

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

FILMED

APR 11 1991

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. G(W)31227-02-41F BY COMBS )  
CATTLE COMPANY )

\* \* \* \* \*

A Proposal for Decision recommending denial of the Application was issued on August 21, 1990. Timely request for oral argument and written exceptions were received from Applicant, Combs Cattle Company. Objector James Allen Daems and Helen Joy Daems submitted timely briefs opposing the exceptions.

Oral argument on the exceptions was held before the Assistant Administrator of the Water Resources Division on December 14, 1990 at Bozeman, Montana. Russell McElyea presented argument for the Applicant and Matt Williams argued for James and Helen Daems. James Morrow appeared on behalf of Objector Estate of Joseph Robbie and joined in the arguments presented by the Daems. Don P. Mellon appeared pro se.

The Applicant proposes to divert part of a claimed water right to supplement irrigation and provide new irrigation at a different location. See Proposed Findings of Fact Nos. 5 and 6. The burden of proof was on the Applicant to establish that the new use would not adversely affect other users of Blaine Spring Creek water. See Mont. Code Ann. § 85-2-402(2), (1989) and discussion accompanying Proposed Conclusion of Law No. 8. The Proposal for Decision would deny the Application because the

CASE # 31227-02

Applicant failed to establish lack of adverse effect. See Proposed Conclusions of Law Nos. 7 and 8. Upon review of the record and after considering the parties' arguments, the Department agrees with the Hearing Examiner.

Applicant's exceptions target the Hearing Examiner's inquiry into historic use patterns of the underlying water right. Applicant complains that the Hearing Examiner's findings with respect to historic use would reduce their water right. Using jurisdictional and res judicata arguments, the Applicant contends that the Department must accept their pre-1973 rights as claimed before the Water Court and recognized in previous decrees. However, the Proposal for Decision assumes the validity of Applicant's claim and accepts the quantity and priority as stated in the claim and previous decrees. See Proposed Findings of Fact Nos. 5, 6, 10 & 11. The Hearing Examiner's findings and conclusions concerning historic use patterns are not contrary to Applicant's Statement of Claim. Consequently, Applicant's arguments are moot.

Applicant, however, also argues that the Department is precluded from inquiring into parameters of water rights not addressed in prior decrees or claims. Precedent, however, is otherwise. See Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). In Quigley, like here, an appropriator wanted to change the place of use of a previously decreed right. The decree, like here, stated the flow but excluded the pattern of use. In discussing the absence of a period of use and a specification of

the acreage to be irrigated in the decree, the Supreme Court stated:

But in any event, the court's failure to include either of those two elements could not serve to expand the early water rights beyond the beneficial uses claimed and proved, or to remove the well-established limitation of the appropriator's right to waters actually taken and beneficially applied. So to hold would be to revolutionize the water right laws in practically every instance where rights have been decreed in the usual manner. . . . The mere fact that the decree awarding a water right in miner's inches or other flow measurement fails to describe the acreage actually irrigated or the time of flow or the volume of water actually used, cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators.

Id. at 509-510. Quigley was affirmed and the historic beneficial use limitation on previously decreed rights stated and confirmed by the Montana Supreme Court more recently as follows:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as to the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. Thus an owner may have a decreed right to a certain number of miner's inches of water; or a statutory appropriative right to a stated amount; or a right depending on mere use; or even a prescriptive right to a stated amount; nonetheless, the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use.

McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). In other words, incomplete descriptions of water rights in prior decrees do not provide a license to expand historic use patterns to the detriment of other users.

Decreed and claimed water rights are limited by historic beneficial use and the Department in reviewing an Application for Change must examine historic use to ensure that prior appropriations are not enlarged to the detriment of other appropriators. See discussion accompanying Proposed Conclusion of Law No. 7. The Department is obligated to protect other water users in change applications. Mont. Code Ann. § 85-2-402, (1989). The Department will not abdicate its statutory responsibilities by failing to make the necessary inquiries here.

The Applicant purports to specifically except to Proposed Findings of Fact Nos. 11, 12, 13 & 14. The Applicant's arguments primarily attack the weight and credibility given to particular pieces or segments of evidence and testimony rather than the findings themselves. In particular, the Applicant argues that the opinions and conclusion asserted by its expert should be afforded more weight. However, it is the Hearing Examiner's province to judge the weight and credibility of the testimony adduced at the hearing. See Sharkey v. Atlantic Richfield Co., 239 Mont. 159, 777 P.2d 335, 327 (1989). Moreover, the Department agrees with the Hearing Examiner that the Applicant's expert's conclusions and opinions relevant to adverse effect were based on erroneous assumptions. See discussion accompanying Proposed Finding of Fact No. 13. The Proposed Findings are supported by competent substantial evidence in the complete record. Therefore, the findings will be adopted as proposed. See Mont. Code Ann. § 2-4-621(3), (1989).

The Applicant also excepts to Proposed Conclusions of Law 7, 8 & 9. The arguments offered in Applicant's brief to support these specific objections have already been responded to in this opinion. Moreover, the Applicant's arguments are fairly and completely answered by the Hearing Examiner's reasoned opinions which accompany Proposed Conclusions of Law 8 & 9. The Department agrees with the law as stated and applied by the Proposed Conclusions of Law and will adopt the Conclusions.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision, and incorporates them herein by reference.

ORDER

Application for Change of Appropriation Water Right No. G(W)31227-02-41F by Combs Cattle Company is denied.

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 30 days after service of the Final Order.

Dated this 25 day of March, 1991.

  
Laurence Siroky  
Assistant Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 25<sup>th</sup> day of March, 1991 as follows:

Combs Cattle Company  
P.O. Box 577  
Ennis, MT 59729

John Branger, Manager  
Robbie Stock Ranch  
513 Varney Road  
Ennis, MT 59729

Don P. Mellon  
14 Fish Hatchery Road  
South #1  
Ennis, MT 59729

Helen Joy Daems  
c/o Jim Daems  
26 Gravely Range Road  
Ennis, MT 59729

John Padilla  
P.O. Box 6487  
Bozeman, MT 59771

Peggy A. Elting  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301

William Russell McElyea  
Moore, O'Connell, Refling and  
Moon  
P.O. Box 1288  
Bozeman, MT 59771-1288

James H. Morrow  
Morrow, Sedivy and Bennett  
P.O. Box 1168  
Bozeman, MT 59771-1168

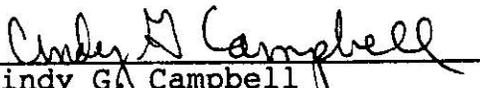
Matt Williams  
Attorney at Law  
506 East Babcock  
Bozeman, MT 59715

James A. Daems  
678 Varney Road  
P.O. Box 170  
Ennis, MT 59729

Scott Compton, Manager  
Bozeman Water Resources  
Regional Office  
111 North Tracy  
Bozeman, MT 59715

**CASE # 31227-02**

Fred W. Robinson  
Legal Unit  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. G(W)31227-02-41F BY )  
COMBS CATTLE COMPANY )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 2, 1990 in Bozeman, Montana.

Applicant Combs Cattle Company appeared at the hearing by and through Counsel Perry J. Moore and Russell McElyea.

Gerald L. Westeson, Professor of Civil and Agricultural Engineering at Montana State University, appeared as an expert witness for the Applicant.

Arnie Rosdahl, ranch manager for Combs Cattle Company, appeared as a witness for the Applicant.

Boyd VanFleet, ranch manager for Bar 7 Ranch, appeared as a witness for the Applicant.

"Glen" Daniel Schultz, resident of Shining Mountains Subdivision and a member of the Shining Mountains Owners Association ("SMOA") Board of Directors, appeared as a witness for the Applicant.

Objectors James A. Daems and Helen Joy Daems appeared at the hearing in person and by and through counsel Matthew W. Williams.

Objector Joseph Robbie, hereafter known as "Estate of Joseph Robbie" or "Robbie Ranch", appeared at the hearing by and through

**FILMED**

**CASE #** 31227-02

SFP 10 1990

counsel James H. Morrow.

John Branger, ranch manager for Robbie Ranch, appeared as a witness for Objector Robbie Ranch/Estate of Joseph Robbie.

Jay Linderman, past ranch manager for Robbie Ranch, appeared as a witness for Objector Robbie Ranch/Estate of Joseph Robbie.

Jan Mack, New Appropriations Specialist with the Bozeman Water Resources Field Office of the Department of Natural Resources and Conservation (hereafter, the "Department"), was called as a witness by Objector Robbie Ranch/Estate of Joseph Robbie.

Objector Don P. Mellon appeared at the hearing pro se.

Objector John Padilla did not appear at the hearing.

#### EXHIBITS

The parties in this matter stipulated that the direct testimony and cross-examination of certain witnesses and parties in the hearing In the Matter of Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company would be incorporated by reference in the record of the present matter (see Preliminary Matters), and that the exhibits discussed by these witnesses also would be incorporated to the extent that they are relevant to the present Application.

Upon review of the record in both Applications, the Hearing Examiner finds the following specified exhibits, introduced in the hearing for T-L Irrigation Company, to be relevant in the present matter and incorporates them into the record herein:

Applicant's Exhibits numbered 2 (photocopies of Statement of

Claim of Existing Water Right No. G(W)31227-41F, of SMOA's protective covenants, and of a 1963 district court decree on Blaine Spring Creek, 5 (Soil Conservation Survey aerial photograph of the area in question), 6 (photocopy of Dr. Gerald L. Westesen's resume), 7 (photocopy of Dr. Westesen's report entitled "Net Depletion and Site Investigation for T-L Irrigation Change Application"), 8 (computer printout of area well logs), and 9 (letter from Water Court listing all filings received on Claim No 41F-W-031227-00).

Daems Exhibits numbered 1 (photocopy of SMOA protective covenants), 2 (photocopy of Montana Irrigation Guide "Estimated Monthly and Seasonal Consumptive Use" for Madison County), 6 (photocopy of Statement of Claim for Existing Water Right No. 136415-41F filed by James Daems), 7 (photocopy of Statement of Claim for Existing Water Right No. 141897-41F filed by James Daems), 8 (photocopy of Statement of Claim for Existing Water Rights No. 141896-41F filed by James Daems), and 9 (photocopy of Provisional Permit No. 20486-s41F granted to Helen Joy Daems).

Mellon Exhibits numbered 1 (map of Shining Mountains Subdivision created by overlapping several plat maps), and 2 (photocopies of DNRC verification abstracts for Statement of Claim for Existing Water Rights No. 31227-41F).

Robbie Ranch Exhibit No. 1 (photocopy of deed conveying real property to Don P. and Marsha D. Mellon).

These incorporated exhibits are identified in the present discussion by the designation "(T-L)".

The Applicant offered seven additional exhibits for the record in this matter:

Applicant's Exhibit 1 (Combs) is an enlargement of the Water Resources Survey map of the area in question. The exhibit has an overlay marked with the historic place of irrigation (green-hatched area) and the areas of irrigation proposed pursuant to the change (blue-hatched area for Combs Cattle Company), as well as various water courses and ditches. Applicant's Exhibit 1 was accepted for demonstrative purposes, and was marked by the parties at the hearing with their respective points of diversion.

Applicant's Exhibit 2 (Combs) is a certified photocopy of a warranty deed to real property, conveyed to Peter T. Combs by Kenneth and Mildred Gustin (1 page).

Applicant's Exhibit 3 (Combs) is a certified photocopy of a warranty deed to real property, conveyed to Timothy T. Combs by Peter T. Combs (1 page).

Applicant's Exhibit 4 (Combs) is a certified photocopy of a warranty deed to real property, conveyed to Peter T. Combs by Bull Wheel Ranch (1 page).

Applicant's Exhibit 5 (Combs) consists of photocopies of handwritten records of Combs Cattle Company diversions through the Coad Ditch from 1980 through 1989, kept by ranch manager Arnie Rosdahl and assistants (11 photocopied pages, covering pages 40 through 61 of Mr. Rosdahl's records). Attached are two photocopied pages from the same record book, showing a conversion table for use in translating the Parshall flume measurements

recorded into miner's inches of water flow.

Applicant's Exhibit 6 (Combs) is a photocopy of Statement of Claim for Existing Water Rights No. 136417-41F, filed by Peter T. Combs for appropriations from Blaine Spring Creek, with accompanying documentation (7 pages).

Applicant's Exhibit 7 (Combs) is a photocopy of Statement of Claim for Existing Water Rights No. 148520-41F, filed by Peter T. Combs for appropriations from Blaine Spring Creek, with accompanying documentation (20 pages). Counsel for Objectors Daems asked to have it noted for the record that the Claim is dated August 2, 1982, after the filing deadline for claims. The documentation accompanying the Claim indicates that the claimant filed a timely claim claiming a 1976 priority (as of the date he acquired the lands), then terminated his claim, then resubmitted the claim at a later date.

Applicant's Exhibits 1 through 7 (Combs) were accepted for the record without objection.

Objectors Daems offered one additional exhibit for inclusion in the record in this matter:

Daems Exhibit 10 consists of photocopies of pages 38 through 41 of a publication entitled "Montana Surface Water Law, Measurement, and Structure", Bulletin 620 issued by the Montana Agricultural Experiment Station, Montana State University (April, 1968) (4 pages). Daems Exhibit 10 was accepted for the record without objection.

Objector Robbie Ranch/Estate of Joseph Robbie offered eight

exhibits for inclusion in the record in this matter:

Robbie Exhibit 1 (Combs) is a letter authorizing James H. Morrow to represent the Estate of Joseph Robbie in this matter (1 page).

Robbie Exhibit 2 is a letter and accompanying photocopy designating personal representatives for the Estate of Joseph Robbie (2 pages).

Robbie Exhibit 3 is a photocopy of a sales agreement on the sale of real property to Joseph Robbie by William and Helen Thexton (2 pages). The second page of the agreement was mistakenly marked Robbie Exhibit 4. Therefore, there is no Robbie Exhibit 4 in the record in this matter.

Robbie Exhibit 5 is a photocopy of a warranty deed to real property, conveyed to Joseph and Elizabeth Robbie by Thexton Ranch Company (2 pages).

Robbie Exhibit 6 is a copy of a warranty deed to real property, conveyed to Joseph Robbie by Beardsley Stock Ranch (2 pages).

Robbie Exhibit 7 is a cover letter to James H. Morrow, attached to 32 photocopied pages covering the Agreement for Sale and Purchase of Real Property between William and Helen Thexton and Joseph Robbie.

Robbie Exhibit 8 consists of two photocopied documents: The Findings of Fact and Conclusions of Law, and Decree entered in Cause No. 5526, Fifth Judicial District (1963 Decree on Blaine Spring Creek) (10 pages); and the Answer of Defendant United

States of America, filed in the same matter (9 pages).

Robbie Exhibit 9 is a photocopy of flow records obtained from Russ Orr, manager of the Ennis Fish Hatchery. The records, which run from 1978 to 1988, are kept by employees of the U.S. hatchery and show date and time of flow reading, whether irrigation water was being diverted at the point of diversion just above the hatchery measurement point, and the gauge reading. A page attached to the front of the records shows a chart for converting gauge reading to cfs flow rate, and a page attached to the back of the records shows Blaine Spring Creek discharge for the water year 10/71 through 9/72 (total 22 pages).

Robbie's Exhibits 1, 2, 3, and 5 through 9 were accepted for the record without objection.

Objector Don Mellon did not offer any additional exhibits for inclusion in the record in this matter.

The Department did not offer any exhibits for inclusion in the record. The Department file was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The record in this matter closed upon receipt of all briefs timely filed by the parties on or before April 23, 1990.

#### PRELIMINARY MATTERS

The Application for Change in this matter involves changes to the same claimed water right as does the Application for Change filed by T-L Irrigation Company. Water Right No. 31227-

41F has been divided, and portions thereof transferred to T-L Irrigation Company, present Applicant Combs Cattle Company, and Shining Mountains Owners Association on behalf of J.W. Smidansky. Hearings on these Applications, numbers G(W)31227-41F, G(W)31227-02-41F and G(W)31227-03-41F respectively, were held back to back, since they involve the same underlying water right, the same issues, and for the most part the same parties. Since the Applications are so closely related, certain evidence is relevant to the records in all of the Applications.

The parties in the present matter stipulated that the testimony given by James Daems, Tom Lehman, James Foster, Gerald Westesen, Boyd VanFleet, and Glen Schultz at the hearing on Application No. G(W)31227-41F by T-L Irrigation Company will be incorporated in the record in the present matter to the extent it is relevant, and that the cross-examination of these witnesses also will be incorporated. The parties further stipulated that exhibits introduced at the T-L Irrigation hearing, which are relevant to the present Application, will be deemed admitted for purposes of the present Application. (See "Exhibits".) Objector Mellon also requested, and the parties agreed, that his closing statement and offers of proof in the T-L Irrigation hearing will be incorporated in the record in this matter by reference. The parties in this matter also incorporated many of their procedural motions and objections in the record of the present Application by reference to the arguments made on the record in the T-L Irrigation hearing.

Due to the duplication of parties and issues in the T-L Irrigation application and the present application by Combs Cattle Company, and to avoid undue repetition, the Hearing Examiner also has incorporated portions of the discussion set forth in the T-L Irrigation Proposal for Decision by reference in this Proposal for Decision.

I. The Applicant in the present matter moved to dismiss the objection of Don Mellon, alleging that Mr. Mellon has no recognized interest in the matter which would give him standing. The Hearing Examiner denied the Applicant's motion and allowed Don Mellon to participate as an objector at the hearing, while limiting the scope of the Objector's argument on the issue of ownership of the water right to be changed to an offer of proof on the issue. The Applicant renewed its Motion to Dismiss.

The Hearing Examiner hereby reiterates her position that the statutory language of §85-2-308, MCA is broad enough to allow Mr. Mellon status as an objector and the right to participate in the hearing process. For a full discussion of this issue, see Preliminary Matters in the Proposal for Decision, Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company (hereafter, "T-L Irrigation Proposal for Decision").

II. The Objectors raised challenges to the Applicant's ownership of the water right in this matter, arguing post-1973 abandonment of the water right, and alleging that the water right could not be sold to the Applicant because the Applicant's

predecessor in interest did not own the right. On the issue of abandonment, the Hearing Examiner reiterates her position that there is no basis for making a determination of abandonment, even if the Department should choose to assert jurisdiction on this issue. The Hearing Examiner also reiterates her position that the Department cannot accept jurisdiction on the ownership issue, and denies Objector Mellon's Motion to Certify on the basis that certification of the water right ownership issue in this matter would not be appropriate. For a full discussion of these decisions, see Preliminary Matters, T-L Irrigation Proposal for Decision. However, the decision reached in this matter obviates any adverse effect to the Objectors which might be caused by the Hearing Examiner's rulings on these matters.

III. Objector Mellon alleges that the administrative process in this matter is flawed by inadequate notice: he claims that the individual landowners who reside in Shining Mountains Subdivision were entitled to individual notice of the Application. However, the Hearing Examiner hereby reiterates her position that a review of the record indicates that notice in this matter was adequate. For a full discussion of this decision, see Preliminary Matters, T-L Irrigation Proposal for Decision.

IV. Counsel for Objector Daems moved to have the testimony given by Montana Power Company witness Kenneth Salo in the hearing for T-L Irrigation's Application included in the record in the present matter. Since Montana Power Company is not a

party to the present matter and Kenneth Salo was not available for cross-examination at the hearing in the present matter, the Hearing Examiner denied the Motion. Objector Daems objected to the Hearing Examiner's ruling.

To the extent that Mr. Salo's testimony was relevant to both Applications, and would not have been modified by the particular facts of the present Application and was not susceptible to different cross-examination based on the evidence peculiar to the record in the present matter, Mr. Salo's testimony might have been admissible. However, the Hearing Examiner believes that the difficulty of determining the results of these factors outweighs the benefits to be gained, and reiterates her ruling on the Motion. However, the Objectors cannot argue that the Hearing Examiner's ruling has caused adverse effect to their interests, since the testimony of Mr. Salo was not useful in reaching the proposed decision. See Findings of Fact 11 and 12, T-L Irrigation Proposal for Decision.

V. A great deal of evidence and testimony was introduced on the issue of whether the Shining Mountains Subdivision lot owned by Objector Mellon was part of the original place of use for Water Right No. 31227-41F, presumably to develop a record in case of appeal. However, based on the Hearing Examiner's determination that the Department does not have jurisdiction to decide the underlying issue of ownership of the water right, this evidence will not be reviewed in this Proposal.

VI. Several issues of fact and law not addressed in this

Proposal were raised either directly or indirectly in the course of the hearing in this matter; such issues as at what points return flows run into ditches which intersect Blaine Spring Creek or which are used by the parties to obtain water, the location and adequacy of measuring devices, the extent to which the changing water conditions experienced by Blaine Spring Creek appropriators may be the result of factors other than the changes in this particular water right, the use of other water rights appurtenant to the historic place of use and of those appurtenant to the proposed place of use, and the Applicant's failure to remove any acreage from the claimed place of use. Due to the decision made in this matter, these issues have not been reached. However, should this decision be modified or reversed, these and other issues may have to be addressed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-402 (1), MCA states in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department."
2. Application for Change of Appropriation Water Right No. G(W)31227-02-41F was duly filed with the Department of Natural

Resources and Conservation on March 13, 1989 at 3:12 p.m.

3. The pertinent portions of the Application were published in the Madisonian, a newspaper of general circulation in the area of the source, on May 18, 1989.

4. The source of water for claimed Water Right No. 31227-41F is Blaine Spring Creek (also known as Warm Springs Creek), a tributary of the Madison River.

5. Statement of Claim for Existing Water Rights for Irrigation No. 31227-41F was filed by Shining Mountains Owners Association on September 8, 1981, claiming 250 miner's inches up to 1000 acre-feet of water per year for irrigation of 490 acres of land. The 490 acres listed as the place of use was reduced to 279 acres in the temporary preliminary decree. This acreage includes the entire bench where Shining Mountains Subdivision presently is located (the "SMOA bench") as well as acreage to the west of the diversion ditch. (See Applicant's Exhibits 1 and 5; Department file.)

The historic place of use as verified includes 75 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ , 60 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ , 10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ , 35 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ , and 20 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 19, all in Township 07 South, Range 01 West, as well as 10 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ , 20 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , 20 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , 25 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and 4 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 24, all in Township 07 South, Range 02 West, all legals located in Madison County, Montana (see Department file).

The priority date for the claim is September 19, 1880. The

**CASE #**

21227-41F

31227-41F

claimed period of appropriation for the right is April 1 through September 30 of each year.

6. SMOA, the owner of record of claimed Water Right No. 31227-41F (Applicant's Exhibit 2), has agreed to transfer a portion of the water right to Combs Cattle Company. By means of the Application for Change in this matter, Combs Cattle Company (hereafter, "Applicant" or "Combs") seeks to change the place of use of the transferred 100 miner's inches up to 400 acre-feet of water to 60 acres in the E½ of Section 18 for supplemental irrigation, and to 4½ acres in the NW¼SW¼ of Section 17 and 151.36 acres in the E½ of Section 18, Township 07 South, Range 01 West, Madison County for new irrigation of a total of 155.86 acres of land.

As specified in the Application, the past place of use for claimed Water Right No. 31227-41F will remain unchanged. See Application Attachment 4(B)2.

The Applicant also proposes to change the point of diversion for its portion of the claimed Water Right from the historic points of diversion in the NE¼SE¼SW¼ of Section 13 and the SE¼NE¼NW¼ of Section 24, Township 07 South, Range 02 West to a point of diversion in the NE¼SE¼NE¼ of Section 24, Township 07 South, Range 02 West. (See Application.)

7. Objector James A. Daems is owner of record of three claimed water rights on Blaine Spring Creek: Claim No. 136415-41F for 120 miner's inches up to 11 acre-feet of water per year for stockwatering, with a priority date of April, 1883 and a

claimed period of use of January 1 through December 31 of each year; Claim No. 141896-41F for 120 miner's inches up to 1098 acre-feet of water per year for irrigation, with a priority date of April 1, 1883 and a claimed period of use of May 1 through November 1 of each year; and Claim No. 141897-41F for 192 miner's inches up to 1756.8 acre-feet of water per year for irrigation, with a claimed priority date of Spring, 1938 and a claimed period of use of May 1 through November 1 of each year. The point of diversion for all three Claims is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 18, Township 07 South, Range 01 West, Madison County, Montana. (See Daems Exhibits 6, 7, and 8.)

Objector Helen Joy Daems is owner of record of Water Right Permit No. 20486-s41F for 2.41 cfs up to 96.4 acre-feet of water per year from Blaine Spring Creek for irrigation, with a period of use of April 1 through October 31 of each year and a priority date of October 2, 1978. The point of diversion for the Permit is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 18, Township 07 South, Range 01 West, Madison County, Montana. (See Daems Exhibit 9.)

Robbie Ranch, a/k/a the Estate of Joseph Robbie, is the owner of record of several claimed water rights on Blaine Spring Creek (see Department records); however, the individual rights were not introduced at the hearing in this matter.

8. The Applicant proposes to divert its portion of Water Right No. 31227-41F (100 miner's inches up to 400 acre-feet of water) at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 24, Township 07 South, Range 02 West. The water would be diverted by means of a

**CASE #** 31227-02  
201-11-15-15

ditch known as the "Coad Ditch" and transported to the proposed place of use. (Testimony of Arnie Rosdahl.) The water diverted through the Coad Ditch is measured by means of a Parshall flume (testimony of Rosdahl), although there is no information in the record as to the exact location of the Parshall flume.

Mr. Rosdahl testified that the ditch and flume are able to divert the proposed additional 100 miner's inches of water and that, in fact, he has diverted this water previously at times when SMOA was not using it. His records (Applicant's Exhibit 5) indicate that Mr. Rosdahl on several occasions has diverted more than 100 miner's inches of water in addition to the Applicant's claimed rights of 100 miner's inches of water (1899 priority) and 75 miner's inches of water (1883 priority). Mr. Rosdahl stated that he has used SMOA water on occasion since 1976.

9. The Applicant proposes to use the transferred water right for supplemental irrigation of 60 acres of land, using flood irrigation by means of contour ditches already in place. (Testimony of Rosdahl, Westesen.) This land is located on a bench which rises approximately 100 feet above the Shewmaker Ditch, slightly lower than the SMOA bench which is the historic place of use. (Testimony of Gerald Westesen, Applicant's Exhibit 1.)

Arnie Rosdahl testified that the area of proposed new irrigation is below the bench, and that the Applicant plans to irrigate the lower area by running water through a ditch and dropping it over the edge of the bench in a pipe, then probably

sprinkler-irrigating the area of new use (155.86 acres of land, according to the Application). Dr. Westesen testified that the lower portion of the Combs property is somewhat higher than the river valley, and that the Combs property in general appears to have the same general soil characteristics as the SMOA bench.

Mr. Rosdahl testified that his normal irrigation practice on the area currently irrigated has been to flood-irrigate the ground two or three times, turn off the water for about a month during haying, then irrigate again until shutting off irrigation, usually in September.

10. The Applicant has additional claimed water rights on Blaine Spring Creek, one for 75 miner's inches of water and one for 100 miner's inches of water, which are utilized on the acreage for which the present right would provide supplemental water. The Applicant wants to change the present right as proposed to provide water for better coverage of this acreage, as well as for new irrigation. (Testimony of Rosdahl.)

The Applicant's existing claims on Blaine Spring Creek (Claim No. 136417-41F for 75 miner's inches, with an 1883 priority date, and Claim No. 148520-41F for 100 miner's inches, with an 1899 priority date) are diverted from Blaine Spring Creek through the Coad Ditch at the same point of diversion as that proposed for the present water right.

11. It is not possible from the record in this matter to reconstruct the historic pattern of use for Water Right No. 31227-41F with any exactitude. The water right has been utilized

on the claimed place of use somewhat differently by every irrigator of record, apparently in conjunction with other water rights. However, the record as a whole suggests that at maximum use the right most likely was used for a certain length of time, then shut off, then use resumed, and the pattern repeated over the irrigation season, rather than being used at the full flow rate constantly for a 150-day irrigation season as hypothesized by Applicant's witness Dr. Gerald Westesen.

Water Right No. 31227-41F is part of a larger water right with an 1880 priority date which was sold to three separate individuals or entities in 1963, at which time one of the Applicant's predecessors in interest first acquired the right for use on the SMOA bench. (See Robbie Exhibit 8.) Therefore, "historic use" on the claimed place of use began in 1963.

Subsequent to Applicant's predecessor in interest, Lehman Ranch Company, acquiring the water right, it was used on the SMOA bench by Tom Lehman and Jim Foster, witnesses for Objector Daems in the T-L Irrigation application. Mr. Lehman, who formerly was part owner of the bench area and who managed the property from 1960 to 1967, testified that he flood-irrigated the whole benchland. (See area marked by Mr. Lehman in black on Applicant's Exhibit 5 (T-L) to depict original irrigation area.) When the Blaine Spring Creek water was purchased in 1963, Mr. Lehman put in a center ditch from the north-south diversion ditch and expanded irrigation to new acreage east of the diversion ditch. (See red markings on Applicant's Exhibit 5 (T-L).) He

also utilized Cold Spring Creek water and Wigwam Creek water on the benchland, with the Wigwam water being utilized on the southern bench area near Wigwam Creek. (Testimony of Lehman.)

James Foster, part owner of the SMOA bench lands from 1957 to 1972, testified that he used an "upper ditch" to flood-irrigate lands west of the diversion ditch, and sprinkler-irrigated lands east of the diversion ditch by means of a 50 h.p. pump and six 4" wheel lines. Mr. Foster stated that he also used Cold Spring Creek and Wigwam Creek water rights on the bench, in addition to other Blaine Spring Creek water rights and the water right under review herein. He testified that he was not sure which Blaine Spring Creek water rights were being used on the property at any given time. The crops irrigated by Mr. Foster changed from 50% alfalfa/50% grass in 1957 to 5% alfalfa/95% grass in 1973.

Mr. Foster testified that he normally irrigated in "sets" of ten days on/five days off, beginning in the middle of May in an average irrigation season. He stated that normally there would be one irrigation "set" in May, two in June, one in July (allowing time for haying), and a couple of sets in August. Objector Daems testified that he was able to use water from Blaine Spring Creek to fill his junior rights during the "frequent" periods of time water was not used by Mr. Lehman and Mr. Foster. (Testimony from T-L hearing.)

Subsequent to the land being purchased by Shining Mountains (approximately 1972), there was intermittent irrigation of the

**CASE #**

Σ 11.11.11  
31337-12

historic place of use. Objector Daems testified that a Mr. Sawin attempted to irrigate the bench in the early 1970's with a small sprinkler system. Arnie Rosdahl testified that he irrigated the SMOA bench in 1978 from May to July, using sprinklers south of the center ditch and flood-irrigating the area north of the ditch. Subsequent to the filing of the Claim for this water right, Boyd VanFleet testified that he flood-irrigated 60 to 80 acres of the SMOA bench in approximately 1983-1984. He stated that he ran Blaine Spring Creek water through the main ditch continuously from June until early September, to both the bench and the Bar 7 Ranch, and irrigated land west of the ditch with Wigwam Creek water and possibly Cold Spring Creek water.<sup>1</sup>

The testimony of these witnesses, which is the only evidence on record as to the pattern of use for claimed Water Right No. 31227-41F, contradicts Dr. Gerald Westesen's postulation that the right would have been used at its full flow rate of 250 miner's inches for a 150-day irrigation period. (See Applicant's Exhibit 7 (T-L); discussion infra.) The testimony of the witnesses is further supported on the issue of the pattern of use by the Claim itself. Claim No. 31227-41F claims a total volume of 1000 acre-feet of water per year. Divided by the claimed flow rate, this volume yields only 81 days of continuous use. This amount of time appears to most closely resemble Mr. Foster's irrigation

---

<sup>1</sup>As relevant as Mr. VanFleet's testimony may be to the issue of post-1973 abandonment (see Preliminary Matters), the use he described occurred after the Claim in this matter had been filed, and therefore cannot be found relevant to the issue of historic use of the claimed right.

pattern of six sets of about 10 days each, which also is the most extensive historic use testified to on the record.

12. Witnesses for the Applicant and for the Objectors in this matter testified about the amount of return flow resulting from use of the water right in this matter. Unfortunately, since the lay witnesses did not quantify their estimates and the expert witness based his estimate on assumptions not clearly supported by the available evidence, it is not possible to arrive at any logical quantification of the return flow.

As fully set forth in the Findings of Fact in the Proposal for Decision, In the Matter of the Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company, Applicant's witnesses Boyd VanFleet and Glen Schultz testified that they did not observe any runoff from the SMOA bench, and that they believe the erosion scars on the northeast edge of the bench probably were caused by operation of the Economy Power generating plant and its ditch. The witnesses stated that any runoff which might occur could return to Blaine Spring Creek to the north of the bench, go into Wigwam Creek to the south, or into ditches to the east. Mr. VanFleet stated that he observed between two and five "seeps" next to Blaine Spring Creek when he was on the SMOA property, from near the water surface to two or three feet above it.

Objector's witness Tom Lehman stated that any return flow went into Blaine Spring Creek, and testified to "some" leakage occurring in the upper ditch. Witness Tom Foster testified that

the area he flood-irrigated produced a lot of runoff because of his irrigation practices, and that he saw evidence of return flows to Blaine Spring Creek. Mr. Foster also discussed a wet "swale" area along the property boundary next to Blaine Spring Creek.

Objector James Daems testified that substantial leakage from the main ditch below the point of diversion created "bogs". He also testified that several draws down by Section 24 ran water from the bench back into Blaine Spring Creek over a number of years, and that there were a number of springs in the bottom of the canyon in Section 19 that are not there now. Mr. Daems stated that sweet clover and other vegetation which used to grow on the edge of the bench above Blaine Spring Creek has disappeared, and that springs which used to be in evidence right above the creek have not been active for the last five to seven years.

Applicant's expert witness, Dr. Gerald Westesen, arrived at an estimate of 10% return flow. He stated that he believes this estimate is on the high side, and that there is "virtually no opportunity" for return flow, given the gravelly soil with an extremely high infiltration rate (as evidenced by the remains of closely spaced lateral ditches), the lack of pick-up ditches next to the fields, and the "highly fractured" nature of the underlying limestone layer. (Testimony; see also Applicant's Exhibit 7 (T-L).) Dr. Westesen referred to logs of wells in the area (Applicant's Exhibit 8 (T-L)) which show that fractured

limestone is present, and stated that in his opinion the limestone underlying the historic place of use is fractured and highly permeable and therefore any water not consumed by plant use most likely would pass downward through the limestone fractures and be lost.

Apart from his stipulated expertise (see Applicant's Exhibit 6 (T-L)), Dr. Westesen has done a great deal of work in the Madison Valley. (Testimony.) However, he specified under cross-examination that he does not know the geology underlying the SMOA bench and cannot be sure as to what direction the limestone layer trends, how fractured it is, nor whether it is underlain by less permeable material. Dr. Westesen, who testified that his visual inspection of the site did not show any springs or other evidence that water came out in seeps, also agreed that physical evidence of return flows would be affected by how much irrigation has occurred on the bench in recent years.

All in all, the evidence in this matter indicates that historic water use on the SMOA bench resulted in return flows substantial enough to be noticed. Mr. Lehman and Mr. Foster have provided the best available information on historic use, since they personally irrigated the bench and their testimony may be counted credible. In conjunction with Objector Daems, who is a lifelong resident of the area and an irrigator with great experience with water conditions on Blaine Spring Creek, and whose testimony therefore is entitled to great weight (see, e.g., Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939)), they

have testified to surface return flows to Blaine Spring Creek and to the presence of springs and seeps which indicated subsurface return flow.

The estimates of Dr. Westesen, who did not consult with the historic water users and was not privy to the actual pattern of use on the bench, are not sufficient to counterbalance the testimony of the actual users. Unfortunately, however, the testimony of these users also does not provide a clearly supportable basis for quantifying return flows from the SMOA bench.

13. It is not possible to compare consumptive water uses of the historic use and the proposed use in order to determine possible adverse effects to other appropriators on the source, based on the information available on the record.

As fully discussed in Finding of Fact 12 in the Proposal for Decision in the Matter of Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company, Dr. Westesen's calculations concerning water consumption on the historic place of use were based on several assumptions unsupported by the evidence in the record. The historic water use assumed by Dr. Westesen in making his calculations is not reflected in the Statement of Claim for the underlying water right nor is it supported by the testimony of the historic irrigators. Therefore, his calculations of return flow and net depletion are suspect, resting as they do on his assumptions about the pattern of water use and irrigation practices.

It also is not possible to make any supportable calculations of net depletion and possible return flow for the proposed place of use, since the record provided insufficient information about use of the water on the proposed place of use.

Dr. Westesen did not make any specific calculations concerning net depletions for the Combs Cattle Company proposed place of use. (See Applicant's Exhibit 7 (T-L).) Rather, he stated in general terms that changing the place of use for the transferred 100 miner's inches of water should increase the opportunity for the Daems and Robbie ranches to receive return flows. Dr. Westesen estimated that nearly the full 100 miner's inches should reach the Comb's property since there would be little ditch loss (presumably in contrast to the ditch losses experienced on the historic place of use, which may have been substantial, according to testimony), and that the Combs property is in "close proximity" to the Daems and Robbie properties and to the Madison River. (Applicant's Exhibit 7 (T-L), page 3.) Dr. Westesen testified that there was less chance for water to be lost "irretrievably" under the proposed change, and that any return flows which might occur might be intercepted by the nearby users. In response to cross-examination, Dr. Westesen stated that he did not know if return flows would end up in the same ditches as in the past, enabling Mr. Daems to irrigate pursuant to his historic pattern of use. He also responded that any surface return flows would not be available to users whose points of diversion are south of the Combs property, since indications

of return flow show that the flow goes north from the Combs property.

Dr. Westesen testified that he did not assess the percentage of return flow from the Combs property but would roughly estimate it at the same 10 percent figure as that of the historic place of use, and that he did not assess the Combs irrigation efficiency since it would depend in part on management practices. However, he did assume that irrigation using the transferred 100 miner's inches would be done by means of the present contour ditch system.

Testimony by Arnie Rosdahl indicates that the Applicant intends to use the transferred water right for new use irrigation of 155.86 acres of land, probably by sprinkler, in addition to using the water for supplemental irrigation of the 60 acres of land presently flood-irrigated with other water rights. (See Finding of Fact 9.) However, apart from the information that the water probably will be transported to the proposed new acreage by means of a flume (Finding of Fact 9), there is no information in the record as to the type of irrigation system the Applicant plans to install, its probable efficiency, how it can be operated to irrigate the additional acreage, or how the water right in this matter will be utilized to provide supplemental irrigation as well as providing for the new irrigation. Therefore, the information of record cannot be used to flesh out Dr. Westesen's general assumptions concerning return flows from the proposed place of use. However, it does contradict Dr. Westesen's

assumption that the transferred 100 miner's inches would be used solely in the existing flood irrigation system.

In view of the fact that it is the Applicant's stated intent to use the water right in this matter for new use irrigation of a larger acreage than the same amount of water irrigated on the past place of use but which has the same general soil characteristics as the SMOA bench (testimony of Dr. Westesen)<sup>2</sup>, and in view of the widely recognized technical fact that sprinkler-irrigation systems yield much less return flow than do flood-irrigation systems such as the contour ditch system which Dr. Westesen assumed would be the means of irrigation, Dr. Westesen's general opinion that the proposed change would increase the opportunity for the Objectors to receive return flow from use of this water right is not supported by the record. It also should be noted that Dr. Westesen's estimations of very little ditch loss on the proposed place of use mean that ditch losses would not be available to the source as return flow, in contrast to the returns to Blaine Spring Creek which the SMOA diversion ditch engendered. (See Finding of Fact 12.)

14. Arnie Rosdahl testified that the Applicant has used claimed Water Right No. 31227-41F on the proposed place of use on

---

<sup>2</sup>Even assuming arguendo that Water Right No. 31227-41F provided full irrigation for the historic place of use (which the evidence does not support -- see Finding of Fact 12 in the T-L Irrigation Company Proposal for Decision), the most acreage that 100 miner's inches would have irrigated is approximately 111.6 acres (100 miner's inches = 2/5 of the entire 250 miner's inches claim; 2/5 of the verified 279 acres of use = 111.6 acres), compared to the proposed new acreage of 155.86 acres.

occasion since 1976, resulting in occasional complaints, but that no one has petitioned for appointment of a water commissioner on Blaine Spring Creek. However, testimony by the Objectors indicates that changes in use of the water right have affected water conditions in Blaine Spring Creek.

Objector James Daems testified that flow reduction in Blaine Spring Creek has been gradual, with problems in water availability developing over the last few years since Bar 7 Ranch and Combs Cattle Company have expanded. He stated that his 1883 priority water right and his 1938 priority water right from Blaine Spring Creek used to be reliable but that the rights, especially the junior one, are not reliable water rights anymore. He stated that he believes this state of affairs is the result of changes in use of historic rights upstream on the creek.

Mr. Daems stated that he believes historic water use on the SMOA bench made water available to him which no longer is available; first, through loss of return flow to the creek and loss of recharge by means of seeps and springs. Second, he testified that historically irrigators Foster and Lehman turned the water off frequently, resulting in water being made available for use downstream. Mr. Daems testified that upstream users are diverting more water than previously, and that he believes more water will be diverted in the future.

Jay Linderman testified on behalf of Robbie Ranch that by the time Blaine Spring Creek reaches the ranch in Section 30 there often is no water left during the height of the irrigation

season. Mr. Linderman testified that the water availability problem has developed gradually as the area ranches have attempted to produce more crops. He stated that at times (in the 1988 irrigation season, for example) Bar 7 Ranch, Combs Cattle Company, and Daems all were using the water right in question as "free water", resulting in no water reaching the Robbie Ranch. After contacting the other parties, Robbie received some water but was unable to fill its second water right. As a result, Robbie has had to irrigate with Madison River water rights, jeopardizing irrigation on other Robbie lands. Mr. Linderman stated that Robbie Ranch will suffer a considerable financial loss if its Blaine Spring Creek rights cannot be filled. He stated that he believes Robbie Ranch would have a better chance to fill its junior Blaine Spring Creek right if the water is left in the creek rather than being used on the additional acreage proposed by the Applicant, but that use on the Combs land probably would be better for Robbie Ranch than use on the SMOA bench. John Branger, current ranch manager for Robbie Ranch, stated that it probably would be better for Robbie Ranch if the transferred 100 miner's inches water right is used for irrigation on Combs land rather than on the SMOA bench, due to Comb's closer proximity to the Robbie Ranch.

The Applicant argues that the effects experienced by the Objectors are the result of resuming the use of Water Right No. 31227-41F rather than changes in its use, and that the objections to the present Application are the result of resistance to

changes in long-standing patterns of use rather than the result of harmful effects. (Applicant's closing statement.)

15. The record contains uncontradicted testimony that the Applicant in this matter has a possessory interest in the proposed place of use. See also Applicant's Exhibits 2, 3, and 4. Although counsel for Objector Robbie Ranch argued that the proposed place of use is owned by individual persons rather than being in the name of the Applicant, Arnie Rosdahl gave uncontradicted evidence that the specified individual family members do business as the Combs Cattle Company, the named Applicant in this matter.

16. Objector John Padilla failed to appear at the hearing in this matter.

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

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto. Title 85, Chapter 2, Part 4, MCA.

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

3. Objector John Padilla failed to appear at the hearing in this matter. (Finding of Fact 16.) Therefore, he is in default pursuant to Administrative Rule of Montana 36.12.208 and

his interest in this proceeding is dismissed without prejudice.

4. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in §85-2-402, MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to (§85-2-436) that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

5. The Applicant has a possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 15.

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

7. In order to determine whether a proposed change in use of a water right will adversely affect the water rights of other appropriators, it is necessary to have evidence as to whether or not the proposed change will result in the consumption of volumes and flows in excess of the historical use or in a use pattern which differs from that established by practice, and whether or not any change in these factors will adversely affect other appropriators by changing the stream conditions.

The Applicant is correct that mere resumption of use of a water right, with an attendant increase of consumption to former

levels, does not constitute an increase in the burden on the source, assuming that the water right has not been abandoned. See In the Matter of the Application for Change of Appropriation Water Right No. G190495-41A by the United States of America, U.S. Fish and Wildlife Service (January 27, 1989 Proposal for Decision). Further, a change which results in somewhat different water conditions may be acceptable if the water rights of others are not adversely affected. See In the Matter of the Application for Change of Appropriation Water Right No. G34573-76H by Carrie M. Grether (September 10, 1986 Final Order). However, the use may not be resumed or changed in a manner which acts to the detriment of other appropriators.

As fully discussed in Conclusion of Law 6 in the Proposal for Decision in the Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company, appropriators have vested rights to maintenance of the stream conditions which existed as of the time of their arrival on the source. To the extent that the impact proposed changes will cause to stream conditions cannot be evaluated, the Department cannot grant a change authorization, since it cannot determine whether (or to what extent) adverse effects to the water rights of other persons will result. The Department has had to deny or only partially grant proposed changes which arguably could have been authorized in whole if the applicants had introduced evidence sufficient to allow the Department to find no adverse effect (or alternatively, to allow the Department to condition a change authorization so as

to protect the appropriators). See T-L Irrigation Conclusion of Law 6 for citations.

In the present matter, the Applicant is insistent that the Department must rely on the Claim for Existing Water Rights and its attendant documentation to define the historic use of claimed Water Right No. 31227-41F, and that the Department may not delineate the right in terms other than those provided by the Claim. However, the Department on numerous occasions has asserted its authority to make those inquiries necessary to complete its statutory obligation to determine if the criteria have been met, including inquiries concerning the effect of the historic pattern of use on stream conditions. Since a Statement of Claim does not provide more than the outside parameters of the historic use, in cases where the objectors to a change allege that the proposed change will alter the stream conditions created by the historic pattern of use of the right, the Department must look beyond the face of the Claim at more specific information in order to be able to assess the impacts.

The Department does not thereby assert jurisdiction to modify the underlying water right, nor does its determination have any res judicata effect. The water right holder retains the entire water right and the ability to use it as it is defined in the claim. See, e.g., Preliminary Matters, In the Matter of the Application for Change of Appropriation Water Right Nos. G05081 and G05083 by Neil M. Moldenhauer, March 20, 1984 Final Order. Therefore, there is no property loss as suggested by the

Applicant. Rather, the result of denying a change where insufficient evidence exists to allow a finding of no adverse effect is to provide maximum protection of the parties. The water right holder retains the right as claimed and holders of other water rights are protected, whereas granting a change under such circumstances may result in severe or irreparable harm to other users on the source.

8. The Applicant has not met its burden of proof on the issue of adverse effect in this matter. See the discussion of burden of production contained in Conclusion of Law 7 in the Proposal for Decision, Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company.

In the present matter, the Applicant discharged its initial burden of production by introducing the Application, the Statement of Claim for the underlying water right, and the testimony of witnesses. The Objectors discharged their burden of production by describing their water rights and offering a plausible argument that the proposed changes would cause adverse effect to their water rights. See T-L Irrigation Conclusion of Law 7 for citations. Although the Applicant argues that the Objectors' assertions regarding the possibility of injury are unsubstantiated and therefore insufficient to discharge their burden of proof (see Applicant's post-hearing brief in the present matter, page 15), a review of the record indicates that the Objectors' allegations concerning the existence of return flows and the recent change in stream conditions are corroborated

by the testimony of several individuals (see Findings of Fact 12, 13, and 14) and are "unsubstantiated" only in the sense that the witnesses could not quantify the amounts of water involved. There is substantial evidence that the historic use of Water Right No. 31227-41F resulted in some amount of both surface and subsurface return flows. In addition to the testimony of the Objectors themselves, there is testimony by the historic irrigators, testimony by the Applicant's witness who observed seeps, and the fact that the Applicant's expert witness did not discount return flows and agreed that various factors could affect his own return flow quantification.

The Applicant is correct in its assertion that information available on historic use of the water right in this matter does not provide sufficient evidence to allow a quantification of the return flow to be made. (See Applicant's post-hearing brief in this matter, page 15.) However, the inability to quantify the return flow does not result in a finding that the criterion regarding adverse effect has been met and a change authorization may be granted; to the contrary, it results in a determination that the Applicant's burden of persuasion has not been met. The Applicant's failure to discuss its proposed new irrigation of additional acreage and what return flows, if any, may result from this proposed irrigation underscores the Applicant's failure to carry the burden of persuasion on the issue of return flows. See Finding of Fact 13.

It is true that Robbie Ranch's witness Linderman and Branger

stated that use of the transferred 100 miner's inches of water to irrigate the Combs Cattle Company land probably would be more beneficial to Robbie Ranch than use of the water on the SMOA bench. (See Finding of Fact 14.) It is not possible to tell from their testimony whether or not this opinion was the result of Dr. Westesen's testimony concerning the existence of runoff from the Applicant's flood-irrigation system and the closer proximity of the Combs property to the Objectors. It well may be that use of the transferred 100 miner's inches right in the Applicant's existing flood-irrigation system might result in more return flows benefitting Robbie Ranch. However, the record indicates that the proposed change in place of use would work to the detriment of the Daems by changing the place where the return flows are available for their use. (See Finding of Fact 13.) Furthermore, the fact that the Applicant does not propose only to use the water in the existing irrigation system, but also to stretch its use to sprinkler irrigate an area 2½ times the size of the area currently flood-irrigated, does not support a finding that more return flow will be available to the Objectors in general under the proposed changes.

The Objectors allege that the recent changes in the use of the water right in this matter have resulted in a gradual flow reduction in Blaine Spring Creek. See Finding of Fact 14. The evidence in the record indicates that some or all of this flow reduction must be ascribed to the "change" in use created by several individuals using the water right for their own

irrigation when SMOA was not using it. (See Finding of Fact 14.) Clearly, full use of the right by one or quite possibly several irrigators during the same season will have a measurable effect on the stream conditions and the water available to fill junior water rights. This change in stream conditions can hardly be charged to the Applicant, except to the extent that the Applicant has been one of the irrigators diverting the right for "free water". (See Finding of Fact 8.)

However, the proposed changes may result in more water being diverted from Blaine Spring Creek pursuant to the water right in this matter than has been diverted historically. The record reflects that the 100 miner's inches of water under review herein historically irrigated approximately 112 acres of land, while under the proposed changes the water will be used for new irrigation of 155.86 acres in addition to supplemental irrigation of 60 acres. As a general rule, an increase in the acreage to be irrigated with the same amount of water constitutes evidence of increased consumption, unless the Applicant provides evidence as to how the increase may be accomplished without diverting more water. See generally In the Matter of Application for Change of Appropriation Water Right No. G155812-43A by Rogerric I. and Karen K. Knutson, September 19, 1989 Final Order. The Applicant in this matter did not provide evidence as to how the proposed new irrigation could be accomplished, in addition to using the water for supplemental irrigation, without diverting a greater volume and/or for a greater length of time than under the

historic pattern of use for the right. Furthermore, this right also may be used for irrigation of the historic place of use. See Finding of Fact 6.

Assuming arguendo that the Applicant can measure the flow rate of this particular water right and keep track of when it is being utilized (as opposed to the use of the other water rights being diverted through the same ditch), the Applicant might be able to substantially duplicate the historic use of the water by proper management and measurement. See In the Matter of the Applications for Change of Appropriation Water Rights Nos. G136329-410, G136330-410, and G136331-410 by Lloyd DeBruycker, September 22, 1988 Final Order. However, the Applicant did not provide any evidence on how the water right could be managed so as not to increase the burden on the source above that created by historic use. The Department does not have sufficient information to develop a proposed management plan so that the change authorization might be granted with conditions.

In summary, the Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators, and thereby has failed to show that the proposed changes will not adversely affect the water rights of other appropriators.

9. The Applicant has provided substantial credible evidence that the proposed means of diversion is adequate, see Finding of Fact 8, and that the construction of the appropriation

works is adequate as to the existing flood-irrigation system. See Finding of Fact 9. However, as discussed above, the Applicant has failed to provide substantial credible evidence concerning the proposed new irrigation and has failed to provide sufficient evidence that the proposed means of operation is adequate to prevent adverse effect to other appropriators.

10. If, upon review by the Department at the Final Order stage or by the appropriate district court upon appeal, it is determined that the Hearing Examiner's proposed decision must be amended or reversed, further evidence will be needed on several issues. In such an event, therefore, the matter should be remanded so that the necessary information may be obtained. In denying the Application for Change at this point, the Hearing Examiner does not purport to have determined that the proposed changes could not be authorized, given sufficient credible evidence and an adequate plan of management.

Wherefore, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G(W)31227-02-41F by Combs Cattle Company is denied.

NOTICE

This proposal may be adopted as the Department's final

**CASE # 31227-02**  
12 17 2018

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

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

Dated this 21<sup>st</sup> of August, 1990.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301  
(406) 444-6834

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 27<sup>th</sup> day of August, 1990, as follows:

Combs Cattle Company  
P.O. Box 577  
Ennis, MT 59729

John Branger, Manager  
Robbie Stock Ranch  
513 Varney Road  
Ennis, MT 59729

William Russell McElyea  
Moore, O'Connell, Refling and  
Moon  
P.O. Box 1288  
Bozeman, MT 59771-1288

James H. Morrow  
Morrow, Sedivy and Bennett  
P.O. Box 1168  
Bozeman, MT 59771-1168

Don P. Mellon  
14 Fish Hatchery Road  
South #1  
Ennis, MT 59729

Matt Williams  
Attorney at Law  
506 East Babcock  
Bozeman, MT 59715

Helen Joy Daems  
c/o Jim Daems  
26 Gravely Range Road  
Ennis, MT 59729

James A. Daems  
678 Varney Road  
P.O. Box 170  
Ennis, MT 59729

John Padilla  
520 South 5th Street  
Miles City, MT 59301

Scott Compton, Field Manager  
Bozeman Water Resources  
Field Office  
111 North Tracy  
Bozeman, MT 59715

  
Cindy G. Campbell  
Hearings Unit Secretary