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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
EXTENSION OF TIME ON AUTHORIZATION TO )  
CHANGE NO. G(W)110476-76H GRANTED TO )  
MELVIN CHRISTLEY

FINAL ORDER

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter 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 June 16, 1989 Proposal for Decision, and incorporates them herein by reference.

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

ORDER

That Application for Extension of Time to Perfect Authorization to Change No. G(W)110476-76H is granted. Appropriator shall complete the appropriation works and put water to beneficial use as specified in the Authorization on or before November 30, 1989. The Notice of Completion of Change of Appropriation Water Right shall be filed on or before November 30, 1989.

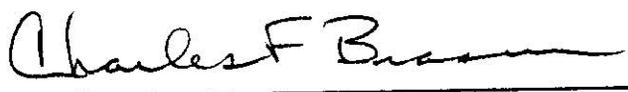
**CASE #** 110476

NOTICE

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

Dated this 27 day of July, 1989.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
\_\_\_\_\_  
Charles F. Brasen, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 860  
Kalispell, Montana 59903-0860  
(406) 752-2288

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 27<sup>th</sup> day of July, 1989, as follows:

Melvin G. Christley  
1051 NE Willow Creek Road  
Corvallis, MT 59828

Mike McLane  
Missoula Field Office  
P.O. Box 5004  
Missoula, MT 59806

Susy Birse  
Daly Ditches Irrigation Dist.  
SE 534 Tammany Lane  
Hamilton, MT 59840

  
\_\_\_\_\_  
Irene V. LaBare  
Legal Secretary

BB

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
EXTENSION OF TIME ON AUTHORIZATION TO ) PROPOSAL FOR DECISION  
CHANGE NO. G(W)110476-76H GRANTED TO )  
MELVIN CHRISTLEY )

\* \* \* \* \*

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 March 8, 1989, in Hamilton, Montana. The Applicant appeared pro se. The Objector, Daly Ditches Irrigation District, appeared through Susie Birse, District Secretary, and Tom Hollings, District Manager. Mike McLane, Field Office Manager, Missoula Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") appeared as Department staff witness.

The Department extension file, which contains the original Application for Extension and Objections thereto, photocopies of the Change Authorization (with attached Final Order), correspondence between the Department and parties, and Department processing documents, was made available at the hearing for review by the parties.

No objection was registered to any part of the Department's file; therefore, the Department extension file remains a part of the record in its entirety.

**CASE # 110476**

The parties were given notice at the hearing that the Hearing Examiner would take notice of the maps contained in the original Change Application. No objections were registered.

Having reviewed the record in this matter and being fully advised in the premises, the Examiner proposes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1. Section 85-2-312(3), MCA, states in pertinent part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. Section 85-2-402 (7), MCA, states in pertinent part:

The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and

limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

3. On December 20, 1985, Authorization to Change No. G110476 was issued to add an additional point of diversion and change the place of use of 20 acres of irrigation as described in Water Right Claim W110476.

4. The underlying water right Statement of Claim No. W110476-76H, has a period of appropriation of May 15 through October 15 of each year. (Department records.)

5. Under the Authorization, the Applicant was required to have completed the authorized change on or before November 30, 1987. A Notice of Completion of Change of Appropriation was due on or before November 30, 1987.

6. On October 28, 1987, the Applicant requested an Extension of Time, through his daughter, Gail Christley.

7. On November 30, 1987, the Missoula Water Rights Bureau Field Office issued a Temporary Extension of Time with a Notice of Completion due date pending final action on the (extension) application.

8. The pertinent portions of the Application for Extension of Time were published in the Ravalli Republic, a newspaper of general circulation in the area of the source on November 25, 1987. Additionally, the DNRC served notice by first-class mail

on entities which it determined had an interest in, or could be affected by, the extension request.

9. The Department received a timely objection to the Application for Extension of Time from Daly Ditches Irrigation District.

10. Mr. Christley purchased sufficient irrigation pipe to irrigate the new place of use and a five horsepower pump prior to the fall of 1986. (Applicant testimony.)

11. Mr. Christley was asked by his church to serve in the South Pacific in the fall of 1986. (Applicant testimony.)

12. Mr. Christley left to serve his church in March of 1987 and returned in October, 1988. (Applicant testimony.)

13. No work on the project occurred after Mr. Christley was summoned by his church in the fall of 1986, except for the application for additional time to complete the project. Mr. Christley explained that he intended to complete the project himself, rather than hiring a contractor to do the installation work. Since he was out of the country, no work could be done.

14. The work remaining to be done includes design and installation of two measuring devices, pump site preparation and pump installation, and acquisition of any environmental permits to accomplish these tasks.

15. Time estimates needed to complete the project range from "this year" (Applicant testimony) to "a week to obtain a 310 Permit and 1 day to install the measuring device." (Objector testimony.)

16. The basis of the objection in this matter is twofold:

A. The amount of time allowed by the Department to complete the project should have been six months and not two years that was allowed;

B. The Applicant allowed one year of his allotted time to complete the change to go by without pursuing any of the activity required to perfect the change, nor was there any project activity during the time the Applicant was away serving his church. Thus, it was alleged that the Applicant was not proceeding diligently towards completion of the project.

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner.

3. The Department did set limitations on the time for completion of the change. There are no statutory criteria for information to be used by the Department in fixing any time limits for completion of changes. The Examiner infers from the language in the statutory criteria for fixing limits on time for completion of water right permits (85-2-312(2), MCA) that the time must be "reasonable for the task at hand". The original limitation of 771 days (date of issuance of the authorization,

December 20, 1985, until notice of completion due date, November 30, 1987) is reasonable (see Finding of Fact #15 ). Therefore, the objection based upon the length of time originally allowed by the Department is without merit.

4. This is an Application to Change an Existing Water Right. Accordingly, the "due diligence" requirement as set forth in In the Matter of Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787 Transferred to Marvin and Mary Ann Rehbein is not binding.

5. The holder of an Authorization to Change is required to show good cause why the time limit for completion stated on the Authorization should be extended. Section 85-2-312(3), MCA. "Good cause" is defined in part as ". . . substantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed." (Black's Law Dictionary, 5th ed. 1983)

6. Regarding whether the Applicant has good cause, the record shows Mr. Christley did not have advance knowledge that he would have to leave the country for one and one-half years; therefore, his absence may be considered an unforeseeable circumstance. Mr. Christley can complete the change of point of diversion and place of use if allowed the time he would have had available had he not been summoned to serve his church.

7. The period during which Mr. Christley can appropriate water ends October 15 of each year. Thus, any time that exceeds a week and a day (see Finding of Fact #15) prior to October 15 is a reasonable time limit.

WHEREFORE, the Hearing Examiner proposes the following:

ORDER

That Application for Extension of Time to Perfect Authorization to Change No. G(W)110476-76H is granted. Appropriator shall complete the appropriation works and put water to beneficial use as specified in the Authorization on or before November 30, 1989. The Notice of Completion of Change of Appropriation Water Right shall be filed on or before November 30, 1989.

Dated this 16<sup>th</sup> day of June, 1989.

*Charles F. Brasen*  
Charles F. Brasen, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 860  
Kalispell, Montana 59903-0860  
(406) 752-2288

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (P.O. Box 860, Kalispell,

MT 59903); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues

which the parties have set forth in their written request for oral argument.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was served by mail upon all parties of record at their address this 10<sup>th</sup> day of June, 1989, as follows:

Melvin G. Christley  
1051 NE Willow Creek Road  
Corvallis, MT 59828

Daly Ditches Irrigation District  
Attn: Susie Birse  
SE 534 Tammany Lane  
Hamilton, MT 59840

Mike McLane  
Missoula Field Office  
P.O. Box 5004  
Missoula, MT 59806

  
\_\_\_\_\_  
Irene LaBare  
Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION ) AMENDED FINAL ORDER  
WATER RIGHT NO. G 110476-76H )  
BY MELVIN G. CHRISTLEY )

\* \* \* \* \*

The Final Order of April 2, 1985 required the Change Authorization herein to be completed by December 1, 1985. As the final authorization has yet to be processed, such a time period is obviously inappropriate. The time period within which the Permittee must complete the change as authorized by the Final Order of April 2, 1985 is therefore extended to November 30, 1987.

DONE this 6 day of January, 1986.

Gary Fritz  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6605

**CASE # 110476**

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 7, 1986, she deposited in the United States first class mail, postage prepaid, an order by the Department on the Application by Melvin G. Christley, Application No. G 110476-76H, an Application for Change of Appropriation Water Right addressed to each of the following persons or agencies:

1. Melvin G. Christley, 1051 NE Willow Creek Rd., Corvallis, MT 59828
2. Ivan A. & Ellonia Sylvester, 664 NE Willow Creek Rd., Corvallis, MT 59828
3. Andrew T. Lloyd, 644 NE Coal Pit Rd., Corvallis, MT 59828
4. Daly Ditch Irrigation District, Attention Suzie Birse, S.E. 534 Tamany Ln., Hamilton, MT 59840
5. Mike McLane, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
6. Sarah Bond, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna K. Elser

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

On this 7<sup>th</sup> day of January, 1986, 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.

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

**CASE # 110476**

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. G 110476-76H BY MELVIN G. )  
CHRISTLEY )

\* \* \* \* \*

The time period for filing comments or exceptions to the Proposal for Decision (hereafter, "Proposal") of January 16, 1985 has expired.

Melvin G. Christley, and Mike McLane, Field Manager for the Missoula Water Rights Bureau Field Office, submitted comments. The Department of Natural Resources and Conservation (hereafter, "Department") responds thereto below. Having given due consideration to the comments, and being fully advised in the premises, with the amendments included below, the Department hereby adopts the Proposal as the Final Order herein, and incorporates same by reference herein.

The Department hereby corrects the typographical error on page 4, under Case, sixth line down, the sentence is corrected to read, "the old place of use..."

Further, the total volume figure for the rights in issue was inadvertently omitted from the order. The appropriate volume figures, using the Applicant's SB76 claimed volume and percentage of flow rate changed, have been included in the Order.

Mike McLane

At the time of the hearing. Dave Pengelly was Field Manager for the Missoula Area Water Rights Bureau Field Office. Mr. Pengelly has left this position, and Mr. McLane is now the Field Manager for this office. Hence, Mr. McLane was thrust into the position of trying to understand a water use pattern which was unfamiliar to him. He was able to ferret out some errors in the Proposal. Mr. McLane indicated he thought the reference to a water exchange with the Hedge Ditch was an error, and should have instead reflected exchange with the Bitterroot Irrigation District and the Big Ditch (see Proposal p. 5).

Mr. Christley's comments indicated, however, that the correct finding would be that the Objectors take water from Hedge Ditch, but that the Applicant did not. Because of the Applicant's familiarity with local irrigation practices, and because the record supports the finding of the water exchange agreements between Daly Ditch and the Objectors, the reference to Daly Irrigation District Ditch and Hedge Ditch will not be changed. The exchange involves waters flowing into the Hedge Ditch from Coalpit Creek. The Hedge Ditch, according to the Dept.-2, flows through both the Objectors' properties.

Mr. McLane questioned whether the Applicant was receiving contract water from Daly or Bitterroot Irrigation District. (see, p.6. Proposal). Mr. Christley's comments corroborated that this reference was erroneous. The Proposal is hereby amended as follows:

Findings of Fact 2; the last sentence on p. 6, is amended to read:

The Applicant seeks, by this change, to irrigate his entire 80 acre parcel, adding the southern most 20 acres, to be irrigated with the 15 inches by means of a pump, and continuing to irrigate the upper 60 acres with the remainder of the 40 inches (i.e.: 25 inches), and with contract water from Bitterroot Irrigation District.

Finally Mr. McLane spotted the error in the legal description on p. 13. The place of use should be 40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, not Section 33.<sup>1</sup>

Reference to the evidence on file indicates that, indeed, Section 35 is the correct section. Hence, the Proposal is being corrected to read:

P. 13, Place of Use: 40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West.

Mr. Christley

Mr. Christley's submission pointed out several errors in the Proposal. The reference on p. 4 to contract water from Daly Ditch should be corrected to reflect that the contract water is, in fact, from Bitterroot Irrigation District. As indicated above, the record reflects that the contract water is from Bitterroot Irrigation District. The Proposal is therefore hereby corrected as follows:

<sup>1</sup> This is the only reference to the old place of use in the Proposal which erroneously describes the use as being in Section 33.

P. 4, C. Case "The old place of use would continue to be irrigated with "contract" water from Bitterroot Irrigation District, and with other rights of the Applicant".

Mr. Christley also questioned the import of paragraph 6 on Page 7. That paragraph, supported in the record, merely finds that on Mr. Christley's Statement of Claim for Existing Water Right, or SB76 Claim, he marked, as the point of diversion, an area where no diversion existed. According to Mr. Christley's own testimony, the area denoted as the point of diversion is actually the area Mr. Christley claims as the source for his water. What impact this may have in the adjudication process is not for the Department, at this time and in this forum. to say. The finding is necessary for a proper understanding of the disposition herein, and is supported by the record.

Mr. Christley also indicated that the power costs for the project as authorized might be prohibitive. He asked that the Change Authorization be granted for a different irrigation plan, outlined in his comments.

The Department has processed the Change Authorization as applied for, developing a record and issuing a Proposal for Decision, and now Final Order, thereon. Because the record exists as it does, and because a Final Order as requested by Mr. Christley would contravene the Objectors' rights to a full and fair opportunity to be heard, the Department cannot issue a

Change Authorization for a project other than that presented at the hearing. Mr. Christley is not required to implement this change, but because of the ambiguity in his comment, the Change Authorization will be issued.

That is, if Mr. Christley had indicated a certain decision not to implement the project as presented at the hearing, the Department would treat the submission as a termination of the application, and deny same. Mr. Christley's comments being somewhat vague, however, the Department will grant the Authorization. The Applicant has until December 1, 1985 to make up his mind: should he ultimately decide to implement the change as outlined in his submission, and to forego the change authorized, this authorization will terminate, and Mr. Christley must submit a new change application for the project he desires to implement.

WHEREFORE, based upon the foregoing, the Department hereby issues the following:

FINAL ORDER

That, subject to the terms, conditions, restrictions and limitations below, Application for Change of Appropriation Water Right No. G 110476-76H by Melvin Christley be granted to change the following described water right.

CLAIMED USE:

POINT OF DIVERSION NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 36, Township 7 North, Range 20 West, Ravalli County, Montana.

PLACE OF USE 40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North. Range 20 West.  
10 Acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35. Township 7 North. Range 20 West.  
10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35. Township 7 North. Range 20 West, all in Ravalli County.

FLOW RATE 1 cfs up to 300 acre-feet

PERIOD OF USE May 15 to October 15

PRIORITY DATE 9:04 a.m., February 24, 1912

NEW USE:

ADDITIONAL POINT OF DIVERSION S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , SECTION 35, TOWNSHIP 7 NORTH, RANGE 20 WEST, RAVALLI COUNTY.

CHANGED PLACE OF USE 20 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West, Ravalli County.  
40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35. Township 7 North. Range 20 West. Ravalli County. (This acreage is currently irrigated.)

FLOW RATE .375 cfs at the new point of diversion up to 112.5 acre-feet.  
.625 cfs at the historic point of diversion up to 187.5 acre-feet.

PERIOD OF USE May 15-October 15.

a. The Applicant must install adequate measuring devices at the historic point of diversion, and at the new point of diversion.

b. The Applicant must complete the foregoing Change Authorization on or before December 1, 1985.

**CASE #** 110476

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 2 day of April, 1985.

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

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 8, 1985, she deposited in the United States mail, FIRST class mail, an order by the Department on the Application by Melvin G. Christley, Application No. G 110476-76H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Melvin G. Christley, 1051 NE Willow Creek Rd, Corvallis, MT 59828
2. Ivan A. & Ellonia Sylvester, 664 NE Willow Creek Rd., Corvallis, MT 59828
3. Andrew T. Lloyd, 644 NE Coal Pit Rd., Corvallis, MT 59828
4. Daly Ditch Irrigation District, Attention Suzie Birse, S.E. 534 Tamany Ln., Hamilton, MT 59840
5. Mike McLane, Water Rights Bureau Field Office, Missoula (inter-departmental mail)
6. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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

On this 8<sup>th</sup> 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 # 110476**

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

*John P. Giblin*

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

**CASE # 110476**

4/10/84

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 110476-76H BY MELVIN G.     )  
CHRISTLEY                                    )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1983) and to the contested case provisions of the Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1983) the Department of Natural Resources and Conservation (hereafter, "Department") held a hearing in the above-entitled matter in Hamilton, Montana.

I. STATEMENT OF THE CASE

A. Parties

The Applicant, Mr. Christley, appeared pro se.

Objectors Ivan and Ellonia Sylvester appeared, pro se.

Objector Andrew Lloyd appeared pro se.

Objector Daly Ditch Irrigation District appeared pro se, through its representative Suzie Birse.

The Field Manager for the Missoula Area Office of the Water Rights Bureau of the Department, Dave Pengelly, appeared as staff expert witness for the Department.

B. Exhibits

The Applicant and Objectors offered no exhibits for inclusion into the record.

**CASE # 110476**

The Department offered the following exhibits into the record:

- D-1 A photocopy of a map attached to Mr. Christley's Statement of Claim of Existing Water Rights (hereafter, "SB76 Claim") Number 110476
- D-2 A Memorandum dated August 24, 1983, by David L. Pengelly, to file Number G-110476-76H regarding field investigation of objections to the instant Application. Attached thereto is a portion of a photocopy of a United States Geological Survey topographic map of the area in issue. Drawn thereon are the relevant lands owned by the Applicant and Objectors. The Hedge Ditch, Coalpit Creek, the point where Coalpit Creek enters Hedge Ditch, proposed diversion point of Christley and point of diversion claimed by Christley, Lloyd and Sylvester. The map was used by all parties during the hearing to illustrate their testimony.
- D-3 A photocopy of an SB76 Claim Number 110477-76H by Melvin G. Christley, claiming 300 acre-feet per year of waste and seepage from Coalpit Gultch (sic) with a priority date of 5:40 p.m. June 15, 1955.
- D-4 A photocopy of an SB76 Claim, Number 10474-76H by Melvin G. Christley, claiming 375 acre-feet per year from Willow Creek, with a priority date of June 1, 1873.
- D-5 A photocopy of a SB76 Claim, Number 15449-76H by Andrew T. Lloyd, claiming 220 acre-feet per year from Coalpit Gulch, with a priority date of May 15, 1888.

- D-6 A photocopy of an SB76 Claim, Number 12690-76H by Andrew T. Lloyd, claiming 135 acre-feet per year from Robbins Ditch (the source being designated as Willow Creek) with a priority date of December 1, 1864.
- D-7 A photocopy of an SB76 Claim, Number 12689-76H by Andrew T. Lloyd, claiming 135 acre-feet per year from "Robbins" (the source being designated as Willow Creek), with a priority date of June 1, 1885.
- D-8 A photocopy of an SB76 Claim, Number 15493-76H by Ivan A. and Ellonia Sylvester, claiming 240 acre-feet per year from Robbins Ditch-Willow Creek, with a priority date of June 1, 1885.
- D-9 A photocopy of an amended SB76 Claim Number 15492-76H by Ivan A. and Ellonia Sylvester, claiming an undisclosed amount of water from Robbins Ditch, designating the source as Coalpit Creek and the point of diversion as the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 36, Township 7 North, Range 20 West, Ravalli County, Montana. Attached thereto is a photocopy of the original SB76 Claim Number 15492-76H by the Sylvesters.
- D-10 A photocopy of an SB76 Claim, Number 15491 by Ivan A. Sylvester, claiming 240 acre-feet per year from Robbins Ditch, (designating Willow Creek as the source) with a priority date of Dec. 1, 1864.
- D-11 A photocopy of an SB76 Claim Number 12688-76H by Ivan A. Sylvester, claiming "all available seepage" from the Sylvester Ditch, (designating as the source an unnamed stream, tributary to the Bitterroot River.

The exhibits were received into the record without objection.

C. CASE

The Applicant seeks to change his point of diversion and place of use for 15 miners' inches, .375 cubic feet per second (hereafter, "cfs") of a 40 miners' inches (1.0 cfs) existing right. He proposes to move his diversion point for the 15 inches to the west, downstream, and install a pump to sprinkle irrigate approximately 20 acres. The old place of <sup>use is</sup> ~~is~~ has approximately 60 acres to the north of the new place of use. The old place of use would continue to be irrigated with "contract" water from Daly Ditch Irrigation District, and with other rights of the Applicant. Basically, the Applicant would continue to irrigate the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  (old place of use) and begin irrigating in the S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, Township 7 North, Range 20 West, Ravalli County.

The Objectors, Andrew Lloyd and Ivan and Ellonia Sylvester, allege there is insufficient water in Coalpit Creek to satisfy their prior existing rights therein, and that the Applicant's proposed use is infeasible and unwise, and that the changed use would interfere with their existing rights.

Objector Daly Ditch (hereafter, "Daly") was not individually notified of the Application in time to file an Objection thereto, apparently because of the contemporaneous change in its ownership, from the Department to the users of the District.

Daly was notified in time for a representative to appear at the hearing, however, and there, Ms. Birse indicated that Daly was concerned that the change from flood to sprinkler would reduce the return flows in Coalpit Creek, thereby increasing the Applicant's consumptive use and reducing the flow of Coalpit Creek into the Daly's Hedge Ditch. Daly has a claimed right to water from Coalpit Creek which it relies upon, particularly late in the irrigation season, to get water to its customers further along the ditch.

The other Objectors, as well as the Applicant, also take water from the Hedge Ditch. The Objectors have an exchange agreement with Daly, allowing them to take "their" claimed water out of Hedge, in return for their allowing a like amount to flow into the ditch. The effect of the various exchange agreements alluded to at the hearing is to move the Objectors' points of diversion downstream. A photocopy of the map, a part of Exhibit D-1 is attached hereto for reference.

The Objector's water rights are senior to those of the Applicant. The Applicant alleges his water rights should not be subordinated, or, "jointly administered" to theirs, because his "source" is seepage and return flows rather than their "claimed" source, Coalpit Creek water.

A large ditch, the "Big Ditch", runs along the contours of the valley and uphill from the area in issue. The parties testified that the flow in their source, "Coalpit Creek", increased substantially 10 or 12 days after the water is turned

into the Big Ditch, and it is a generally recognized fact in the area that seepage from the Big Ditch and return flows from upper flood irrigators accounted for this.

## II. FINDINGS OF FACT

1. The Department has jurisdiction over the parties and the subject matter herein.

2. The Applicant regularly filed the instant Application with the Department seeking to change his diversion point and place of use for an existing right. Apparently, the claimed diversion point for SB76 Claim #110476-76H, the right sought to be changed, is NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 36, Township 7 North, Range 20 West, Ravalli County. The proposed additional point is S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West. The old diversion point will continue to be used, as the proposed change only involves approximately .375 cfs (15 miners inches) of a right to 1 cfs (40 miners inches). The remainder would continue to be used as before. As for the place of use, all acreage previously irrigated would continue to be irrigated, and 20 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West, would be newly irrigated with the water through the new diversion point. The Applicant seeks, by this change, to irrigate his entire 80 acre parcel, adding the southern most 20 acres, to be irrigated with the 15 inches by means of a pump, and continuing to irrigate the upper 60 acres with the remainder of the 40 inches (i.e.: 25 inches), and with contract water from Daly Irrigation District.

3. The Department published a notice containing the facts pertinent to the Application in The Ravalli Republic, a newspaper of general circulation in the area of the source on May 25, June 1, 8, 1983. The current point of diversion was incorrect because the Applicant originally inaccurately claimed a diversion point in NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 2, Township 6 North, Range 20 West, and this is the claimed point of diversion in the Notice.

4. Objectors Ivan and Ellonia Sylvester timely filed an objection to the change stating as the basis therefore, "not enough water".

5. Andrew Lloyd timely filed an objection stating, "Changing point of diversion in Christley Application would take water out of ditch used by Lloyd and Sylvester. It would extend water to areas not previously irrigated. There is not enough water in Coalpit Creek after previous rights are taken out under our 1889 filing. Such a change would materially interfere with the water rights of all others in the area."

6. Apparently, Mr. Christley had confused the area of source with the diversion point. The original claimed point of diversion, NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 2, Township 6 North, Range 20 West, is actually the claimed collection area for the seepage water the Applicant claims is his "source". The Applicant in fact has no diversion facilities at that point.

7. During the notice period the Daly Ditch Irrigation District was in the process of changing ownership from the Department to the users of the system. Dave Pengelly contacted

Steve Fry, of the Department, regarding the instant Application. Mr. Fry indicated the Department did not wish to object. A representative of the District appeared at the hearing, however, expressing the District's concern that the changed use would increase the consumptive use of Coalpit, and reduce the flow from Coalpit into their Hedge Ditch. (Testimony, Dave Pengelly, Suzie Birse).

8. The Sylvesters' claimed water rights indicate claimed priority dates of June 1, 1885 (Claim No. 15493-76H); May 15, 1888 (15492-76H); December 1, 1864 (15491-76H); May 15, 1888 (12688-76H).

9. Andrew Lloyd's claimed water rights indicate claimed priority dates of Dec. 1, 1864 (Number 12690-76H); and June 1, 1885 (12689-76H).

10. The water table in the general area of the past and proposed uses rises as a result of seepage and return flows from the heavy irrigation there. (Testimony of Applicant and of Objectors).

11. The Applicant's claimed priority date for the right sought to be changed 9:04 a.m., February 24, 1912.

WHEREFORE, based upon the foregoing Findings of Fact and on the evidence in the record herein, the Hearing Examiner hereby makes the following:

### III. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto.

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

3. "An appropriator may not change the place of diversion, place of use.... except as permitted under this section and approved by the Department". § 85-2-402(1) MCA (1983). The Applicant herein has applied to the Department for approval of a change in place of diversion and change in place of use for all existing water rights.

4. The Department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons... § 85-2-402(2) MCA (1983). Pursuant to this statute, the Department held a hearing to receive evidence on the change.

5. The "adverse affect" determination must follow the precepts of the common-law, which the legislature did not change by enactment of the Water Use Act, Castillo v. Kunneman, 39 St. Rep. 460, (1982).

6. Beneficial use is the base, measure, and limit of the right. Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Osnes Livestock Co. et al. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936); 79 Ranch, Inc. v. Pitch, 40 St. Rep. 981, 666 P.2d 215 (1983); In

the Matter of the Application for Beneficial Water Use Permit No. 35527-s41H by Glenn H. Lehrer (appeal on other grounds, pending) Final Order July 25, 1984.

7. The appropriator may not bootstrap a new use onto an existing right through the guise of a change proceeding. In the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H and In the Matter of the Application for Sever or Sell No. 20737-s41H by the City of Bozeman, Proposal for Decision June 4, 1984; Final Order, January 9, 1985.

8. The SB76 claims are prima facie proof of their content until issuance of a final decree. § 85-2-227 MCA (1983). In the instant matter, although the parties gave conflicting testimonial evidence regarding the historic use of the parties' claimed rights, such evidence was insufficient to rebut the prima facie effect of the claims. § 26-1-102(6); Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935); Marshall v. Minischmidt, 148 Mont. 263, 419 P.2d 186 (1966).

9. The Objectors' seniority protects them as against interference from the Applicant's use. Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 85 P.880 (1906); Raymond v. Wimsette, 12 Mont. 551, 31 P. 537 (1892).

10. As a matter of law, the rights of seniors cannot be adversely affected by a change in use by a junior, whose right to use water is inferior to theirs in either case. Of course, if the changed use enlarges the historic use, then the change is, to that extent, a new use and subject to the statutory and common

law requirements thereof. Feathermann v. Hennessey, 43 Mont. 310, 115 P. 983 (all); In the Matter of the City of Bozeman, Final Order, January 9, 1985.

11. Due to the lack of evidence regarding historic use herein, the best that can be fashioned is a requirement in the change authorization that the Applicant install a measuring device to insure that increased diversions will not result from the change authorization. As in much of the state, the practical aspects of enforcement are left to the users of the source herein.

12. Whether the Applicant's "source" is wastewater or seepage, or return flows from upper irrigation, is irrelevant herein.

As a factual matter, seepage is a significant source for most irrigation in the Bitterroot; as a legal matter, the Applicant's source is tributary to that of the Objectors and hence all rights must be administered on the same ladder of priorities, Dern v. Tanner, 60 F.2d 626 (1932). It is sufficient to note that the Objectors water source is tributary to that of the Applicant. Olsen, et al. v. McQuerry et al., 41 St. Rep. 1669, (1984).

13. The Applicant has shown by substantial credible evidence that the rights of other persons will not be adversely affected by the change in use if the change is appropriately conditioned. The requirement of a measuring device at the original point of diversion will enable the objectors to police the Applicant's use. Certainly, by adding the southernmost 20

acres, the likelihood of increased use under the guise of a Change Authorization is high. Hence, the necessity for such a measuring device.

14. There is no credible evidence on the record herein that the Objectors will suffer adverse affect from the Change sought herein. The major objection raised at the hearing was that there was insufficient water for satisfaction of all the users' rights. Because the Objectors are senior, however, this is a matter regarding stream administration rather than one encompassed in the change proceeding. That is, the Objectors claimed that no additional use could be made of Coalpit Creek water, but no additional use is herein sought.

Certainly, the Applicant may find the expense of procuring and installing an adequate measuring device prohibitive. In that event, he may choose to forego implementation of the change hereby authorized. This would result in the Change Authorization lapsing, but would not of course, affect the underlying right.

WHEREFORE, based upon the foregoing, and upon the evidence herein, the Hearing Examiner hereby makes the following:

#### PROPOSED ORDER

That, subject to the terms, conditions, restrictions and limitations below, Application for Change of Appropriation Water Right No. G 110476-76H by Melvin Christley be granted to change the following described water right.

POINT OF DIVERSION NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 36, Township 7 North, Range 20 West, Ravalli County, Montana.

PLACE OF USE 40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 33, Township 7 North, Range 20 West.  
10 Acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West.  
10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West, all in Ravalli County.

FLOW RATE 1 cfs

PERIOD OF USE May 15 to October 15

PRIORITY DATE 9:04 a.m., February 24, 1912

NEW USE

ADDITIONAL POINT OF DIVERSION S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , SECTION 35, TOWNSHIP 7 NORTH, RANGE 20 WEST, RAVALLI COUNTY.

CHANGED PLACE OF USE 20 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West, Ravalli County.  
40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 35, Township 7 North, Range 20 West, Ravalli County.

FLOW RATE .375 cfs at the new point of diversion.  
.625 cfs at the historic point of diversion.

PERIOD OF USE May 15-October 15.

a. The Applicant must install an adequate measuring device at the historic point of diversion.

DONE this 16<sup>th</sup> day of January, 1985.

  
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Sarah A. Bond, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6625

## NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

**CASE #** 110476

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 December 17, 1985, she deposited in the United States mail, first class mail, an order by the Department on the Application by Melvin G. Christley, Application No. G 110476-76H, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Melvin G. Christley, 1051 NE Willow Creek Rd, Corvallis, MT 59828
2. Ivan A. & Ellonia Sylvester, 664 NE Willow Creek Rd., Corvallis, MT 59828
3. Andrew T. Lloyd, 644 NE Coal Pit Rd., Corvallis, MT 59828
4. Daly Ditch Irrigation District, Attention Suzie Birse, S.E. 534 Tamany Ln., Hamilton, MT 59840
5. Mike McLane, Water Rights Bureau Field Office, Missoula (inter-departmental mail)
6. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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

On this 17<sup>th</sup> day of December, 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.



Notary Public for the State of Montana  
Residing at HELENA, Montana  
My Commission expires 1.21.1997

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