contemplated by Bozeman would result in an expansion or enlargement of the historic use associated with the right.

45. The use by Bozeman of the Lichtenberg right as contemplated by Bozeman would result in injury to juniors' vested rights to maintenance of the stream conditions as of the time of their appropriation.

46. Bozeman has no present need for water during the summer months (April 15 - September 15).

47. The "Lichtenberg right" consists of 100 inches with an 1866 priority and 100 inches with an 1873 priority decreed to Henry Monforton, and 100 inches with an 1869 priority decreed to W. Caldwell.

48. The distance involved in the change in the location of the means of diversion is too slight to account for any differences in available water at the respective points, even asusming that Hyalite is a gaining stream. The differences would not be measurable.

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49. The Blaney-Criddle method of estimating crop consumption is a reasonable one.

50. The Lichtenberg right was used historically to irrigate approximately 250 acres.

51. The Henry Monforton place, the place of use of the Lichtenberg water, has for at least two decades (1945-1975) been irrigated in a fashion that devotes 1/3 of the land to grain production, and 1/3 of the land to summer fallow, and 1/3 of the land to hay production.

52. Irrigating hay crops requires substantially more water than the irrigation of grain crops.

53. The pattern of irrigation at the Monforton place was substantially as follows. Around the first of June, the hay was irrigated. Then, around the first of July, the grain was irrigated. Then, in August, a second irrigation of the hay was performed.

54. The Lichtenberg right was used over a 90 day period, but not continuously over the 90 day period. The Lichtenberg right was used approximately 40 days in actual irrigation.

55. The City's diversions pursuant to the Lichtenberg right will be 100% consumptive to users on Hyalite Creek or Middle Creek.

56. The City's diversions pursuant to the Lichtenberg right will result in a net benefit to users below the confluence of Middle Creek, and the East Gallatin River.

57. The Middle Creek Ditch Company has decreed rights to 2900 inches of Middle Creek. Said waters are distributed and

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used for irrigation purposes. The priority date for such rights range from 1864 through 1881. The point of diversion for such rights is downstream from Bozeman's point of diversion for all waters claimed in these proceedings. Middle Creek Ditch also carries supplemental water out of Hyalite Reservoir.

58. The Hoy Creek Ditch Company diverts water downstream from Bozeman's point of diversion for all the waters sought herein. Hoy Creek distributes water for irrigation purposes. Hoy Creek has adjudicated to it 750 miners inches of Middle Creek. Hoy Creek uses up to 210 miner's inches at times of spring-melt runoff. Hay Creek also carries water attendant to arrangements with Hyalite Reservoir. The flows of Middle or Hyalite Creek generally become insufficient to fill all decreed rights after runoff. Runoff recedes by July 1 in most years.

59. Water Commissioners are typically used in July or late June. The time that water commissioners are needed is reflective of the time of water shortages.

60. The City of Bozeman intends to change the point of diversion, and place of use, means of diversion and purpose of use of an existing right.

61. Hyalite or Middle Creek is water short. That is, substantial shortages inevitably occur in July and August of any given year, and commonly, some of the Objector ditch companies priorities are worthless at such times.

62. The Lichtenberg right has historically used up or consumed 301 acre feet per year. This quantity has been lost to the stream system. Bozeman may take such a quantity of water without injury to other appropriators.

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CONCLUSIONS OF LAW

1. The Department has subject matter jurisdiction over so much of Bozeman's application for a new water use permit that seeks a use for present need. The Department has no subject matter jurisdiction over any other quantity of water sought, MCA 85-2-301 et seq.

2. The Department has subject matter jurisdiction over Bozeman's claim for a change of a water right, except that the Department has no jurisdiction over the question of whether Bozeman holds title to the right at issue. MCA 85-2-402.

3. Bozeman has a bona fide intent to appropriate 3.2 cfs up to those volumes stated in Finding of Fact #3, and Bozeman is not in this respect attempting to speculate in the water resource. Bozeman has a speculative intent to appropriate any greater quantity of water.

4. Bozeman's means of diversion are adequate for all the waters sought herein, and said means will not result in the waste of the water resource. See State ex rel. Crowley v. District Court, 108, Mont. 89, 88 P.2d 23 (1939).

5. There are unappropriated waters available for Bozeman's use in the amount of 14.9 cfs up to 5399 acre feet annually, and all lesser amounts throughout the October 15 through April 15 time of use proposed by Bozeman.

6. The use of 14.9 cfs up to 5399 acre feet, and all lesser amounts, by Bozeman will not adversely affect the rights of prior appropriators.

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7. The priority date for Bozeman's new water use permit is October 23, 1978, at 3:30 p.m. MCA 85-2-401.

8. Bozeman is an entity entitled to appropriate water. MCA 85-2-301, MCA 85-2-102(10).

9. Bozeman is not entitled to water by virtue of its new water use application from September 15 - October 15. Such a time of use is not within the period claimed by Bozeman. See MCA 85-2-301, 85-2-307.

10. The Objectors have the burden of going forward with the evidence such that reasonable minds can differ over the scope and exent of their asserted water rights. See, In re Brown. In addition, the Objectors have the burden of production on the question of the type and character of the injury complained of by Bozeman's proposed change. The Objectors, Hoy Creek Ditch Co. and Middle Creek Ditch Co. have met such burden. MPC and the Bureau of Reclamation have not, and assuming arguendo they have, the preponderance of the evidence is against them. MPC and BR rights are immaterial to the change proceeding because the disposition herein otherwise protects them, and because the City's consumption is less than the historical consumption.

11. The City is limited to the historical consumptive use of the Lichtenberg right in making its change in the purpose of use and change in the place of use.

12. The City can change up to 301 acre feet annually and can use such quantity at such times that diversions have taken place historically without injury to other appropriators.

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13. The City can presently use, and has need for, up to 190 acre feet from September 15-October 15 of any given year, but such use is an expansion of the historic use of the Lichtenberg right and must be used under a current priority date.

14. The Applicant bears the burden of persuasion by substantial credible evidence on its application for a new water use permit. Although Bozeman's filing predates the statutory change providing for this standard, the parties have agreed to apply it herein. In any event, the result would be the same even of the higher burden of a preponderance test. See generally, In re Monforton. The Applicant has met its burden.

15. The Applicant has the burden by a preponderance of showing the existance of an underlying right that can be the subject of a change. The Applicant further has the burden by the same standard of showing that no injury of the type and character asserted by the Objectors will occur. The Applicant has met its former burden, but has met its latter only as provided for herein. Even if the burden as regards the question of injury to other appropriators in a change proceeding was solely on the Objectors, the result would be the same.

16. Municipal use is a beneficial use, and such use embraces domestic uses, watering parks, commercial and business uses, fire fighting, watering parks and lawns and flushing sewers. MCA 85-2-102(2), City and County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1913), Holt v. City of Cheyenne, 22 Wyo. 212, 137 P. 876 (1944), Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1 (1957).

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WHEREFORE, based on the findings of fact and conclusions of law, the following proposed orders are issued.

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 20736-s41H is hereby granted to the City of Bozeman to appropriate 190 acre feet of water from September 15 - October 15, inclusive; and 190 acre feet of water from November 16 - December 15, inclusive; and 190 acre feet of water from December 16 - January 15 inclusive; and 190 acre feet of water from January 16 - February 15, inclusive; and 190 acre feet of water from February 15 - March 15, inclusive; and 190 acre feet of water from March 16- April 15, inclusive. All such waters shall be used to provide a supplemental municipal water supply for the City of Bozeman, and at no time shall such waters be diverted at a rate in excess of 3.2 cfs. The waters provided for herein shall be diverted from Middle Creek, also known as Hyalite Creek, at a point in the NE ¼NE¼NW¼ of Section 23, T35, R5E, all in Gallatin County. The priority date for rights granted herein shall be October 23, 1978, at 3:30 p.m.

> Provided that nothing herein shall be construed to authorize the City of Bozeman to divert water to the injury of any senior appropriator. All rights granted herein are subject to all existing and senior rights, and to any final determination of such rights as provided by Montana law.
>
> Provided further that in no event shall the City divert water except at times for such water, and at all other times the City shall cause and otherwise allow the waters provided for herein to remain in the source of supply.

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Provided further that Bozeman is authorized to divert the waters provided for herein out of the Middle or Hyalite Creek drainage into the East Gallatin drainage.

Subject to the terms, limitations, and restrictions described below, Application for Sever or Sell Appropriation Water Right No. 20737 by Del Lichtenberg to City of Bozeman is hereby granted to change the following described rights:

Amount: 300 miners' inches
Priority: 75 inches as of March 11, 1897; 75 inches as of July 1866; 75 inches as of October 1869; and 75 inches as of July 1873.
Purpose of Use: irrigation
Place of Use: S½S½ and N½SE¼ Section 23, T35, R5E and NE¼ Section 15, T35, R5E, all in Gallatin County.
Point of Diversion: SW¼SE¼NW¼ Section 23, T35, R5E, in Gallatin County.
Source of Supply: Hyalite or Middle Creek

Said rights are changed in their point of diversion, place of use, purposes of use and means of diversion, in the particulars noted below.

Amount: 3.8 cfs up to 301 acre feet annually
Priority Date: .95 cfs as of March 11, 1897; .95 cfs as of July, 1866; .95 cfs as of October, 1869; .95 cfs as of July 1873.
Purpose of Use: municipal
Place of Use: City of Bozeman
Point of Diversion: NE¼NE¼NW¼ Section 23, T35, R5E, in Gallatin County
Source of Supply: Hyalite or Middle Creek

Provided that diversions and use hereunder shall be confined to May 25-June 10, June 25-July 10, and August 1-August 10, all inclusive in any given year;

Provided further that no diversions shall take place hereunder if water is being diverted to the historic place of use defined above for agricultural purposes under a priority date senior to July 1, 1973;

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Provided further that no diversions take place hereunder unless and until Bozeman files water transfer forms indicating that Bozeman is successor in interest to the historic water use described above;

Provided further that Bozeman is authorized to divert the waters provided for herein out of the Hyalite Creek drainage into the East Gallatin drainage.

NOTICE

This Proposal for Decision is subject to the objections of the parties hereto. Said objections must be filed with Gary Fritz, Administrator, Water Resource Division, DNRC, 32 South Ewing, Helena, Montana, within twenty days of service of this order. Said objections must include a demand for oral argument, or the same is waived.

DATED this 4th day of June, 1984.

Matthew W. Williams
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620

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MEMORANDUM

New Water Use Permit

Beneficial Use

As discussed elsewhere herein, Bozeman is entitled to only that quantity of water it can beneficially use at the present time. "Beneficial use" within this context means the greatest quantity of water Bozeman can reasonably use. That is to say, Bozeman is entitled to a reliable water system. To this end, Bozeman is entitled to assume that its other sources of supply are at their lowest flow, and to assume that the greatest reasonable demand will be placed on that flow. See Denver v. Sherriff, supra. This rule is, of course, not unique to municipal entities. An irrigator's claim is not limited by average rainfall in the region, where drought would markedly increase his reasonable demand on the source. See Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

Here, the City of Bozeman has a reliable supply of 7,021 acre feet on an annual basis, with maximum possible diversions of 13,690 acre feet in good water years with all diverison facilities in good repair. The 7,021 acre foot figure is premised on a 90% reliability factor, meaning that Bozeman can expect to divert this quantity of water in at least 90% of the years. The 7,021 acre foot figure also disregards certain contractual claims to water from Hyalite Reservoir and the

Middle Creek Ditch Users. Disregarding these contractual claims is reasonable. Bozeman need not be required to purchase water when it can claim the resource in its own right. Indeed, the contractual arrangement with Middle Creek has now expired.

Thus, the task is to award Bozeman the difference between 7,021 acre feet and that quantity of water currently needed within the time of use proposed by Bozeman. The evidence on this point does not precisely dovetail. Applicant's Exhibit 4 would appear to indicate that Bozeman is short approximately 190 acre feet monthly throughout the winter. Mr. Mann testifies for Bozeman, however, that the winter deficit in 1980 is 1522 acre feet. Dividing 1522 by the seven month period indicated by Mr. Mann, we arrive at a monthly deficit of approximately 217 acre feet. Finally, Mr. Mann testifies that in 1980 the reliable yield is only 1650 acre feet for the winter months (here meaning a six month period), and gross diversion requirements are 2992 acre feet. The difference, 1342 acre feet, translates into a monthly average of approximately 224 acre feet. However, the 1650 foot figure (approximately 275 acre feet per month) is at odds with the reliable supply shown in Exhibit 4 (approximately 310 acre feet).

One is tempted to say that the inherent limitations of a graphic display makes it inherently less credible. However, if one adds the reliable supplies indicated thereon, the total indicates approximately 7025 acre feet, which is in close accord to Mr. Mann's 7021 acre feet. Since the graphs indicate a significant amount of detailed work, it is concluded that 190

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acre feet is a reasonable quantity for Bozeman's present needs during each of the winter months for which there is a deficit during the time of use proposed by Bozeman (October 15-April 15).

Since the City, by the evidence, plans continuous diversions where the physical scarcity of water in its other sources requires the exercise of the rights claimed herein, one can arrive at the correct flow rate from the 190 acre foot figure by noting that one cubic foot per second flowing for one day will yield 1.98 acre feet. Thus, the Applicant is entitled to a flow rate of 3.2 cfs.

It will also be observed that part of the present need evidenced by Bozeman is outside the time of use proposed by the City in its application. (September 15-October 15). As such, Bozeman is not entitled to such quantity by virtue of the application for a new water use permit. The measure of an appropriation must be limited by the announced intentions of the appropriator. Tooley v. Campbell, 24 Mont. 13, 60 P. 396 (1900), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909). Moreover, the "public notice" provisions would be controverted if the permit exceeded the announced intentions of the prospective appropriator. MCA 85-2-307, MCA 85-2-312(1) (permit may not exceed amount of water requested).

The claim by Bozeman for future use fails, jurisdictional defects aside, as an evidentiary matter. The proof of municipal growth by Bozeman, upon which need for water is predicated, is premised solely on the testimony of Mr. Mann. Mr. Mann consulted with the City Engineer on population estimates, and together they

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consulted other studies and arrived at a "conservative reasonable" estimate. The record does not reveal what data was utilzed, or in what fashion it was used. The record does not reveal the purposes or scope of the other studies. The record does not even show whether such other studies were concerned with the Bozeman area proper or the Bozeman environs. The record does not show whether future population estimates where arrived at by "trending" off of historical data, or whether a more sophisticated approach was utilized that focused on the economic and demographic variables that influence and are influenced by population growth. The record is equally barren as to the expertise of civil engineers to fashion such predictions. The record therefore contains no "reliable, probative and substantial" evidence, see MCA 2-4-702, to support a finding of the amount of future need, albeit it is evident that some future need will occur.

The tendency is to overlook all these defects, since the full amount is otherwise available without adverse effect to the Objectors herein. The Supreme Court in this State has shared this difficulty of defining reasonable limits to appropriations where such measure is not part of the live controversy Between the parties. See Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924) (court not bound by stipulation of parties as to measure of appropriation). The difficulty with paper rights is not their prejudice to existing users, but rather the ambiguity they create for future users. Where, as here, an entity attempts to lay claim to the remaining unappropriated water of a source, it

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is appropriate to demand more cogent proof of the extent of the need. The directive of the water permitting process to "provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights," MCA 85-2-101(2), see Mont. Const. Art. IX, §3(4), would be of little value or impact if the collection of "rights" so collected bears little or no relation to actual need on the source of supply. See generally, Basin Electric Power Cooperative v. State Board of Control, (Wyo.), 578 P.2d 557 (1978), McIntire, The Disparity Between State Water Rights Records and Actual Water Use Patterns, 5 Land & Water L. Rev. 22 (1970).

Unappropriated Water & Adverse Use

These issues can be summarily dealt with by the observation that Bozeman in its application for a new water use permit seeks a wintertime use on a source that is otherwise used at such times only for stockwatering. (MPC's and BR's hydroelectric uses are dealt with in In re Brown).

The focus of the inquiry is whether the natural and inevitable effects of Bozeman's diversions will, as a practical matter, capture water otherwise required for downstream demand, and whether Bozeman's diversions are administratible in deference to downstream demand in times of shortage. In re Brown, supra, In re Monforton, supra. Here the evidence shows that the source of supply will yield in excess of 14.2 cubic feet per second in the winter months in at least 50% of the years. Table 1, Exhibit 8.

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Stockwatering is not a heavily consumptive use. Fifteen gallons per day is a reasonable estimate for cattle. One cubic foot per second yields 646,272 gallons per day. Thus, one cfs over one day is capable of providing the consumptive needs of over 43,000 head of livestock.

The Hearings Examiner understands that stockwater users heaviest demand is for "carriage" water, or that amount required to get the water needed for consumptive uses to the livestock. Stockwater users are entitled to such waters so that they can "reasonably divert" that quantitiy of water required for consumptive uses. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). Even if one assumes, however, that the demands for such water extend annually with no requirement for any storage to any degree, there is still unappropriated water available. Even doubling the City's otherwise reasonable estimate of 5 cfs for such purposes, one can see from Exhibit 8, Table 4, that the City's diversions will still not necessarily or inevitably capture waters required for stockwatering on Hyalite Creek. (Hyalite Creek is the only source of controversy in this regard. East Gallatin flows will provide the carriage waters for users further downstream.)

The testimony of some of the objectors regarding the phenomenon of "anchor ice" and the increased requirements for carriage water attendant to it is not material to the present inquiry. Such "freezing from the bottom" is not an inevitable occurrence. If severe winters create such problems, and demand attendant to it is otherwise reasonable, the City with its junior

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priority cannot tread on this lawful senior demand. The permit process is not a replacement of the requirement for administration of a stream according to the priorities thereon. Rather, it merely blocks uses whose diversions will for all practical purposes always need to be curtailed in the face of senior demand.

The Hearings Examiner is also aware that Mr. Mann in his testimony used figures reflecting a smaller volume of water available out of Hyalite. However, that testimony in context was refering to that volume out of Hyalite that could be diverted reliably. (90% exceedence level). The City need not be limited by the base flow of Hyalite. When additional quantities are physically available in Hyalite, the City is entitled to use them should it have a need for them. The testimony does not indicate that the City intends to abandon a portion of its claim, particularly where the higher flows in Hyalite would be "firmed up" by diversions from the City's other sources. At any rate, the amount of water provided for herein for the City's present needs is within Mr. Mann's reliably available projections.

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Change of Water Right

Historical Use

At common law, the measure of an appropriation was framed by that quantity of water put to beneficial use over a reasonable period of time. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). Thus, in Whitcomb v. Helena Water Works Co., 151 Mont. 443, P.2d 301 (1968), the defendant City was enjoined from refilling its reservoir during late summer months where such diversions took water historically relied on by downstream juniors. The court held that such late summer diversions were an extension of the historic diversion practices of the City, and that therefore such addtional diversions constituted an enlargement of the original appropriation. An enlargement of the original appropriation is in law the birth of a new appropriation with a priority date attendant to the initiation of the new use.

Similarily, in Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911) the court observed that a change in a portion of a right historically devoted to placer mining to an agricultural enterprise resulted in an increase in the historic consumption of the right. The Court held that such an increase in consumption resulted in a new appropriation to the extent of the increased use. See also Head v. Hale, 38 Mont. 302, 100 P. 222 (1909) (increase of use amounts to new appropriation), but see generally, Bagnell v. Lemery, 40 St. Rep. 58 (1983) (adding storage to direct flow right to extend use not injury).

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Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), is to the same effect. There, against the claims of upstream juniors, a downstream appropriator was limited to his historical use under his adjudicated right. That is to say, the downstream senior was prohibited from extending his use to provide for a fish pond and swimming hole, where the historical use was confined to irrigation. Such an extension of use amounted to a new appropriation. See generally Cate v. Hargrove, 41 St. Rep. (1984).

The threshold question herein is the relevance of this "doctrine of historic use" to a proceeding focusing on whether the change asserted will adversely affect other appropriators. MCA 85-2-402. Stated more particularly, the issue is one of whether those activities that alter the historic use of a water so as to increase the burden on the source of supply fall within the rubric of a "change of water right."

In re Meadowlark Estates, Dept. Order, goes part way to at least framing the issue. Therein, the Department determined that an applicant for a change of water right is implicitly required by the statutes to make a prima facie showing of the existence of a water right that is the subject matter of the proposed change. In a change of water right proceeding, the legislature implicitly assumed that a water right existed, and an applicant for a change must show in an evidentiary way the existence of the same in order to have "standing" to involve the statutory process for the change of underlying interest. Stated another way, the statutes

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do not contemplate that the Department will approve a change of an interest that is nonexistent. See Pet. for Change, Etc., v. St. Bd. of Control, (Wyo. 1982) 649 P.2d 657 (1982).

Bozeman has, of course, complied with the narrow holding of Meadowlakes. The rights Bozeman seeks to change are decreed. "Adjudicated" rights, even prior to the present adjudication procedures, are prima facie evidence of the existence of the described interest, even as against those not party to the original decree. See Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938), Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935). (For a discussion of the burden to show legal title in the interest, see Burden of Proof, infra.)

Of more central importance to the present inquiry is the observation in Meadowlakes that a studied indifference to the question of the existence of the underlying right is at odds with the overriding purpose of the permit process. Meadowlakes recognizes that the permit/change provisions of the Montana Water Use Act are part of a constitutional and legislative overhaul of the water right system. The permit/change provisions are an implementation of the constitutional command to "provide for the administration, control, and regulation of water rights," and to provide for "a system of centralized records" for the same. Mont. Const., Art. IX, Sec. 3(4), see also MCA 85-2-101(2).

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The consistent theme of Meadowlakes and Monforton, supra, is that this collection of centralized records would be of little value or impact if it represented a mere collection of paper filings bearing little or no relationship to actual uses on a stream. Refusing to countenance an expansion of use attendant to a disruption implicit in a change of water right contributes to a "centralized record" of paper filings.

The doctrine of historic use differs from the question of the existence of the underlying right only in the scope of the scrutiny of the underlying right. Adjudications cannot feasibly set limits on an hour-to-hour or day-to-day basis. Hence, the adjudicated limit only describes the most water that can be reasonably used for the claimed use. Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). For example, an irrigator may claim sufficient water to irrigate his place of use in a drought year (no precipitation), notwithstanding that his customary use of the source will normally be less (some precipitation).

Enlargements of appropriations occur, however, not only by exceeding the "drought" levels prescribed in the decree, but also by management factors that tend to increase the demand on the source toward drought levels by increasing the place of use or by increasing the consumption of water. See Petition for Change, Etc. v. State Board of Control, supra. That is to say, enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right.

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This principle is reflected not only in the foregoing Montana cases, but in practically every state adhering to the prior appropriation doctrine. See Oliver v. Skinner, 190 Ore. 423, 226 P.2d 507 (1957), Tudor v. Jaca, 178 Ore. 126, 165 P.2d 770 (1946), Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534 (1868), Jensen v. Birch Creek Ranch Co., 76 Utah 356, 289 P. 1097 (1930), Gunnison Irrig. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 P. 852 (1918), Twaddle v. Winters, 29 Nev. 88, 85 P.280 (1906), Johnston v. Little Horse Creek Irrig. Co., 13 Wyo. 208, 79 P. 22 (1904), Clough v. Wing, 2 Ariz. 371, 17 P. 453 (1888)), Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962), Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954), Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 154 P.2d 507 (1944), Colorado Springs v. Just, 126 Colo. 289, 249 P.2d 151 (1952), Enlarged Southside Irrigation Co. v. Johns Flood Ditch Co., 116 Colo. 589, 183 P.2d 556 (1947). Thus so much of Meadowlakes that reflected a concern for the prevention of the bootstrapping of new uses to old priority dates is equally applicable under the historic use doctrine.

The Hearings Examiner understands that some Montana cases seem to speak in a contrary way as to the applicability of the historic use doctrine to change proceedings. In transbasin diversions cases, Montana has seemed to say that juniors in the basin of origin cannot as a matter of law be adversely affectd by a change in the basin of use. Since any return flows of the former use could not be available to juniors in the basin of origin, changes in that return flow attendant to the changed use

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cannot work injury. See Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972). This approach ignores, of course, the factual inquiry of whether there has been an increase in the historic diversions in the basin of origin in order to serve the changed use.

Similarly, Montana courts have commonly observed that no change in a water right can adversely affect an upstream junior. See Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935), Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936), but see Quigley v. McIntosh, supra. This, of course, is only true if the downstream senior is not increasing his historic use by the change, and only if such increase is immaterial as a matter of law to a "change-related" complaint.[1]

The invitation to focus solely on return flow disruptions seems enticed by a concern that a focus on the point of diversion by an administrative agency would amount to an invalid adjudication. The flavor of this reasoning appears most pronounced in the jurisdiction of Utah. See Crafts v. Hansen, (Utah 1983), 667 P.2d 1068, United States v. District Court, 121 Utah 18, 2421 P.2d 774 (1952), Piute Reservoir & Irrigation & Reservoir Co., 13 Utah 2d 6, 367 P.2d 855 (1962). Because of the fear of administrative excess, Utah applies the test of is there reason to believe that the proposed change could be implemented without adverse effect to existing rights. The nub of this position is reflected by some of the early decisions of this

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agency, to the effect that an applicant for a change need only show that his diversion works are administratible in deference to junior's rights to maintenance of the stream conditions.

W.S. Ranch Company v. Kaiser Steel Corporation, (N.M. 1968), 439 P.2d 714, reflects a similar posture. Therein, the court held that the adjudicated quantity must remain sacrosanct, notwithstanding a claim that a move downstream in the point of diversion would allow the claimant a greater quantity of water on a gaining stream. Curiously, and perhaps paradoxically, the court also observed that the claimant could not divert more downstream than he had upstream.

W.S. Ranch Company is against the weight of authority in the Western states, and is inconsistent with Montana law. See Quigley, supra, Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911), C.C. Cate v. Hargrave, 41 St. Rep. (1984), (historical use "fills in" decree), McIntosh, supra (no proof of gain in move downstream), see also Hamilton v. Town of Crawford, 592 P.2d 1327 (Colo. 1979) (decree embraces only that source of supply historically relied on), Rominiecki v. McIntyre Livestock Corp., (Colo. 1981), 633 P.2d 1064. The adjudication process assumes the operation of the historical use doctrine. Quigley v. McIntosh, supra, Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936). Focusing on the underlying concept in a change proceeding implements the decree rather than undermines the judicial product.[2]

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Moreover, acknowledging the historic use doctrine in a change proceeding complements the aim of the adjudication process to provide for an administratible stream. There can be no gainsaying that without a comprehensive adjudication, it is better to be upstream with a shovel rather that downstream with a priority, if only for the difficulties of administering water rights. See generally, State v. Pecos Oly. Artes. Conservancy Dist., (N.M. (1983), 663 P.2d 358. ("The object of an adjudication suit is to determine all claims to the use of the water in a given stream system in order to facilitate the administration of unappropriated waters and to aid in the distribution of waters already appropriated.") The constitutional provision and corresponding statutes of tnis State expressly recognize the one of the goals of the new system so as to provide for the regulation of water rights.

The early adjudication procedures were flawed because not all of the users were before the court. See generally, Stone, Are there Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 249, Stone, Problems Arising Out of Montana's Law of Water Rights, 27 Mont. L. REv. 1 (1965), Anaconda Nat. Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926). Therefore, the decree culminating tne process could never be executed as against absent appropriators. Without an opportunity to be heard by each water user, and a decree specific enough to allow for administration, the day-to-day regulation of rights according to the priorities thereof inevitably floundered. See generally, State ex rel. Zosel v. District Court, 56 Mont. 578, 185 P. 1112 (1919), State ex rel. Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935).

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The change proceeding should not be read so narrowly that it frustrates the purposes of an adjudication. Ignoring any "change-related" impact breeds the same frustrations that were endemic to the former system. The W.S. Kaiser approach, even assuming that it limits an appropriator to the water historically available to him, handicaps the administration of rights because it does not quantify the underlying historic use in a way susceptible of execution. Thus, such a system necessitates more hearings in order to effectuate the exercise of the underlying priority as against the claims of others. The State may not act summarily where issues of fact are outstanding. See Montana Power Company v. Public Service Commission, 41 St. Rep. 1712 (1984), Fuentes v. Shevin, 407 U.S. 67 (1972), North Georgia Finishing, Inc. v. Di-chem, Inc., 419 U.S 601 (1975). Moreover, the controversy must be resolved in definite terms so that the result thereof may be administered in a largely ministerial fashion. See generally, Endicott-Johnson Corporation v. Encyclopedicia Press, Inc., 266 U.S. 285 (1924), MCA 85-5-101 et seq., Holmstrom Land Co. v. Ward Paper Box, 36 St. Rep. 1403, 605 P.2d 1060 (1979). These factors argue strongly for administrative jurisdiction over all facets of change-related impacts. See generally, Huff v. Bretz, 285 Or. 507, 592 P.2d 204 (change proceedings are designed to correct difficulties inherent in unrestrained changes, and thus exist for the benefit of public generally).

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Similarly, focusing on and quantifying disruptions in historic use gives effect to future appropriators' vested rights to maintenance of the conditions as of the time of their respective appropriations. The impetus toward reuse and development of the water resource this doctrine serves is substantially undermined where the parameters that describe such conditions are not defined. It is the "legal" conditions on the stream that an appropriator's right attaches to, see Harvey v. Davis, (Colo. 1982), 655 P.2d 418, and to the extent that these conditions remain undefined, the substantive protections intended are eroded and frustrated by the uncertainty attendant to estimating exactly what the stream conditions are. See also Addendum A.

Finally, In re Brown largely dispels the specter that an administrative inquiry into an existing right amounts to an invalid adjudication. Therein, it was observed that such an argument was premised on a faulty syllogism. It does not follow that since an adjudication involves an interpretation and determination of an existing right, all proceedings, whatever their purpose and character, also involve an adjudication if an accounting of an existing right takes place therein. Even a rejection of an application for change for failure to show an existing right cannot be read as adjudicating the "nonexistence" of the underlying right. It is well settled that collateral estoppel or res judicata will not be where the character and purpose of the proceedings differ, there being in such situations marked differences in the incentive to litigate any particular

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issue. See generally, Restatement (Second) of Judgments, §88, §68.1.

In a similar way, an examination of any objector's water rights hardly equates to an adjudication of that right. Objectors' water uses are material to a change proceeding only to the extent that such uses define one's vested rights to maintenance of the stream conditions. A determination of these rights to maintenance of the stream conditions cannot adjudicate the underlying interest. Even if one's objections to a proposed change are dismissed, it hardly follows that one cannot continue to divert according to the priority attached to the underlying right. Instead, such a rejection only determines that the changed conditions proposed by an applicant do not disturb the rights to maintenance of the stream conditions implicit in the water use sought to be protected.

An adjudication, it must be noted, merely confirms preexisting rights. See Cresson Consolidated Gold Mining Co. v. Whitten, 139 Colo. 273, 338 P.2d 278; Cline v. Whitten, 144 Colo. 126, 355 P.2d 306 (1960). Adjudications reflect the fact that all steps necessary to the culmination of an appropriation have been taken. See Southeastern Colo. Water Cons. Dist. v. Rich, (Colo. 1981), 625 P.2d 977 (1981). Since nothing in this proceeding can, by virtue of tne character of the proceeding, have anything to do with the salient issues in an adjudication, it follows that any result herein cannot infringe upon judicial authority. Weibert v. Rothe Bros., Inc., (Colo. 1980), 618 P.2d 1367).

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This result is also compelled solely as a practical matter in effectuating changes of water rights. The doctrine of historic use, although speaking to enlargements of use, is nothing more than a backhanded way of describing other appropriator's vested rights to maintenance of the stream conditions. That is to say, enlargements of use are significant precisely because they change the stream conditions to the detriment of junior appropriators. See Quigley v. McIntosh, supra. The doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors. See Weibert v. Rothe Bros., Inc., supra, Green v. Chaffee Ditch Co., supra, Farmer's Highline Canal, supra, Danielson v. Kerbs Ag., Inc., (Colo. 1982), 646 P.2d 363, Rominiecki v. McIntyre Livestock Corp., (Colo. 1981), 633 P.2d 1064

> We are committed to the rule that the appropriator of a water right does not own the water, but has the ownership in its use only. (Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459; Allen v. Petrick, 69 Mont. 373, 222 Pac. 451; Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68; Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 Pac. 11; Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 Pac. (2d) 286; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 Pac. (2d) 1074, 89 A.L.R. 200.) Likewise it is settled by the decisions of this court that such a right is property which may be disposed of apart from the land on which it has been used. (Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L.R.A. 737; Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 Pac. 999; Maclay v. Missoula Irr. Dist., supra.)

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> After an appropriator has used the water sufficiently to answer the purposes of his appropriation, he may not take the water of the stream remaining which he cannot use for such purposes and sell it to other parties so that it will deprive subsequent appropriators of their right to use the same. (Galiger v. McNulty, 80, Mont. 339, 260 Pac. 401; Tucker v. Missoula Light & Ry. Co., supra; Creek v. Bozeman Water Works Co., supra.)
>
> One who purchases a water right independent of the land to which it was therefore appurtenant does not thereby enlarge or extend the right, and one who so purchases such a right is entitled to do only those things which the original owner of the water right might have done. (Maclay v. Missoula Irr. Dist., supra; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Babcock v. Gregg, 55 Mont. 317, 178 Pac. 284.) Brennan v. Jones, 101 Mont. 550, 567, 55 P.2d 697 (1936).

The decree that defines the particular use, See MCA 85-2-227, must be read against a backdrop that prescribes the waste of the water resource and confines the use of the appropriation to only such times and in such measure that water is actually needed for the defined purpose. See Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 P. 11 (1926), Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949). The pattern of use these concepts serve to define are the "conditions of the stream" subsequent appropriators have vested property interests in. Because of the scarcity of water in the arid West, the doctrine of appropriation accords property interests in such stream conditions in order to provide security for the development of water. That is to say, the doctrine of vested rights to maintenance of the stream conditions provides

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security in the flow of waters against the acts of others in order to promote capital intensive water development. See Quigley v. McIntosh, supra; Creek v. Bozeman Water Works, supra. Ignoring the effects of a change "at the headgate," and exclusively concentrating on the effects of a change on the return flows available works results that are completely out of line with the protections afforded junior appropriators, and with the right of an appropriator to change his use. Suppose X returned 10 cfs to the stream in his former use, and his proposed use would return only 5 cfs. If juniors relied on this 10 cfs flow, and if the whole focus was on the changing pattern of return flows, injury would be found notwithstanding the fact that X intended to divert 5 cfs less for his new use that he had historically. Simillarly, X may leave 10 cfs as return flow in both his new and former use, and hence under a restricted inquiry the new use would not cause injury, notwithstanding the fact that the former use was exercised only periodically as a supplemental irrigation supply, while the new use entails constant diversions for a new industrial use.

The ultimate test for the protection of junior's vested rights to maintenance of the stream conditions is whether the "burden on the stream" will be changed by the altered conditions. This requires an accounting of the loss to the stream by the old and new use respectively. An accounting cannot properly be completed where types of credits and debits are excluded from the underlying equation. Nor can proper conditions

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be imposed to protect other appropriators and effectuate changes where central parts of the inquiry are studiously ignored. See generally Addendum A. Since it is not lightly to be inferred that the legislature withheld seminal parts of the relevant inquiry when it afforded the Department jurisdiction over changes of water rights, I determine that the historic use reflected by the Lichtenberg right is within the jurisdiction of the Department. The tail must go with the hide.

Application of Historic Use Doctrine

Changes of agricultural rights to municipal purposes raise common problems in effectuating the change without injury to other appropriators.

> Plaintiff's action against the City of Westminister is but one of several cases in this jurisdiction involving a municipality's purchase of agricultural water rights with the intention of devoting such rights to municipal and domestic purposes. The municipality, of course, has the legal right to devote its acquired water rights to municipal uses, provided that no injury accrues to the vested rights of other appropriators. Farmers Highline Canal & Reservoir Co. v. City of Colden, supra; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313; Hutchins, Law of Water Rights in the West 384 (1942). The principal dangers attending the municipality's altered use are that the city will attempt to use a continuous flow, where the city's grantor only used the water for intermittent irrigation; Baker v. City of Pueblo, 87 Colo. 489, 289 P. 6031; and that the municipality will enlarge its use of the water to the full extent of the decreed rights, regardless of historical usage.

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> Green v. Chaffee Ditch Co., supra; Farmers Highline Canal & Reservoir Co. v. City of Golden, supra; Farmers Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 1P.2d 756. To protect against the possibility of such extended use of the water rights, the courts will impose conditions upon the change of use and point of diversion sufficient to protect the rights of other appropriators. We have reviewed and upheld such restrictive conditions in numerous cases. See, e.g., Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder, 1157 Colo. 197, 402 P.2d 71; City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151; Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 115; Farmers Reservoir & Irrigation Co. v. Town of Lafayette, supra.
>
> Westminister v. Church, (Colo.), 445 P.2d 52, 58.

Similarly in this case, the issue presented by the evidence is whether the City's proposed municipal use will result in an enlargement of use either in time or quantity, see Colorado Springs v. Just, supra, out of the Lichtenberg right. The evidence shows that unless the City's use is properly conditioned, the City's use will result in just such an expansion to the detriment of junior appropriators.[3]

The City has applied to use the Lichtenberg right from April 15 through October 15. While this period is generally within the irrigation season, the evidence shows that the actual use of the Lichtenberg right was confined to the 90 day period of June, July, August. Moreover, the evidence shows that the water was used regularly within this period only for approximately 40 days. The customary pattern of water use was reflected by an

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irrigation of the hay crop around June 1, followed by an irrigation of the grain crops around July 1, followed by a second irrigation of the hay crop in August.

The City must be limited to those times that the Lichtenberg right has been exercised historically. Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), Quigley v. McIntosh, supra. An appropriate estimate of such times is May 25-June 10, June 25-July 10, and August 1-August 10.

The Hearings Examiner is aware that some of the evidence indicates a longer period of customary use. However, as discussed below, the historical use doctrine is necessarily an abstraction, and at any event, in view of the labor requirements in the early season, additional use seemed to depend on whether the Lichtenberg rights could be exercised in August. The evidence shows that August diversions were often curtailed for all but Lichtenberg's most senior right. Thus, little prejudice accrues to the City, and at any event, the 40 day figure is sponsored by a witness for the City.

Consumptive Use

The City's evidence herein is geared toward quantifying the consumptive use of the Lichtenberg right. The amount of water consumed or used up and lost to the stream system is relevant to the injury equation because the use of such water cannot affect other water users. It simply was not available to them.

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It should be emphasized, however, that consumptive use is not the necessary measure of the quantity that can be transferred in all cases. Rather, it sets the minimum level of water that can be changed. It is perfectly possible that an appropriator may be able to change without injury substantailly more than he historically consumed. Whether or not any appropriator is so entitled depends on whether the return flows accruing from his former use were in turn depended upon by other appropriators. Consumption is not in and of itself the legal barometer of the right to change. Rather, it is relevant only as it relates to the question of injury.

Consumptive use is critical herein, however, because the City has made it such. In short, the City claims to change only that amount consumed out of the Lichtenberg rights. Thus, whether or not the return flows, including those waters percolating back to the stream, from the Lichtenberg right augmented Hyalite Creek at times when the Objectors were using water is immaterial.

The return flow issue does dispose, however, of any claims of injury to those lcoated downstream from the confluence of Muddle Creek and the East Gallatin. While the City's diversions will be 100% consumptive to those users on Hyalite, they will result in a net increase in water at points downstream from the East Gallatin point of return. This is so because a municipal use is inherently less consumptive than an agricultural one. Although lawn watering is likely to equal, if not exceed, the consumption of crops, all the other uses under the municipal rubric are likely to be only marginally consumptive.

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The City has used the Blaney-Criddle method of estimating crop consumption attendant to the old use. Because of the paucity of records of diversions, and because of the practical difficulties in measuring return flows, the Blaney-Criddle methodology is a reasonable and well-accepted technique. See Blaney and Criddle, Determining Water Requirements for Settling Water Disputes, 4 Nat. Resources J. 29 (1964).

The City errs not with the methodology employed, but rather in the data utilized in exercising that methodology. The City assumed that all of the acres formerly irrigated were devoted to alfalfa production. In fact, for at least two decades, 1/3 of the land was fallow. Therefore, because the measure of the underlying right is limited by historic use, a 1/3 reduction must be made in the City's land base in the Blaney-Criddle formula.

The resulting measurement must be further reduced by the additional 1/3 land area devoted to grains. Alfalfa is a notoriusly ravid consumer of water. Ignoring the historical single cut of grain and replacing it with double cuts of a water-loving species will tend to significantly overstate consumption.

This total must be still further reduced to reflect the contribution of rainfall. The crop requirement estimated by the Blaney-Criddle method must be reduced by the contribution of precipitation to that crop need. The City recognized this, but used a drought year in fashioning this reduction. While the end result may be descriptive of the consumption of the Henry

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Monforton place in such a water short year, it is not by definition characteristic of consumption in the average or normal year.

The effects of the foregoing reductions is reflected in the cross-examination of Mr. Brown. The only error therein is averaging the alfalfa and grain irrigation requirements and extending the same across the irrigation season. Grain requires and has historically been given only one irrigation. The doubling involved in the alfalfa calculation for two cuttings overstates consumption for grain. Correcting for the same, and using the methodology employed in Exhibit 2E, the average annual consumption at the Monforton place by the crops is 206.67 acre feet. (10.35-12=.86 acre feet; .86(250x1/3)=71.66; 14.82-12=1.24 acre feet; 1.24(250x1/3)x2=206.67; 206.67+7.66=278.33 irrigation requirement).

This quantity must be expanded to reflect the additional quantity of water lost to the stream system as a result of inefficiencies in the diversion system. That is to say, some of the water diverted will be lost to the stream system even though the crops themselves don't utilize it. The Applicant estimated these losses by assuming a 55% overall efficiency factor for Lichtenberg's flood irrigation practices, thereby arriving at a gross diverison rate from the net irrigation requirements. The Applicant then assumed that 25% of the difference between the gross diversion and the net irrigation requirements would be lost to such things as evaporation, plants excluding crops, and deep percolation.

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The 55% efficiency factor was a "ballpark" selection with no individual regard for the particular circumstances attendant to the exercise of the Lichtenberg right. Nonetheless, I accept it as reasonable, primarily because any prejudice accrues to the City who sponsored the testimony. I conclude generally that Lichtenberg's diversion efficiencies are likely to be toward the upper end of the efficiencies commonly associated with the flood irrigation, because of the highly efficient ditch system. The right at issue herein was diverted out of the Cottonwood Canal, a "community canal" serving many users. Whether or not Lichtenberg had a right to so divert is immaterial. Such diversions were exercised historically, and thus they quantify the right for the purposes herein. Thus, losses out of the head ditch were minimized because of the pro rata contribution to such losses by other rights in the ditch.

The 25% loss factor is much more difficult to justify. The figure is premised on a 1952 study for the entire Gallatin Valley by the Bureau of Reclamation. The study is not part of the record, and thus we are left to guess whether the Lichtenberg land and irrigation practices bear a close relationship with the object of the 1952 study. I understand that the measurement of such losses must inevitably remain an estimate, but a citation to an old study on the entire Galltin Valley is not much help in deciding the historical losses at issue herein. I construe the study, therefore, to yield an average figure for losses in the Gallatin Valley. Since losses out of the ditch are minimal, and

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since the Jones place is relatively adjacent to the source of supply (thereby indicating that the lands underneath will be at least partially saturated), I conclude that 10% of the inefficiencies associated with the ditch system will be lost to the source of supply.

Therefore, using a 55% gross efficiency on a 1278.3 net irrigation requirement, we arrive at a 506.05 gross acre feet diversion. Taking 10% of the difference (227.72), we arrive at a 22.77 acre foot loss to the stream system as a result of inefficiencies. Thus, the total historic consumption associated with the Lichtenberg right is 301 acre feet per annum. Over a forty day period, it would take a 3.8 cfs flow to divert 301 acre feet. Thus, the City is entitled to 3.8 cfs not to exceed 301 acre feet annually.

The Nature of Historic Use

It must be conceded that the doctrine of historic use is an abstraction bearing only an an attenuated connection to the actual irrigation practices associated with the Monforton place at any given time. Obviously, the irrigation of the Monforton or Jones place throughout history varied significantly depending on climatic factors, including temperature and precipitation, the water available in the source of supply, and the management decisions of the irrigators. These factors governing the historic water use, howeer, will be supplanted by new criteria that will govern the City's diversions. Since the pattern of need for a municipal use varies substantially for that of

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agriculture, it is necessary to condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture.

On this record, the only feasible way of making this municipal right function as an agricultural one is to look to average water years and the characteristic land management scheme. See Westminister v. Church, supra (running ten year average). Thus, in the above analysis, wet years and dry years are ignored in favor of average years. On this record, this is the only feasible way of defining Lichtenberg's property interest inherent in his right to sale in contract with the Objector's property interests in maintenance of the stream conditions. While a more sophisticated approach is possible in this diversion (correlating diversions with snowpack conditions), the record is insufficient to detail such a remedy.

Just as average conditions keynote the physical aspects of water demand, characteristic or average practices of land management control the base for water demand. It is clear from the evidence that Mr. Lichtenberg in at least some years in the recent past has eliminated fallow and pushed hay. However, this practice was not characteristic of the Monforton place over the long term.

It is, of course, evident that the rights incident to an appropriation should not be read so narrowly that the flexibility necessary to a successful farming operation is frustrated. However, it appears from the evidence that the Monforton place was a grain-oriented enterprise through a substantial period of

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time. Grain production was limited, however, by ASCA standards, presumably attendant to some sort of pure support program. This enterprise cannot be changed now to an intensive hay system, with its substantially greater water requirements, without resulting in an enlargement of use that would tread on other appropriator's rights to maintenance of the stream conditions, unless a new priority date is assigned that increment of increased usage. McPhee v. Kelsey, 44 Ore. 193, 75 P. 401 (1903), Oliver v. Skinner, 190 Ore. 423, 226 P.2d 507 (1951).

Conditioning Changes To Yield New Uses

As noted above, Bozeman's application for a change of water right must be denied in part because it would otherwise constitute an enlargement of use to the detriment of the Objectors' rights to maintenance of the stream conditions. In effect, this conclusion reflects the corollary that the proposed use cannot be protected by the original priority date attendant to the old use. The impending question is whether the lost increment of use can be reflected by a priority date corresponding to the time of filing.

Change proceedings and new permit proceedings are statutorily distinct, with differing standards governing each. Compare MCA 85-2-311 with MCA 85-2-402. As such, it seems clear that one cannot, at the minimum, be awarded the substance of a new water use permit without complying with the substantive criteria for issuance of such a permit. Any other result puts form over substance, and subverts the legislative intent inherent in the

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provisions providing for a new water use permit. Thus, the inquiry herein is limited to the question of whether a water right with a new priority date can be assigned that increment of water use claimed by Bozeman in its change that corresponds with the September 15 - October 15 period. No present need for water has been shown at any other time within the time of use proposed by Bozeman in its change application. Thus, even though present need limitations do not bind Bozeman in its attempt to secure a perfected right (although Bozeman cannot divert pursuant to that right until there is a present need), the change application cannot be conditioned to achieve the practical effect of a new water use permit in toto without a frustration of the legislative intent reflected in MCA 85-2-311.

The larger question is whether a right resembling a new water use permit can ever be yielded by conditioning a change application in view of the distinct statutory standards. Close analysis dictates that there are no practical reasons why such results cannot flow from a change proceeding, so long as the statutory standards for a new water use are respected.

Certainly the public notice given of the pendency of this change proceeding presents no real obstacle. Although the notice of Bozeman's application for change obviously does not indicate that Bozeman seeks a new water use permit, it does give notice that Bozeman claims the identical use under an earlier priority date. Since no complaint could be lodged as to notice if the change was approved according to the terms thereof, it follows

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that no complaint can be heard if the water use proposed is granted with a more junior and hence inferior priority date.

For these reasons, rather than relegate Bozeman to the cumbersome procedure of refiling a new use application with this agency, provision has been made in Bozeman's new water use permit for a September 15 - October 15 use corresponding to the amount of present need during suhc period. The findings and conclusions entered in respect to Bozeman's new water use permit embrace the quantity of water needed during this period.

Burden of Proof

At common law, the burden of proof on the question of injury to vested rights to maintenance of the stream conditions was unequivocally on the complaining objectors. See Holmstrom Land Co., supra. For the reasons contained in Addendum A (Interlocutory Order, In re Beaverhead Partnership), the Hearings Examiner determines that the unitary system provided for in the Montana Water Use Act to determine change of water right issues implicitly requires tht the burden of persuasion be on the applicant for a change of water right, with a burden of production on each Objector to show the type and character of injury the proposed change threatens. (It is interesting to note in this general regard that virtually every appropriation state with similar change proceedings allocates at least some measure of the burden of proof to the applicant for a change. See generally, Weibert v. Rothe Bros., supra, Federal Land Bank v. Union Central Life Ins., 54 Idaho 161 29 P.2d 1009 (1934),

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Roswell v. Reynolds, 86 N.M. 249, 522 P.2d 796 (1974), Oliver v. Skinner, 190 Or. 423, 226 P.2d 507 (1951), Tanner v. Humphreys, 87 Utah 104, 48 P.2d 484 (1935.)

The allocation of the burden of proof is not material in the present circumstance, however. As noted elsewhere herein, the entire change proceeding was litigated by Bozeman on the premise that only the consumptive use associated with the Lichtenberg right would be changed. The Objectors cross-examined and introduced evidence, without objection, that described the historic exercise of the appropriative rights at issue. Moreover, the testimony is in large measure uncontradicted. Only the legal inferences to be drawn therefrom is at issue. In such circumstances, it makes no difference who holds the burden of proof. There are no material issues of fact that would materially affect the result.

The sole exception to this general observation is Middle Creek and Hoy Ditch Company's arguments that Bozeman has failed to show that it is the owner of the Lichtenberg rights. To this end, these Objectors propounded "evidence" consisting of certain deeds that are alleged to be in the chain of title of those lands the Lichtenberg rights were appurtenant to. These deeds would show that portions of the Lichtenberg rights have been previously conveyed, if one applies the presumption that only an express reservation of water rights is effective to sever such rights from a conveyance of the freehold they are appurtenant to. See MCA 85-2-403, Castillo v. Kunneman, infra.

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One might dispose of this controversy solely on an evidentiary basis. These objectors' evidence in this regard was submitted during the deposition of Wayne Treers, a Bureau of Reclamation witness. Such evidence was clearly beyond the scope of Mr. Treer's testimony, and the City properly objected to it. Bozeman had no reason to suppose that such issues would be injected into the Bureau's claim of injury, and Mr. Treers plainly had no idea of what the documents purported to show, apart from what is otherwise clear from the face of the documents themselves. Under such circumstances, Bozeman was at the very least unfairly deprived of an opportunity to present rebuttal evidence.

This analysis assumes, of course, that the Meadowlakes rule does not embrace a requirement that an Applicant show not only the existence of a water right, but also the legal title to the particular right at issue. The Hearings Exmainer determines that such an argument presses Meadowlakes too far, and indeed trespasses on domain outside of this agency's jurisdiction.

Bozeman's argument in this regard is well-directed, albeit mistakenly aimed. Bozeman argues as a matter of statutory construction that the exclusive focus of this proceeding is whether the change of water right will work injury; not whether Bozeman is the holder of the asserted water right. Meadowlakes answers, however, that the existence of a water right is implicity a criteria in a water right proceeding. The legislature assumed in providing for a change of water right that the applicant for the same was an appropriator. See discussion, supra.

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However, the existence of a water right more closely dovetails with the overriding question of injury than does the subsidiary issue of whether the particular applicant is the one authorized to make the change. As previously noted, expansions of appropriations often work injury to property interests of others in maintenance of the stream conditions.

Where a person cannot show in an evidentiary way the existence of a right that can be changed, it is appropriate to conclude that such an applicant seeks in fact a new use to the extent of the failure of proof. Additions to the maximum quantity of water reasonably required for the original appropriation as per se new appropriations. In short, enlargements of appropriations work new priorities to offset potential injury.

The question of legal title to the right asserted involves injury to others, however, if and only if the applicant has no title to all or part of his appropriation, and only if the holders of such title are actually exercising their appropriative interest. That is to say, the actual holders of title to tne appropriative interest must be exercising that interest, or at least have the intent to maintain that interest, before any change in stream conditions can occur.

Moreover, while it is apparent that ignoring the state of title does breed the danger of paper rights Meadowlakes was in part grounded on, this condition is endemic to circumstances where no adjudication has defined the underlying interest in relation to the particular appropriator. It does not of itself

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argue for administrative jurisdiction over issues completely beyond the expertise of the participating agency. Change proceedings are by their nature ill-suited to quiet title. Westminister v. Church, supra. Resolution of the ownership issue involves issues and persons well beyond the purview of water-related matters.

It is enough that the Department not compound the difficulties left to the water courts by perpetuating the same conditions that engendered the need for such a state wide adjudication. Thus, it is appropriate that Bozeman be required to trace its authority over the right asserted herein to the statement of claim reflecting the Lichtenberg right in the adjudication procedures. The proper "forum" for such a showing is the water right transfer provisions. See MCA 85-2-421, et seq. Thus, Bozeman, as a condition precedent to the exercise of the rights provided for herein, must file sufficient water transfer forms to connect its title to a statement of claim deflecting the right asserted herein. This condition, along with the requirement of proof of a water right that can be changed, will go far to alleviate the nature of the problem the objectors define.

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Trans-Basin Diversion

It will be noted that Bozeman's contemplated uses involve a trans-basin diversion, albeit of modest dimension. Bozeman will divert waters out of Hyalite or Middle Creek and ultimately transport the water so diverted to the East Gallatin drainage.

Montana courts have historically exhibited a wary treatment of attempts to take water out of one watershed and put them in another, observing that "waters primarly belong in the watershed of their origin." Galliger v. McNulty, 80 Mont. 339, 356, 260 P. 401 (1927), see also Spokane Ranch and Water Co. v. Beatty, 37 Mont. 342, 96 P.727 (1908); Hansen v. Larson, 44 Mont. 350, 120 P. 229 (1911); Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952). The cases are not of much help in determining what a trans-basin diversion is for these purposes, see generally, Orchard City Irrigation Dist. v. Whitten, 146 Colo. 126, P.2d 130 (1961), nor are they of much help in determining the merits of any particular use that involves this feature.

Presumably, concern for these developments is reflected by the water intensive character of the use insofar as future users in the basin or origin are concerned. In the present circumstances, Bozeman's new water use permit will not take all of the waters available in Hyalite Creek, and therefore there is some margin, albeit a small one, for future development. Bozeman's change takes no more than what has already been historically consumed within the basin of origin. For these reasons, Bozeman's trans-basin plans are explicitly authorized.

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ADDENDUM A

BURDEN OF PROOF

Historically, that is, before the advent of the Montana Water Use Act, the burden of proof in change proceedings was unequivocally on the objector. See Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., 36 St. Rep. 1403, 605 P.2d 1060 (1979). The Department in its jurisdiction over changes of water rights has continued this historic rule, with the exception of the explicit allocation to the Applicant of the burden of demonstrating the existence of the right that is the subject matter of the change.[1] In re Meadowlakes Estates, Dept. Order.

The circumstances of the present matter, however, demand a reexamination of the relevance of the historic rule to change proceedings under the Montana Water Use Act. While the Department's administrative interpretation is to be respected, Standard Chemical Manufacturing Co. v. Employment Security Division, (Mont.), 605 P.2d 610 (1980), Thornton v. Commission of Department of Labor, (Mont.) 621 P.2d 1062 (1980), see also, NLRB v. Hearst Publications, 322 U.S. 111 (1943), it need not be slavishly adhered hereto, particularly where it appears that the allocation of the burden of proof has never been directly put in issue in any administrative proceeding. Any purported expertise of the Department demands less deference where the circumstances do not indicate that such expertise has been applied. See

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[1] It will be noted that the Montana Administrative Procedures Act, MCA 2-4-101 et seq., which contains the procedural requisites for the present matter, leaves silent the allocation of the burden of proof in administrative proceedings. Compare, 5 U.S.C. 556(d)

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generally, E.I. dupont v. Train, 430 U.S. 112 (1977), Natural Resources Defense Council, Inc. v. EPA, 656 F.2d 768 (D.C. Cir. 1981).

Historically, the allocation is grounded on the maxim that each party must prove his own affirmative allegations. Proof is not required to establish the nonexistence of a fact except where such nonexistence is essential to the claim asserted. MCA 26-1-402.[2]

This statutory standard is question-begging in the present instance. Fundamental to its materiality is the threshold question of whether the absence of adverse effect to other appropriators is an essential element of the right to change an existing water right.

In Hansen v. Larsen. 44 Mont. 350, 120 P. 229 (1911), the court discussed the burden of proof in a change proceeding in the following fashion.

> "Counsel for appellant insist that the appropriator who undertakes to establish this right to use water at a place or for a purpose different from that for which the appropriation was originally made, must show affirmatively that such change does not affect adversely any other appropriator. . . . The rule is recognized everywhere that the right to the use of water, duly appropriated, is property, and when once

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[2] The statutory language describing "burden of persuasion" and "burden of production" was changed after the filing of the instant application. However, the changes do no more than clarify formerly obtuse language. No substantive shift in meaning is evident, and therefor no problems of retroactivity are triggered. See generally, MCA 1-2-109, General Ag. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975).

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> acquired cannot be lost except by the modes prescribed by law. The statute does not expressly or by implication declare that a change in character of the use, even though such change does affect the rights of others adversely, shall impair the right in any respect whatever. . . . It would seem logical, then, to hold that the burden is upon the party who insists that such change has affected him adversely, to allege and prove the facts, or in other words that the restrictions in Section 4842 above are matters of defense. At 230."

Lokowich v. City of Helena, 46 Mont. 575, 129 P. 1063 (1913), expanded upon the foregoing in the following fashion.

> "While, of course, one may not change the point of diversion any more than the place of use or the character of use to the prejudice of other appropriators (Revised Codes Section 4842), it does not follow that any such change is to be taken in limine as prejudicial. On the contrary, the burden is on the party claiming to be prejudiced by such change to allege and prove the facts.

It may be conceded that the present statutes governing change proceedings (MCA 85-2-402) do not specify that any desired change of a water right is presumptively prejudicial. However, it is equally apparent that such statutes do not presume that any such change will not be prejudical. Moreover, while one can analytically agree that a changed water right that infringed upon other appropriators prior to the Montana Water Use Act did not in and of itself impair the underlying right, it also seems equally clear that such a renegade change did not permanently disable other appropriator's vested rights to maintenance of the stream conditions at the time of their respective appropriations. Use of water pursuant to a changed water right with such effects may be enjoined, see Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P.459 (1894), or stated another way, there is no property

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right in a change that infringes on such objector's property interests.

The task in any change of water right proceeding is in the end to define the parameters of two competing property interests. On the one hand, there is the right to change the water right itself; that power being a component of the bundle of sticks describing the underlying usufructary interest. See Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936); Galiger v. McNumlty, 80 Mont. 339, 260 P.401 (1927); Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Smith v. Denniff, 24 Mont. 20, 60 P.298 (1900); Hanson v. Larson, supra, Holmstrom Land Co., supra. Bridling the exercise of that right, however, is other appropriators' property interests in maintenance of the stream conditions at the time of their respective appropriations. See Spokane Ranch & Water Co. v. Beatty, 37 Mont. 3452, 96 P.727 (1908), Creek v. Bozeman Water Works, supra, Smith v. Duff, 39 Mont. 382, 102 P. 984; Head v. Hale, 38 Mont. 302, 100 P. 222 (1909). That right is equally attendant to the bundle of sticks describing their respective appropriations; and it serves to define the boundaries of the right to change the appropriative right at issue.

Because of the interdependence of the character of the underlying rights at issue, it would serve no useful purpose to inquire which right is properly a defense to the assertion of the other. Such an analysis is inevitably circular in its force. At common law, the burden was on the objector to a change of water right because there existed no procedural mechanism requiring an

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inspection of the purposed change prior to its implementation. See generally, Stone, Problems Arising Out of Montana's Law of Water Rights, 27 Mont. L. Rev. 1 (1965). Inevitably in such a situation the "affirmative" was on the objector because relief was predicated on his complaint in the judicial system. As a practical matter, an "improper change" was proper until enjoined by judicial decree.

The advent of the Montana Water Use Act completely changed the matrix of the change of water right process, however. The Act now requires the authorization of the Department of Natural Resources and Conservation prior to executing any change of water right. MCA 85-2-402. An administrative forum is detailed in the Act for resolving objections to the requested change. MCA 85-2-402(2). The department must approve the proposed change if it determines that such damage "will not adversely affect the rights of other persons," MCA 85-2-402(4). In effect, the Act replaces the ad hoc piecemeal process with its multiplicity of actions with a single, unified procedure geared to finally resolve the parameters of the right to change. See generally, Lower Catham Ditch Co. v. Bijou Irrigation Co., 41 Colo. 212, 93 P. 483 (1907), Stone Montana Water Rights--A New Opportunity, 34 Mont. L. Rev. 57 (1973). Thus, in the same way that the "affirmative" of the issue was on the objector at common law, the procedural structure detailed in the Montana Water Use Act now places the "affirmative" of the issue on the applicant for a change of water right.[3]

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[3] This procedural change also affords more security to future water users. At common law, a would be appropriator was frustrated in determining exactly what the "legal" stream conditions were that he was entitled to. A subsequent judicial proceeding could always enjoin a water pattern that a new appropriator had come to rely on, because that water pattern itself was a product of a change that infringed an existing appropriator's rights. The procedural complexity thus served to undermine the substantive purposes served by affording an appropriator a property right in existing stream conditions. The latter doctrine affords security in the reuse and successive use of the same water resource, and thus serves to extend the benefits of a limited water supply. See Creek v. Bozeman Waterworks, supra.

Moreover, unregulated changes led to unadministratible streams. In a system where changes are regulated in an ad hoc piecemeal fashion, water commissioners must attend to not only the priority of the rights involved, but also to the precise water pattern those priorities attach to. Since no mechanism existed to define such conditions for the execution of the various rights involved, day-to-day administration of the stream is frustrated by the factual uncertainties wrought by changed water rights. Indeed, because the factual complexities attendant to changes are matters beyond the judgment defining the rights involved, due process was arguably abridged whenever a water commissioner acceded to claims provoked by a change of water right without a prior hearing thereon. See Allen v. Wampler, 143 Mont. 486, 392 P.2d 82 (1964), State ex rel. McKnight v. District Court, 111 Mont. 520, 111 P.2d 292 (1941), State ex rel. Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935), Gans & Klein Inv. Co. v. Sanford, 91 Mont. 512, 8 P.2d 808 (1932), Luppold v. Lewis, 172 Mont. 280, 563 P.2d 538 (1977), Brennan v. Jones, 101 Mont. 530, 55 P.2d 697 (1936). Thus, without an initial resolution of the right to change an existing right, regulation of the priorities on a stream remains cumbersome.

The present procedure simplifies future administration of rights by testing the scope of the right to change prior to its implementation. The decretal language of the disposition serves to provide the framework for the administration of the changed right within the existing pattern of uses on the stream.

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The present character of the proceedings also requires, as a practical matter, that the burden of persuasion be on the Applicant. The issue in any change proceeding is not only whether the Applicant's announced plans can be implemented without injury, but also whether any conditions exist to effectuate Applicant's plans if the particulars of the change do indeed work injury and/or whether these plans may be modified in some degree to allow some measure of the change. See MCA 85-12-402, DeHerrera v. Manassa Land & Irrigation Co., 151 Colo. 528, 379 P.2d 405 (1963), Bates v. Hall, 44 Colo. 360, 98 P. 3 (1908); Fort Collins Milling & Elevatior Co. v. Larimer & Weld Irrigation Co., 611 Colo. 45, 156 P. 140 (1916); Weibert v. Rothe Bros., (Colo.), 618 P.2d 1367 (1980), In re Rominiecki v. McIntyre Livestock Corp., (Colo.), 633 P.2d 1064 (1981).

If the entire burden in a change proceeding is to be shouldered by the objectors thereto, it appears to follow that said burden necessarily requires proof not only of injury attendant to the applicant's plans, but also proof that no conditions exist that would eliminate injury. This, of course, requires proof of a "negative" in the exact same way that an applicant's proof of lack of injury involves such a showing. Moreover, such an allocation of the burden requires a mind-reading exercise by the objectors, as such objectors must inevitably decipher what sort of modifications to his plans the applicant is willing to endure without a total destruction of the underlying intent. Obviously it makes far better sense to have

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the applicant detail modifications that alleviate injury and still preserve the economic incentive for the change.

Placing the burden on the objector also works impractical results in actually fashioning appropriate conditions. The evidence may show that the Applicant's intended change would work injury, but that there exists a type of condition "B" that would alleviate the injury, even though the record is insufficient to quantify the amount of "B" required. For example, the evidence may show that a reduction in return flows in August injures an existing appropriator, but that this reduction could be compensated for by a reduction in diversions and/or a release in some measure of previously stored water attendant to the changed use. If the record was insufficient to quantify the required reduction in diversion, and the burden was on the objector, presumably the application must be granted in toto despite a finding of adverse effect due to a failure to prove the alternate condition "B". It makes far better sense to preserve the status quo until the forthcoming evidence is adduced. With such a procedure, the burden must be on the applicant since an objector

is perfectly protected with existing circumstances, thereby eradicating any incentive to flesh out a naked condition.[4]

Of course, this absurdity can be avoided by allocating the burden of proof to the objector on the issue of whether the applicant's announced plans will work injury, and upon a finding thereof, allocating the burden of proof to the applicant on the question of conditions to alleviate such harm. Other than by its "democratic" appeal, this approach offers little but confusion as the same evidence will often be subject to overlapping burdens of proof. Moreover, such an approach would stifle administrative efficiency, as an applicant would not be disposed to propose conditions until the condition precedent thereto had expressly been ruled on.

None of the foregoing is meant to intimate, however, that the objectors to a change proceeding bear no responsibility in adducing evidence. MCA 2-4-102(7) defines a "party" as a "person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but nothing herein shall be construed to prevent an agency from admitting any person as a

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[4] This glitch results even if the objector should be required to prove the measure of his injury, as well as the existence of injury per se. The measure of injury reflected in the quantity of reduction in return flows bears no necessary relation to the concomitant measure of reduction in diversions required to offset such a depletion. The character of the watercourse between the applicant's point of diversion and the objector's point of diversion may be markedly different than the character of the course the return flows take. Thus, compensation for deprivation of return flows may require more water to bypass the Applicant's point of diversion than the amount of cessation of return flows would indicate.

party for limited purposes." The dichotomous nature of the definition clearly indicates that persons are parties as of right only when they have some personal stake in the outcome, herein, a water right threatened by the applicant's change. See generally, Holmstrom Land Co. v. Ward Paper Box, supra; Tudor v. Missoula Light & Water Co., 77 Mont. 91 250 P. 11 (1926); Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 P.2d 286 (1931); Carlson v. Helena, 43 Mont. 1, 114 P. 110 (1911); Miles v. Butte Electric & Power Co., 32 Mont. 56, 79 P.549 (1905). Moreover, objections to applications for change of water rights must set forth the basis for their underlying complaint. See MCA 85-2-402(2), 85-2-308(2). Therefore, it seems appropriate that objectors bear the burden of production on the questions of the scope and character of their existing rights, and the basis of injury to these existing uses if the applicant's announced plans are implemented. Much of this information will be peculiarly within the province of the objector, and it is not to be expected that the legislature intended an applicant to bear the burden of

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production thereon.[5] See generally, Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484 (1935), Bratten Corp. v. United States, 629 F.2d 467 (7th Cir. 1980), cert. denied 449 U.S. 1124 (1981); Old Ben Coal Corp. v. Interior Board of Mine App., 523 F.2d 25 (7th Cir. 1975).

This allocation also has the salutorious effect of assuring that an applicant for change need not be required to rebut all possibilities of injury that may be attendant to his intended change. Changes in water flows attendant to changes in water rights potentially involve a myriad welter of disturbances for users, depending on the precise character and pattern of need reflected by those uses. Changes of water rights should not be frustrated on the bases of possibilities or potentialities of injury, see Thrasher v.Mannix c. Wilson, 95 Mont. 273, 26 P.2d

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[5] The Hearings Examiner is not persuaded by so much of the reasoning in Tanner that appears to suggest that all of the evidence relevant to the injury issue is within the sole control of the objector. While the impact of a change of water flows on a particular use may be most apparent to that particular appropriator, it does not follow that such water use is also readily privy to those hydrologic factors that produced the variation in water flows.

For example, while an objector may well easily recognize that a reduction in return flows in August will injure his water use, he may not at all be acquainted with the hydrogeologic factors such as soil type, that describe the parameters of that effect traceable to the particular water use that is the subject matter for the change. The latter information is every bit as available to an applicant as it is to an objector.

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370 (1933), Hansen v. Larsen, 44 Mont. 350, 120 P. 229 (1911), Trelease, Changes and Transfers of Water Rights, 13 Rocky Mtn. Min. L. Inst. (507) (1967), and therefore it is appropriate for the objectors to apprise the applicant in an evidentiary way of the character of the injury the intended change threatens. An applicant for a change of water right need not flounder in the evidentiary morass of attempting to "rebut" all conceivable instances of injury before the precise character of the injury has been delineated. Only those effects put in issue by objectors trigger a challenge to the applicant's claim. Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1953).

In summary, the applicant for a change of water right bears the burden of persuasion on all relevant and material issues. The relevant standard is the "more likely than not" or preponderance test. See MCA 26-1-403.

The applicant further bears the burden of production on the specifics of his intended change and on the existence of the water right that is the subject matter of the change. The burden of production is discharged when the evidence and all reasonable inferences therefrom, viewed in a light most favorable to the applicant, is sufficient to allow a reasonable mind to conclude that the ultimate fact exists. (Of course, such a conclusion does not amount to a recognition that the burden of persuasion has been satisfied. Clearing the burden of production hurdle permits, but does not require, a conclusion that the burden of persuasion is satisfied).

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The objectors to a change of water right proceeding bear the burden of production on the issue of injury to their underlying right. The burden extends to the kind and character of adverse effect complained of, but not to the specific amount or measure of such effect. Stated another way, the objectors must adduce evidence that the applicant's change, or some feature thereof, is injurious to some degree to their respective water uses.

Upon discharge of this burden, the applicant faces a number of alternatives. Firstly, the applicant can do nothing further in the way of evidence and instead simply argue that in fact objectors' evidence is not worthy of belief or that in law objectors' evidence does not amount to injury. Alternatively, the applicant can introduce evidence rebutting objectors' claims and/or propose conditions that negate those features of the change that cause injury.

In the event that the applicant's initial evidentiary showing is insufficient to demonstrate that objectors' water uses will not be impaired, further opportunity will be afforded the applicant to devise conditions that cure the injury detailed in the initial disposition. See In re East Bench, Dept. Order 1983. Such conditions must be responsive to the kind and character of injury delineated in the initial disposition, and said conditions must be supported with evidence indicating that it is more likely than not that such condition will cure the indicated injury. In no event can a change be approved in whole

or in part absent proof that it is more likely than not that such change will not work injury to the objectors water uses.[6]

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[6] Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982), is not contrary to the result reached herein. Therein the court observed that the Montana Water Use Act did not change the substantive framework for changes of water rights, but only provided a new procedural mechanism to effectuate the same.

The burden of proof is not one of the bundle of sticks describing the underlying usufructory interest. That is to say, the historical allocation of the burden of proof to objectors is not a component of those rights accruing prior to the Montana Water Use Act. The burden of proof is part of the procedural matrix affording protection to those interests, and the holders of vintage water rights have no constitutional privilege to the historic allocation of the burden of proof. See generally, MCA 85-2-227, 85-2-404(2).

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