Blue Book

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G136329-410, G136330-410, AND G136331-410 BY LLOYD DEBRUYCKER	))))	FINAL ORDER

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing was held on the above-entitled matter on May 13, 1988, in Choteau, Montana. This hearing was to allow presentation of the omitted evidence pursuant to my order of March 28, 1988.

Lloyd DeBruycker, the Applicant in this matter, appeared personally and through counsel Bruce Loble. Rhett Hurless, consulting engineer, and Charles Hanson appeared as witnesses for the Applicant.

Objectors Harold and Fay Baker, and John Baker, appeared by and through counsel Charles Joslyn.

Objector New Rockport Colony appeared by and through colony members Paul and George Wipf.

I have approved the Applications with modifications. First, three of the proposed changes in points of diversion from several proposed are approved with the rest denied since the Applicant failed to prove that no adverse effect would result. Second, the flow rates allowed to be diverted at the proposed diversion points

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are reduced by 30 percent in order to leave in the stream an amount of water equivalent to historic return flows from flood irrigation. Finally, the proposed acreage of 881.3 acres proposed for sprinkler irrigation is allowed but the volume of use until July 15 of any year is limited to that volume equivalent to the historic depletions from flood irrigation.

EXHIBITS

The Applicant offered 14 additional exhibits in support of his Application in this matter, numbered for the purposes of this hearing beginning with Exhibit 5. All the exhibits were admitted without objections.

Applicant's Exhibit 5 is an aerial photo taken on August 9, 1984, at an 8 inches-equals-1 mile scale showing the land area of Sections 10, 11, 12, 13, 14, 15, 22, 23, 24 of Township 25 North, Range 4 West. The exhibit includes mylar overlays A through F.

Applicant's Exhibit 6 is a copy of a report titled "Operation Plan DeBruycker/Campbell Irrigation Project, Teton County, Montana" by Water Engineering Inc. of Bozeman, Montana.

Applicant's Exhibit 7 is a Notice of Completion of Change Appropriation of Water Right #G136330-410 by Jack Stallcup dated August 13, 1983, together with an Authorization for Change by the Department dated May 19, 1983, signed by Ronald J. Guse.

Applicant's Exhibit 8 is a copy of U.S. Geological Survey's published record of gaged flow of the Teton River near Dutton, Montana, for water years Oct. 1983 to Sept. 1984, Oct. 1984 to Sept. 1985, Oct. 1985 to Sept. 1986.

Applicant's Exhibit 9 is photocopies of certified records of the water commissioner on the Teton River for June, July, and August of 1984, 1985, 1986, and 1987.

Applicant's Exhibit 10 is water measurements of Spring Coulee (referred to as Spring "Creek") near Choteau, Montana, during May through mid-November for 1984, 1985, 1986, and 1987.

Applicant's Exhibit 11 is photographs of the DeBruycker/Campbell project taken by Bruce Loble on March 1, 1988, with a memorandum describing the pictures taken.

Applicant's Exhibit 12 is a Statement of Claim of Existing Water Rights-Irrigation #136334-410 by Jack Stallcup on Spring Coulee.

Applicant's Exhibit 13 is a graphical representation of a plant's water needs and soil-water storage.

Applicant's Exhibit 14 is a copy of the decree dated September 1905 between Scharn vs. Otness on Spring Coulee.

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Applicant's Exhibit 15 is a copy of the Finding of Fact and Conclusion of Law of the 1905 Spring Coulee decree.

Applicant's Exhibit 16 is a copy of the Complaint of the 1905 decree.

Applicant's Exhibit 18 is a copy of a hand-drawn map used in the 1905 decree. The location of the places of use as described in the Complaint and Finding of Fact has been added to the map to show the decreed place of use of the rights in this matter.

The Objectors offered no exhibits at this hearing for inclusion in the record in this matter.

As to the evidence submitted at the hearing on May 13, 1988, the Assistant Administrator is the finder of fact. As to all other factual matters, the Assistant Administrator is limited to reviewing, pursuant to § 2-4-621(3), MCA, the findings of fact of the Hearing Examiner in the Proposal for Decision.

ADDITIONAL FINDINGS OF FACT

Findings of Fact 1, 2, 3, 4, 6, and 10 of the Hearing Examiner in this matter are adopted and incorporated into the Order by reference.

The additional Findings of Fact are as follows:

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1. As shown on Exhibit 5 and the attachment "A", Spring Coulee starts above and flows from the southwest through Sections 22, 15, 14, and southeast out of 13. The North branch and Northwest branch are two major tributaries that flow southerly into Spring Coulee in Sections 13 and 14, respectively. The North branch flows into Spring Coulee approximately a mile downstream and to the east of the confluence of the Northwest branch and Spring Coulee.

2. The water amounts in each of the North branch, Northwest branch, and Spring Coulee vary and at there is more water in one tributary than the other.

3. The Northwest branch of Spring Coulee source of water is from snow melt and spring runoff and irrigation runoff, and flows usually decrease substantially or stop after June 15 to July 15.

4. Return flow from irrigation diversions from Teton River increased the water in the North and Northwest branches of Spring Coulee.

5. Historically, usually only stock water was available in July and August on the tributaries and Spring Coulee.

6. Historically, after mid-July nearly all of the water in excess of stock needs in Spring Coulee, Northwest branch, and North branch was diverted for irrigation use by the rights in this matter.

7. Water diverted from Spring Coulee was from snow melt and spring runoff water as well as return flows from irrigation diversions from Spring Coulee, the North branch, and the Northwest branch of Spring Coulee.

8. Runoff and return flows from application of Farmers' Coop water are picked up by Spring Coulee.

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9. Waters were historically diverted from various locations that have changed over the years on the North branch, Northwest branch, and Spring Coulee itself to irrigate the lands in this matter.

10. Water from the North branch was applied to lands adjacent to the North branch and Spring Coulee.

11. Water from the Northwest branch was applied to lands adjacent to the Northwest branch as well as Spring Coulee.

12. Diversions of water were made from Spring Coulee that were above both the North and Northwest branches. Water was applied to lands adjacent to Spring Coulee.

13. As depicted in the 1905 decree, the water rights in this matter were owned and utilized by several different land owners. Over the years since 1905, changes and consolidations of several existing diversions have occurred and areas that were irrigated were realigned.

14. Testimony of Charles Hanson and Exhibit 5 indicated that in the recent past water was diverted at diversion point B on Spring Coulee above both the North and Northwest branches, diversion point C on the Northwest branch, diversion point D on the North branch, and diversion point E was added in about 1950 on Spring Coulee between the confluence of the Northwest and North branches. See attached map.

15. Estimated open earth ditch capacities at or near present headgate flood irrigation diversions at point B on Spring Coulee above the North and Northwest branches is 2,185 gpm; at point C on the Northwest branch of Spring Coulee is 1,894 gpm; at point D on

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the North branch of Spring Coulee is 2,490 gpm. During peak diversions, the full capacity or a total of 6569 gpm at diversions B, C, and D were used. How diversion E was used when diversions occurred at full capacity or even at some lessor capacity at B, C, or D was not specified at this hearing. It appears to be a diversion point added by Charles Hanson to conveniently utilize water previously diverted at diversion points B or C. There was testimony by Charles Hanson that diversion E was used in addition to other diversions on Spring Coulee to divert water released into Spring Coulee from Farmers Canal. When the Farmers Canal users shut off their diversions on the weekends, Mr. Hanson was set up to take the water since he was on the tail end of the irrigation project.

16. The estimated pump capacity at the added diversion point E was 1,100 gpm.

17. There were no other ditch capacities estimated.

18. There are no intervening diversions of water by other water users between the proposed new diversion points and the existing diversion points in this matter.

19. The water rights in this matter decreed in 1905 were used to irrigate up to 560 acres of an unidentified mixture of crops that included hay and pasture at the time of the decree and were owned by several landowners at the time. Since 1905 the extent at which the water rights in this matter were utilized has varied from a few to several hundred acres depending on the owners preference and agricultural markets.

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20. Water in Spring Coulee as well as the North branch and the Northwest branch of Spring Coulee was historically available in sufficient quantities to divert and irrigate until around the end of June to mid-July. After mid-July, water was diverted and used for irrigation only if it was in sufficient quantity to irrigate.

21. In recent history an approximate total of 400 acres were flood irrigated utilizing the above-described diversions, and crops consisted of alfalfa, pasture and grain.

22. Historically, sufficient water was available to grow only one crop of alfalfa.

23. Water as it was available was used on the DeBruycker property. Sometimes water was applied to a few acres up to 400 acres in the recent past, depending on the amount of water available.

24. Testimony of Hanson and Hurless indicated that water was applied by ditch diversion and flood irrigation on 400 acres in a reasonable and efficient manner.

25. Water applied in excess of the soil reservoir capacity or the soil intake capacity on the 400 acres was mostly returned to the North branch, Northwest branch and Spring Coulee within a short time of being applied.

26. The estimated runoff into the water sources in this matter from recent historical flood irrigation practices on 400 acres was 20 to 30 percent of the water applied. Charles Hanson's experienced opinion and Rhett Hurless' expert opinion on this fact was not contested and is a reasonable quantity.

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27. The Montana Irrigation Guide (Soil Conservation Service, 1987) indicated that the daily peak irrigation requirements of small grains differ from the requirements of grass or alfalfa. It also indicates that the pattern of water use over the season varies as well. However, the historical pattern of irrigation in this matter was to apply water when it was available in Spring Coulee or its tributaries and store it in the soil. The crop then draws the water from the soil to meet its immediate needs. The historic practice won't change in this case despite the change in crop. Thus the Hearing Examiner's concern was misplaced.

28. The Montana Irrigation Guide cumulative computed consumptive water use requirement for a dry year at Choteau airport until mid-July is 7.18 inches for alfalfa, 6.80 inches for spring grain; and 6.64 inches for pasture grass. Therefore, on the 200 acres of alfalfa historically grown, a full water supply to meet the crop needs to mid-July is 120 acre-feet. On the 100 acres of pasture grass historically grown, a full water supply to meet the crop needs to mid-July is 55 acre-feet and 57 acre-feet on the 100 acres of spring grain. Total crop depletion to mid-July is 232 acre-feet.

29. Evaporation, deep percolation and other non-recoverable losses occurred historically under flood irrigation practices in addition to the crop depletions. The historic overall irrigation efficiency on 400 acres has been estimated to be approximately 45 percent. It was also estimated that for the area where alfalfa and grain were grown that about 60 percent and for pasture grass about 55 percent of the water applied over and above the net crop

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requirements got back to the stream. Calculations, considering the foregoing, result in a total depletion for crop use and other losses of 349 acre-feet per year to mid-July on 400 acres.

30. The Applicant proposes to change the existing diversion points to diversion locations X in SE¼SE¼SE¼ of Section 15, Y in SE¼NE¼NE¼ of Section 15, and Z in SE¼NW¼NW¼ of Section 13, all in Township 25 North, Range 4 West. See attached map. The Applicant proposes to now irrigate a total of 881 acres as follows: from diversion point X and application be center pivots identified as VLY in Section 15, Township 25 North, Range 4 West; from diversion point Y and application by center pivots identified as 1, 2, and VLY in Sections 11, 14 and 15 of Township 25 North, Range 4 West; and from diversion point Z and application by center pivots identified as 3, 4, and 5 in Sections 11, 13 and 14 of Township 25 North, Range 4 West. Total acreage on which water is to be applied is 881.3 acres, revised downward from 964.2 acres by the Applicant. The Applicant stated at this hearing that waters pertaining to the water rights in this matter would not be applied to pivots 6 and 7.

31. The proposed new diversion point X is located at nearly the same location as diversion point B on Spring Coulee, which is yet above where both the Northwest and North branches enter Spring Coulee. The pump sump is located in the reservoir of a newly constructed earth dam. The reservoir capacity is 18 acre-feet.

32. Diversion point Y is located approximately 0.1 miles upstream of the former diversion point C on the Northwest branch of Spring Coulee. Diversion point Z is to be on Spring Coulee below the confluence of both the Northwest and North branches. (See attached map.)

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33. Diversion point Z as proposed is on Spring Coulee below both the North and Northwest branches. The diversion is be means of one, two, or three pumps, two having a capacity of 875 gpm each, and one at 1,200 gpm. The maximum diversion rate is 2,950 gpm.

34. Diversion at Pt. Y on the Northwest branch as proposed can divert the same waters that were previously diverted upstream at Pt. C on the Northwest branch of Spring Coulee. The diversion is by means of one or two of three pumps, two having a capacity of 875 gpm each, and one at 1,200 gpm. The maximum diversion rate is 2,950 gpm.

35. Diversions at Pt. X as proposed can divert the same waters that were previously diverted upstream at Pt. B on Spring Coulee above the Northwest branch. The diversion is by means of one or two or three pumps, two having a capacity of 800 gpm each, and one at 875 gpm. The maximum diversion rate is 2,475 gpm.

36. The Applicant proposes to divert a maximum of 4,488 gpm at any one time from the proposed diversions pursuant to the water rights herein. The diversion amounts can be measured through flow meters to each pivot.

37. Diversion at Pt. Z can divert the same waters that were previously diverted upstream at Pt. D, C, B, or E on the North branch, Northwest branch, Spring Coulee above the Northwest branch, and Spring Coulee above the North branch, respectively.

38. Waters diverted at Pt. Z as proposed can be physically applied to lands shown as pivots 3, 4, and 5 on Exhibit 5. Each pump's capacity serving pivots 3, 4 and 5 are 875 gpm, 1200 gpm, and 875 gpm respectively.

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39. Waters diverted at Pt. Y as proposed can be physically applied to lands shown as pivots 1, 2, and VLY on Exhibit 5. Each pumps capacity serving pivots 1, 2 and VLY are 1200 gpm, 875 gpm, and 875 gpm respectively.

40. Waters diverted at Pt. X as proposed can be physically applied to lands shown as pivot VLY on Exhibit 5. The pump capacity serving the VLY pivot is 875 gpm.

41. Water pursuant to this change is to be applied on 881.3 acres of grain.

42. An Authorization for Change #G136330 dated May 19, 1983, granted to Jack Stallcup duplicates some of the water rights proposed for change in this matter. However, testimony indicates that only part of the authorized change was ever completed.

Based on these Findings and the Findings of the Hearing Examiner, the Department makes the following

CONCLUSIONS OF LAW

Conclusions of Law 1 through 4 of the Hearing Examiner in this matter are adopted and incorporated into this Order by reference.

Conclusion of Law 5 of the Hearing Examiner in this matter is adopted and incorporated into this Order by reference except for the last sentence, which shall be modified to read: The Applicant did provide sufficient information to allow such a comparison to be made.

Conclusions of Law 6, 7, and 8 are not adopted into this Order since additional evidence and findings have been gathered. The following additional Conclusions of Law are as follows:

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6. There are several issues in this matter that must be decided. Under the analysis in Application for Change of Appropriation Water Right No. 34573-76H by Carrie Grether, September 10, 1986 Final Order, the Applicant is entitled to expand the place of use under his appropriation with water salvaged from claimed rights as long as existing water rights of other appropriators are not adversely affected. Further, the Applicant is entitled to utilize the salvaged water with the priority date of the original appropriation from which it is salvaged. The Grether decision thoroughly discusses what waters may be salvaged by an appropriator, what limitations historic beneficial use places on an appropriative right, and to what extent an appropriator may extend his appropriation by using salvaged waters.

Grether prevents expansion of use utilizing water which was formerly wasted. In this case, past irrigation practice was reasonable and efficient, and the water to be recovered is not due to waste. The Applicant provided sufficient evidence to identify the quantity of water used to irrigate 400 acres. Sufficient evidence was presented to identify the existing water entitlements that would otherwise be irretrievably lost to the source of supply for 400 acres. See Findings of Fact 24, 25, 25, 27, 28 and 29. The Applicant provided sufficient evidence to quantify the rate of flow at which water was irretrievably lost to the source or supply as well as the volume of water that was irretrievably lost to the source of supply. Although irrigation of more than 400 acres was stated to have occurred in the past, insufficient evidence was presented for an evaluation of adverse effect of greater than 400

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acres as to points of diversion, routes of conveyance, irrigation efficiencies, return flows, crops grown, and other data necessary to quantify the historic use for consideration of the proposed change herein. This is not to say that water rights for irrigation of more than 400 acres does not exist, but that sufficient evidence was found for the purpose of evaluating these proposed changes as to the historical use of 400 acres only. Also, acres irrigated is not an independent determinate of the extent of a water right. The type of crop, the efficiency of the irrigator, the extent of flood ditches, type of soils, and other factors effect the total number of acres which water can be applied. Neither the water right claims nor the decree alone or together contain all the necessary elements to fully evaluate the Applications for Change in this matter.

The Applicant provided sufficient evidence as to the operation of the proposed system to allow the Department to limit water consumption so as not to exceed historical amounts, and diversion amounts can be managed, varied, and timed so as not to adversely affect other appropriators. See Findings of Fact 33 through 40. The historic depletion and return flow back to the stream as a result of irrigation of 400 acres can be substantially duplicated by proper measurement and management.

The concern of the Hearing Officer in the Proposal for Decision that the increased peak use by grain would increase the demand on the stream is well founded. The higher peak use would increase the demand on the stream, or increase the frequency with which water is applied and may therefore adversely affect other appropriators. However, on the basis of additional evidence, there is not adverse

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effect due to the difference in daily peak plant water use requirements for grain and alfalfa, since diversions were made when water was available and stored in the soil reservoir. See Finding of Fact 27. If water had been diverted and applied to crops based on crop needs rather than on water availability, then the schedule of water application would have to be more closely examined to ascertain any adverse effects to other appropriators.

Diverting no more than 70 percent of the historic flow and leaving 30 percent of the flow in the stream the Applicant would duplicate historic return flows and not adversely affect existing water rights. The historic diversions, less 30 percent for diversion points B, C, and D, are 1,530 gpm, 1,326 gpm, and 1,743 gpm, respectively. See Findings of Fact 15 and 26.

The maximum historic depletion when water was available was 4,599 gpm. Since the Applicant proposes to divert a maximum of 4,488 gpm at any one time, there is not increased burden on the stream during peak water availability.

The Applicant has provided sufficient evidence so that the seasonal use of water irretrievably lost historically can be measured and properly regulated to duplicate historic conditions and not adversely affect existing water rights. Calculations based on crop water use, application efficiencies, and runoff estimates for the crops of grain, pasture and alfalfa on 400 acres indicates that historically, the total depletion of water up to July 15 was never more than 349 acre-feet. See Findings of Fact 3, 5, and 6. Therefore, limiting the current irrigation to this level of consumption will help to ensure that the proposed changes do not

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adversely affect existing rights. After July 15, water is rarely ever in excess of the rights herein, and a limitation on volume is not necessary as long as the 70 percent of the entitled flows are diverted and 30 percent remains in the stream.

The pattern of water use over the season by pasture, alfalfa, and grain grown historically on 400 acres is considerably different than the water use over a season on 881 acres of grain. However, if the volume of water diverted and used during the time other appropriators may be affected (prior to approximately July 15 of each year) remains at the calculated historic depletion from the streams in this matter to 349 acre-feet, then there will be no adverse effect to existing water rights.

The Applicant has presented sufficient evidence to show that the historic pattern of water depletion resulting from irrigation of 400 acres can be substantially duplicated by proper measurement and management and application of water by pump and sprinkler irrigation to 881.3 acres.

The past practice of diverting water and reservoiring it in the soil profile is a reasonable and efficient means of irrigation and will be continued. If the flows and volumes duplicate historic depletions and are properly measured and managed, then the increased number of acres of 881.3 acres as proposed will not adversely affect existing water rights.

7. The Applicant presented sufficient evidence to allow evaluation of the proposed changes in points of diversion.

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On the basis of the evidence, not all of the proposed changes in points of diversion can be granted. The considerations for a change in diversion point are the effect on other appropriators from the source, as determined by comparing the amount and location of the depletion and return flow.

In the present case, water rights previously diverted at Pt. B can be diverted at Pt. X or Z without adverse effect to other water rights. Water rights previously diverted at Pt. C can be diverted at Y or Z without adverse effect on other water rights. Water rights previously diverted at Pt. D can be diverted at Pt. Z without adverse effect to other water rights. Water rights previously diverted at Pt. E can be diverted at Pt. Z without adverse effect to other water rights. From the evidence, there are no intervening appropriators between the proposed and existing diversion points. Also, the flow conditions can be made to duplicate approximately the stream conditions before the pump and pivots were installed.

However, moving the point of diversion for water rights historically diverted at Pt. D to Pt. X or Y would require an elaborate operation scheme so as not to adversely affect other appropriators. The change amounts to relocating water rights from Pt. D on the North branch of Spring Coulee to Spring Coulee above both the North and Northwest branches. Since the flows vary in amount and duration at each historic source, a manageable measurement and regulation program is necessary so as not to adversely affect other water rights (i.e., diversion at X or Y would have to occur when and to the extent water was available at D). No such management plan was presented by the Applicant.

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If the change in point of diversion was allowed, an adverse effect would result to the upstream water rights of the Objectors Bakers' water rights, since the Bakers' water rights on Spring Coulee would now have senior rights downstream below them.

Similarly, moving the point of diversion for water rights historically diverted at Pt. C to Pt. X or Pt. B to Pt. Y would require an operation scheme that would be difficult to manage at best as well. Since the Department has no facts before it from which an operation scheme could be devised, these proposed changes in points of diversion are denied as well.

Moving the point of diversion for water rights historically diverted at Pt. E to Pt. X or Y on the Northwest branch of Spring Coulee requires evidence as to the amount of water from each of the Northwest branch and Spring Coulee, since there are other senior appropriators on upper Spring Coulee. Since no evidence was presented, a change of diversion from Pt. E to Pt. X or Y cannot be evaluated.

WHEREFORE, based upon the foregoing, and the evidence in the record herein, the Department makes the following

ORDER

Application for Change of Appropriation Water Right No. G136329-410 by Lloyd DeBruycker is hereby granted as follows:

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Change in historic points of diversion on the Northwest branch of Spring Coulee described in this matter to diversion point Y (SE¼NE¼NE¼ of Section 15) on the Northwest branch of Spring Coulee, or diversion point Z (SE¼NW¼SW¼ of Section 13) on Spring Coulee are granted. Change in point of diversion to point X (SE¼SE¼SE¼ of Section 15) on upper Spring Coulee is hereby denied.

A flow measured at diversion point Y of 70 percent of the flow not to exceed 1,326 gpm from the Northwest branch of Spring Coulee is granted and can be diverted at diversion point Y and/or Z. The remaining flow, or at least 30 percent, must remain in Spring Coulee and pass diversion points Y and Z regardless of whether diversion occurs at diversion point Y or Z. Waters diverted at point Y may be used on lands described in this matter as pivots 1, 2, and Valley, and diversions from point Z on lands described in this matter as pivots 3, 4, and 5.

Application for Change of Appropriation Water Right No. G136330-410 by Lloyd DeBruycker is hereby granted as follows:

Change in historic points of diversion on Spring Coulee described in this matter to diversion point X or Z on Spring Coulee are granted except that the rights in this matter historically diverted from diversion point E (SE¼SW¼SE¼ of Section 14) are to be diverted at diversion point Z only.

A flow measured at diversion point X of 70 percent of the flow not to exceed 1,530 gpm is granted to be diverted at diversion point X or Z. The remaining flow or at least 30 percent must remain in Spring Coulee and pass diversion points X and Z in addition to any other flow required at point Z.

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Water diverted at diversion point X may be used on lands described in this matter as pivot "Valley," or from diversion point Z on lands described in this matter as pivots 3, 4, and 5.

Application for Change of Appropriation Water Right No. G136331-410 by Lloyd DeBruycker is hereby granted as follows:

Change in historic point of diversion on the North branch of Spring Coulee described in this matter to diversion point Z on Spring Coulee is hereby granted.

The Applicant may divert 70 percent of the flow as measured at the historic diversion point D (NE¼SE¼NW¼ of Section 11), not to exceed 1,743 gpm from the North branch of Spring Coulee at diversion point Z only. The remaining flow or at least 30 percent must remain in the North branch of Spring Coulee and pass diversion point Z in addition to any other flow required on Spring Coulee as well.

Water diverted at diversion point Z may be used on lands described in this matter as pivots 3, 4, and 5.

The combined rate of diversion to be measured and recorded shall not exceed 4,488 gpm.

The combined volume of water diverted for use from all proposed diversion points X, Y and Z, and including that which is diverted and reservoired at each pump sump, shall be measured and recorded and shall not together exceed 349.0 acre-feet (113,722,000 gallons) by July 15 of any year from the water rights in this matter. No limit on volume is established after July 15 except the limits already imposed on the flows diverted.

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Water is to be applied under the change herein to the place of use depicted in attachment #1 and the following Pivot 1 - 170.5 acres, Pivot 2 - 125.7 acres, Pivot 3 - 154.4 acres, Pivot 4 - 161.5 acres, Pivot 5 - 133.8 acres, and Pivot Valley - 135.4 acres, totaling 881.3 acres.

DNRC is not liable for changes which must be made to the Applicant's present irrigation system to effectuate the changes as granted herein since the applicant chose to construct the system prior to approval of this change.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of the Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

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C. Issuance of this Change Authorization by the Department in no way grants the Appropriator any easement rights, or the right to enter upon the property of other persons or upon federal lands to exercise this Change Authorization, or to enlarge any existing easements.

D. The Applicant shall install water measurement facilities where measurements are required in this Order. The measurement facilities shall be properly maintained and a record kept of the flow rates, volumes, and periods of diversion of all waters diverted and bypassed pursuant to this Authorization. These records shall be made available to the Department upon request.

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 thirty (30) days after service of the Final Order.

DATED this 22 day of September, 1988.

Laurence Siroky

Laurence Siroky
Assistant Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6816

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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 7th day of November, 1988, as follows:

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Irene LaBare
Legal Secretary

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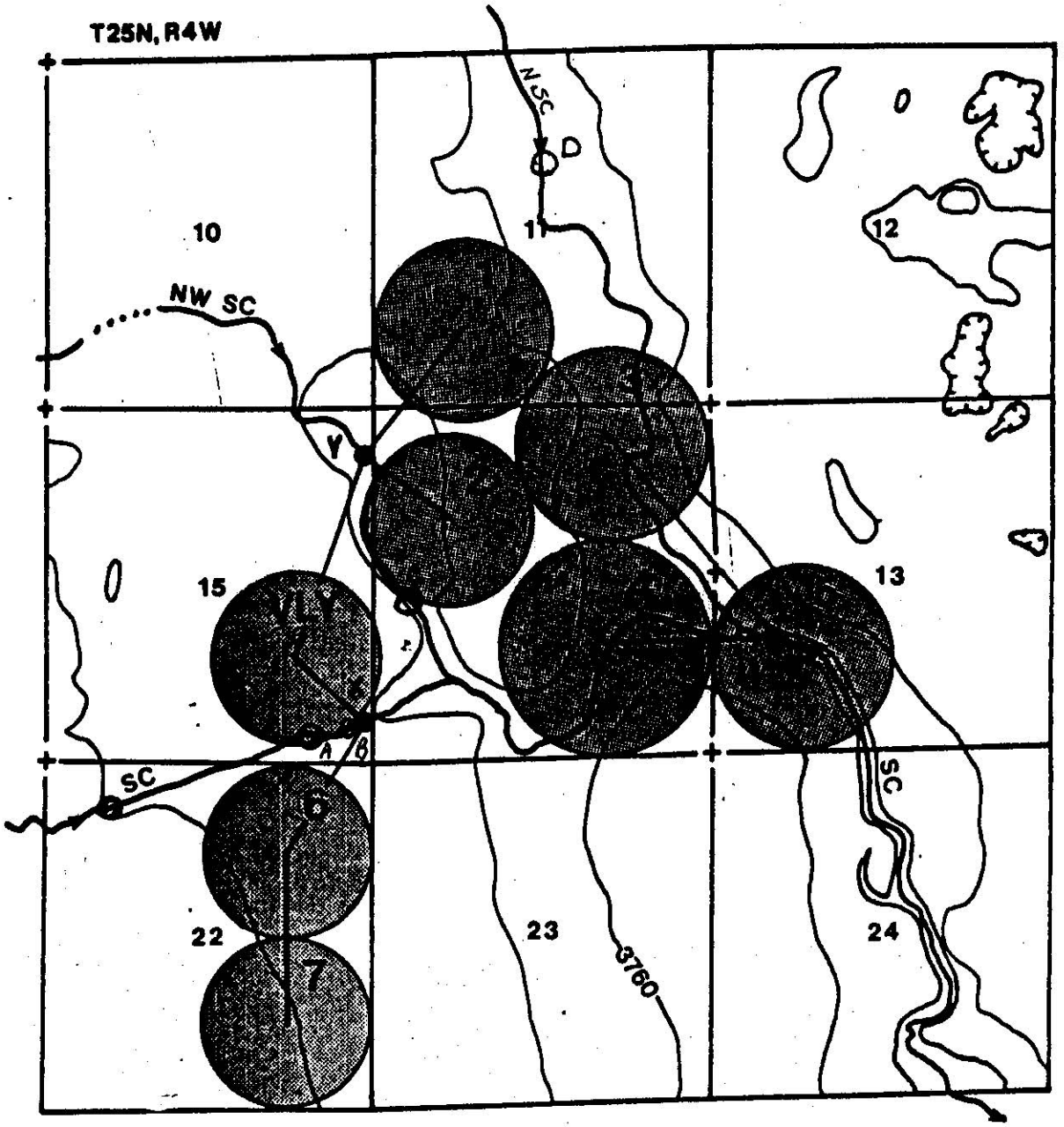
Figure 1



CASE #

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR CHANGE OF APPROPRIATION WATER RIGHTS NOS. G136329-41O, G136330-41O, AND G136331-41O BY LLOYD DEBRUYCKER	))))	PROPOSAL FOR DECISION

* * * * * * * * * *

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 July 10, 1986 in Choteau, Montana.

Lloyd DeBruycker, the Applicant in this matter, appeared personally and by and through counsel K. Paul Stahl.

Rhett Hurless, consulting engineer, appeared as a witness for the Applicant.

Objector Janet Danreuther appeared at the hearing in person, and as representative for Objector Charles Danreuther.

Objector Elizabeth Hawley appeared at the hearing in person.

Objectors Harold and Fay Baker, and John Baker, appeared at the hearing in person and by and through counsel Charles Joslyn.

Lyle Baker appeared as a witness for the Objectors Baker.

Objector New Rockport Colony appeared by and through Colony members George Waldner, David Wipf, and Jacob Wipf.

Marvin Cross, engineering analyst with the Havre Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

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Bob Larson, Field Manager of the Havre Field Office, also appeared at the hearing in this matter.

STATEMENT OF THE CASE

On April 1, 1985, the Applicant filed three Applications for Change of Appropriation Water Rights. Application No. G136329-41O seeks to change 4,488 gallons per minute (gpm) up to 98 acre-feet of water per year (claimed under Claim for Existing Water Right Nos. W136329-41O and W211241-41O) from two diversion points in the NE¼SW¼SE¼ of Section 10, one diversion point in the NE¼NW¼SW¼ of Section 14, and one diversion point in the SE¼SW¼SE¼ of Section 14, all in Township 25 North, Range 04 West, Teton County and all on the Northwest branch of Spring Coulee, to diversion points in the SE¼NW¼SW¼ of Section 13 and the SE¼SE¼SE¼ of Section 15 on Spring Coulee and the SE¼NE¼NE¼ of Section 15 on the Northwest branch of Spring Coulee, all in Township 25 North, Range 04 West, Teton County, Montana. The Application proposes that the water, which previously was diverted by means of a headgate and ditch for flood irrigation of 56 acres in the SW¼ of Section 13, 60 acres in the W½W½ of Section 14, and 67 acres in the S½ of Section 14, Township 25 North, Range 04 West, now be diverted by pump for sprinkler irrigation of 204.8 acres in the S½ of Section 11, 141.2 acres in the SW¼ of Section 13, 280.9 acres in the N½ of Section 14, 196.1 acres in the S½ of Section 14, 3 acres in the S½NE¼ of Section 15, and 138.2 acres in the SE¼ of Section 15, all in Township 25 North, Range 04 West, Teton

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County, Montana. The period of use remains March 1 through October 31, inclusive, of each year.

Application No. G136330-41O seeks to change 3,815 gpm up to 777 acre-feet of water per year (claimed under Claim for Existing Water Rights Nos. W136330-41O, N136333-41O, and W211242-41O) from diversion points located in the SE¼SW¼SE¼ of Section 14, the SE¼SE¼SE¼ of Section 15, and the SW¼SE¼NW¼ of Section 21, all in Township 25 North, Range 4 West and all on Spring Coulee, to a diversion point located on Spring Coulee in the SE¼NW¼SW¼ of Section 13, a diversion point retained in the SE¼SE¼SE¼ of Section 15, and a diversion point on the Northwest Branch of Spring Coulee in the SE¼NE¼NE¼ of Section 15, all in Township 25 North, Range 4 West, Teton County, Montana. The Application proposes that the water, which previously was diverted by headgate and ditch for flood irrigation of 56 acres in the SW¼ of Section 13, 115 acres in the S½ of Section 14, 24 acres in the N½N½ of Section 23, 54 acres in the E½ of Section 15, and 120 acres in the W½ of Section 15, Township 25 North, Range 4 West, now be diverted by pump for sprinkler irrigation of the same acreages specified for new places of use under Application No. 136329-41O. <u>See above</u>. The period of diversion remains March 1 through October 31, inclusive, of each year, as claimed.

Application No. G136331-41O seeks to change 4,488 gpm up to 408 acre-feet of water per year (claimed under Claim for Existing Water Rights Nos. W136331-41O and W136332-41O) from two diversion points on the North Branch of Spring Coulee, one in the NE¼SE¼NW¼ and one in the SE¼SE¼NW¼ of Section 11, Township 25 North, Range

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4 West, to diversion points located in the SE¼NW¼SW¼ of Section 13 and the SE¼SE¼SE¼ of Section 15 on Spring Coulee, and the SE¼NE¼NE¼ of Section 15 on the Northwest Branch of Spring Coulee, all in Township 25 North, Range 4 West, Teton County, Montana. The Application proposes that the water, which previously was diverted by means of a headgate and ditch for flood irrigation of 65 acres in the S½ of Section 11, 4 acres in the W½NW¼SW¼ of Section 13, and 140 acres in the E½ of Section 14, Township 25 North, Range 4 West, now be diverted by pump for sprinkler irrigation of the same acreages specified for new place of use under Applications Nos. 136329-41O and 136330-41O. See above. The period of diversion remains March 1 through October 31, inclusive, of each year, as claimed.

The pertinent portions of the Applications were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on February 27 and March 6, 1986.

Six timely objections were filed to the Application. The objections allege generally that approval of the Applications would result in an increase in the amount of water used over that which has historically been used and therefore will cause adverse effect (Harold and Fay Baker, Charles and Janet Danreuther), and that the damming of Spring Coulee will not leave sufficient water in the stream to allow other appropriators to exercise their water rights. (Glen Baker, New Rockport Colony, John Baker.) John Baker and New Rockport Colony additionally alleged that they had already experienced adverse effect to their water rights caused by the Applicant damming the stream. Elizabeth Hawley

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objected to the Applications on the basis that the Applicant was sprinkling part of her property, resulting in the waste of water and in farming problems on the Hawley land.

Marvin Cross of the Havre Water Rights Bureau Field Office completed a Field Report (dated April 25, 1986) which was sent to all parties of record.

This matter went to hearing on July 10, 1986, and the hearing was completed on the same day. The record in this matter was closed at the end of the contested case hearing.

EXHIBITS

The Applicant offered four exhibits in support of his Application in this matter:

Applicant's Exhibit 1 is a copy of a field report prepared by Marvin Cross of the Havre Water Rights Bureau Field Office, dated April 25, 1986. The report consists of a four-page memorandum; three tables; an addendum entitled "The Concept of Net Depletion" (with schematic attached); and a photocopied "master map" of the area of Applicant's places of use and points of diversion, with seven mylar map overlays.

Applicant's Exhibit 2 is a USGS map, Choteau Quadrangle, with the Applicant's property outlined in black.

Applicant's Exhibit 3 consists of a map with overlays prepared from the USGS Choteau Quadrangle map by Applicant's witness Rhett Hurless. The map shows the location of 20 foot contours, and is marked with the locations of Spring Coulee, the

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North Branch of Spring Coulee, the Northwest Branch of Spring Coulee, and with the location of roads in the area. The map has two mylar overlays: the first overlay identified lands previously irrigated by flood irrigation, based on the Applicant's SB76 Claims, Application for Change, and a site visit by Mr. Hurless. Overlay two identifies the location of the present center pivots, the areas sprinkler-irrigated, and the locations of the pipelines and points of diversion.

Applicant's Exhibit 4 is a graph prepared by Mr. Hurless, showing the different water losses associated with flood irrigation and with sprinkler irrigation. The exhibit also lists crop water requirements for grass (hay), alfalfa, and grain, based on USDA Soil Conservation Service figures.

Applicant's Exhibits 1, 2, 3, and 4 were accepted for the record without objection.

The Objectors offered one exhibit for inclusion in the record in this matter.

Objectors' Exhibit 1 (also marked as Objectors' Exhibit 3 for purposes of the Applicant's Application for Beneficial Water Use Permit No. 58133-s41O) is a photocopy of a map, with the land owned by Objectors Harold and Fay Baker outlined in black.

Objectors' Exhibit 1 was accepted for the record without objection.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file in this matter

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was made part of the record without objection, after review by all parties at the hearing.

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 (1985) 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 or, if applicable, of the legislature." The present matter does not involve the consumption of 4,000 or more acre-feet of water a year and 5.5 cubic feet per second (§85-2-402(4)). Therefore, the Department has jurisdiction over this Application for Change.

2. Applications for Change of Appropriation Water Right Nos. G136329-41O, G136330-41O, and G136331-41O were duly filed with the Department of Natural Resources and Conservation on April 1, 1985; Application No. 136329-41O at 1:02 p.m., Application No. G136330-41O at 1:00 p.m., and Application No. G136331-41O at 1:04 p.m.

3. The pertinent portions of the Applications were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on February 27 and March 6, 1986.

4. The source of water for the claimed water use rights proposed to be changed is surface water from the main branch, the

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North Branch, and the Northwest Branch of Spring Coulee, in Teton County, Montana. Spring Coulee is a perennial stream. See Applicant's Exhibit 2.

5. The appropriation water rights which the Applicant proposes to change historically were used for flood irrigation, and were diverted at eight diversion points: two diversion points on the North Branch of Spring Coulee, three on the Northwest Branch of Spring Coulee, and three on the main branch of Spring Coulee. (See Applicant's Statements of Claim for Existing Water Rights; Applicant's Exhibit 1. See Statement of the Case for legal descriptions.) The Applicant proposes to utilize sprinkler irrigation rather than flood irrigation, and to divert from only three points of diversion: one point of diversion on the Northwest Branch of Spring Coulee, and two points of diversion on the main branch of Spring Coulee. (See Applicant's Exhibit 1; Applicant's Exhibit 3; testimony of Marvin Cross, testimony of Rhett Hurless.)

The Applicant further proposes to sprinkler-irrigate 964.2 acres of land, as compared to the estimated 602 acres which historically were flood-irrigated with the claimed appropriation rights. (See Statements of Claim for Existing Water Rights, as amended by the Applicant; Applicant's Exhibit 1; Applicant's Exhibit 3; testimony of Marvin Cross; testimony of Rhett Hurless.)

The changes for which the Applicant has applied already have been made. (Testimony of Marvin Cross, Rhett Hurless; Applicant's Exhibit 1; Applicant's Exhibit 3.)

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6. The Applicant's predecessor in interest filed Claims (Nos. 136329, 136330, and 136331) claiming irrigation water for 1,520 acres of land. The Applicant subsequently amended those claims, adjusting downward the number of acres irrigated, and also filed implied Claims (Nos. 21241 and 21142) in order to bring the Claims into accordance with the estimated historical use. The places of use under the claimed rights at issue in this matter, as amended, total 602 acres.

The Objectors allege that water was never used on as much acreage as claimed. (Testimony of David Wipf, George Waldner, Lyle Baker.) Marvin Cross testified that the claimed areas of use were checked against available Department documentation of historical use, and against aerial photographs to ensure that the areas could historically have been irrigated. No field investigation was done prior to installation of the present irrigation system.

Applicant's witness Rhett Hurless testified that he had made an independent determination of the Applicant's lands which were irrigated in the past, based on the Applications and on a site visit made by Mr. Hurless.

7. Testimony indicates that the changes in places of irrigation and number of acres irrigated will not in themselves cause any additional volume of water to be withdrawn from Spring Coulee, assuming that the water rights upon which the changes have been based exist as claimed in the adjudication process. (See MCA §85-2-227, which states that a properly filed claim constitutes prima facie proof of its content until the issuance of a final decree.)

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Marvin Cross testified that he reviewed the proposed changes to determine if they would create an additional burden to the stream. To make this determination, he utilized the concept of "net depletion"; that is, he made a determination as to whether or not the Applicant would be taking a greater volume of water from the source (Spring Coulee) in any given year than he would have taken under his historic appropriation system. (See addendum to Applicant's Exhibit 1.)

Based on information provided by the Applicant, who estimated return flows to the stream which occurred under flood irrigation, and by reference to the Soil Conservation Service Irrigation Guide for Teton County, Mr. Cross estimated that the "total volume of water actually permanently depleted from the three sources as a result of the past flood irrigation practices was 1,283 acre-feet per year." (Applicant's Exhibit 1, page 3.) As noted in the report, the estimate is the best one possible based on the information available at the time of the hearing.[1]

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[1] Rhett Hurless calculated, based on his estimate that 301 acres of grass and 301 acres of alfalfa previously were irrigated, that the historical net crop use requirement was 827 acre-feet per year. At an estimated 50 percent irrigation efficiency, the Applicant's predecessors would have had to apply 1,654 acre-feet of water per year. With 70 percent efficient sprinkler irrigation, however, only 1,181 acre-feet of water per year would need to be diverted to achieve the same 827 acre-feet of net irrigation. This comparison tends to show that less volume has to be diverted under sprinkler irrigation to irrigate the same acreage. However, it does not accurately reflect the difference between the volume previously depleted from the source and the amount to be depleted under Applicant's irrigation system, since the crop use will be greater on 964.2 acres of land, even with the change in crop.

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8. The Applicant (through his witness) and Marvin Cross identified and discussed seasonal irrigation requirements and volumes of water permanently depleted from the source under past irrigation practices, and compared them to the estimated requirements and depletions under the proposed changes. However, no information was introduced on the timing of peak use requirements under the past and proposed irrigation practices, nor on the flow rates necessary to meet the historical and the present maximum demands.

For example, a review of the Montana Irrigation Guide (Soil Conservation Service, 1987) indicates that the daily peak irrigation requirements of small grains differ from the requirements of either grass or hay. Since the evidence in the record is inconsistent as to what proportions of the previously-irrigated acreage grew what crop,[2] it is not possible to determine the previous peak flow requirements of the past irrigation for purposes of comparison.

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[2] Marvin Cross estimated 167 acres of grass and 435 acres of alfalfa, while Rhett Hurless, based on existing vegetation observed during his site visit, estimated 301 acres of grass and 301 acres of alfalfa previously were irrigated. (Testimony of Marvin Cross, Rhett Hurless. See Applicant's Exhibits, 1 and 4.) Other cropping patterns may have been used in the past, due to crops other than grass or alfalfa being grown; however, this information is not in the record.

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Montana Irrigation Guide data also discloses different patterns of irrigation demand for small grains than for grass. (The pattern for grains also differs somewhat from that of alfalfa.) Typically, irrigation of grass begins much earlier in the year than irrigation of grains, and continues later into the fall, but the peak water use is less. Therefore, even if the same volume is diverted under past and proposed irrigation systems, a change in the pattern of diversion from the stream may occur when crops are changed, resulting in different flow rate demands; i.e., a volume may be achieved by diverting a low flow rate over a long length of time, or a high flow rate over a much shorter period of time. The volume remains the same, but the effect on the pattern of water availability and on the impact to other appropriators may vary radically.

There is no evidence in the record which discloses whether the historical pattern of irrigation follows these crop use patterns, and hence no way to determine if the proposed changes will actually have an effect on the pattern of water availability. The Applicant's proposed irrigation may actually be comparable to the historical irrigation in terms of peak use requirements and timing of demand. However, there is no evidence in the record in this matter to indicate that such is the case.

9. Sprinkler irrigation normally requires a lower flow rate than does flood irrigation for the same acreage. However, in the present matter, the acreage is being substantially enlarged. The Applicant has applied to change 5,887 gpm of his claimed flow rates. The total of the flow rates claimed in the claimed,

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amended, and implied rights in this matter is 12,791 gallons per minute. (See Applicant's Exhibit 1, Table 1.) The Applicant did not provide any additional evidence as to whether the proposed flow rate exceeds the flow historically depleted from Spring Coulee and its tributaries.

The evidence in the record does not indicate how much flow (as opposed to volume, which was calculated by the Applicant and by Marvin Cross) historically has been depleted from Spring Coulee and its tributaries under the Applicant's claimed use rights. The Applicant estimated that 55 percent to 60 percent of the water diverted over and above net irrigation requirements under previous flood irrigation returned to the stream. (Testimony of Marvin Cross; Applicant's Exhibit 1, page 2.) Applicant's witness Rhett Hurless testified that the runoff occurred rapidly, within hours of the water being diverted. Therefore, even assuming arguendo that the Applicant's predecessors diverted the full flow rate of all the claimed water rights simultaneously, the maximum net depletion of flow on any given day was only a portion of the total diverted flow rate, based on the evidence presented by the Applicant. However, not enough information is available (for example, on past patterns of diversion, topography, and timing of return flows) to allow an accurate determination to be made of the flow rate which historically was "consumptively" diverted..

10. Objectors in this matter testified that installation of the Applicant's present irrigation system (see also Application for Beneficial Water Use Permit No. 58133-s41O) has resulted in a

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reduction of flow in Spring Coulee, and consequently in the amount of water available to meet their own appropriation rights.

George Waldner testified that he has been familiar with Spring Coulee for 38 years, and has never seen the creek go dry prior to the installation of the Applicant's sprinkler irrigation. He stated that there were times when the creek went completely dry when the Applicant's pivots were being used. David Wipf also testified that water availability had changed since installation of the sprinklers, and stated that the creek had gone dry prior to the hearing even though a heavy rain had saturated the soil and the creek could have been expected to have water flowing down the channel.

11. The Objectors made general allegations that the Applicant's changes in points of diversion are altering the pattern of water availability. (Testimony of Lyle Baker, David Wipf, Elizabeth Baker.) The Applicant did not provide any evidence with regard to the changes in points of diversion.

A review of the Application in this matter indicates that the Applicant not only proposes to divert some of his claimed water rights from a different point on the same source, but also proposes to divert some of them from completely different sources. (See Application for Change of Appropriation Right No. 136331-41O, for example, wherein the Applicant proposes to divert water use rights claimed on the North Branch of Spring Coulee out of new diversion points on the Northwest Branch and the main branch of Spring Coulee.) No testimony or evidence regarding the specific effects of these changes (for example, whether the

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timing and flows of the various branches are comparable, or whether or not the changes will result in more calls or less water for the Objectors) was presented for the record.

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

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria 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) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use. Section 85-2-402 MCA (1985).

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4. The water use proposed by the Applicant, that of sprinkler irrigation, is a beneficial use. See MCA §85-2-102(2)(a); see generally Sayre v. Johnson, 33 Mont. 15, 18 P. 385 (1905).

5. In order to make a determination as to 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.

Appropriators have vested rights to the maintenance of stream conditions, since each appropriator has developed a pattern of use based on the water normally available at different times of the year, and has invested time and money in developing irrigation, stockwatering, or other uses which depend upon water availability at given times. An appropriator who has developed irrigation practices based on a senior appropriator's pattern of only using water in certain months, for example, might have to radically alter his farming practices if the senior user was allowed to extend his use year-round. For a full discussion of the right to maintenance of stream conditions, see In the Matter of the Application for Beneficial Water Use Permit No. 20736-41H by the City of Bozeman and In the Matter of the Applicaton to Sever or Sell Appropriation Water

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Right No. 20737-s41H, June 4, 1984 Proposal for Decision, Memorandum. Therefore, the doctrine of appropriation accords property interest in stream conditions in order to provide security for the development of water.

Statements of Claim for Existing Water Rights, such as those filed by the Applicant and his predecessors, are useful in defining the maximum flow rates and volumes which historically have been diverted. However, they do not provide any information as to how much of that water historically has been consumed (and there is a major difference between diversion and consumption, as any water user downstream from a hydropower project can testify), or the pattern in which that water historically was used. For example, the water historically may have been used at a steady rate throughout the entire appropriation period, leaving a steady flow of water available for appropriation by others, or it may have been used almost entirely in mid-summer, requiring spring and fall patterns of use by other appropriators if most of the water available normally was consumed by the senior use during the mid-summer period of time.

> Enlargements of appropriations occur, however, not only by exceeding the "drought" levels prescribed in the decree, but also by management factors that tend to increase the demand on the source toward drought levels by increasing the place of use or by increasing the consumption of water . . . . That is to say, enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right.
> City of Bozeman, supra, Memorandum, page 11.

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Therefore, when Objectors to a change allege that the proposed change will increase the demands on the stream or adversely affect their water use by altering stream conditions (as in the present matter, where the Objectors have alleged that the Applicant's changes have resulted in additional calls upon the stream and in water shortages when none existed before), the Applicant must provide evidence that allows the impact of proposed changes to be assessed by comparing the effects upon the stream - and hence upon other appropriators - caused by the historical use versus the proposed use. The Applicant in the present case did not provide sufficient information to allow such a comparison to be made.

6. The Applicant has failed to prove by substantial credible evidence that the proposed use will not adversely affect the water rights of other persons.

The Applicant provided evidence that the proposed sprinkler irrigation system will not consume a greater volume of water from the source(s) than the volume historically depleted. However, he failed to introduce evidence which shows that the proposed expansion of acreage (change in place of use) will not result in the use of a higher consumptive flow rate than that previously utilized; or that the present patterns of use are sufficiently comparable to the historic patterns of use that other appropriators will not be adversely affected; or that the proposed pattern of use, even if not comparable to the historic pattern of use, will not adversely affect other appropriators. (See Findings of Fact 8 and 9.)

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Testimony by Objectors that they have experienced a reduction in water availability since the Applicant's sprinkler system was installed indicates that the proposed changes have already altered the stream conditions, and adds credence to the possibility that the proposed changes will adversely affect other appropriators.[4] Allegations made on behalf of the Applicant, that causes other than the changes may be responsible for the water shortages experienced by the Objectors, are not supported by any evidence in the record.

7. The Applicant did not present any evidence with regard to the proposed changes in points of diversion, and therefore did not meet his burden of proof on this issue. (See Finding of Fact 11.)

8. Because the Proposal for Decision in this matter is rendered on the basis of a failure of proof, rather than because

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[4] Counsel for the Applicant made much of the fact that the Objectors who so testified (representatives of New Rockport Colony) had water rights which are junior in priority to those of the Applicant. However, George Waldner has 38 years of familiarity with Spring Coulee, and his testimony on water availability therefore is entitled to great credence. See, e.g., Worden v. Alexander, 108 Mont. 208 (1939). In addition, the fact that these Objectors are junior to the Applicant is irrelevant when determining if the proposed changes (as opposed to exercise of the claimed water rights within the parameters of historical use) will adversely affect their water rights: a senior water right holder cannot subsequently extend the use of water to additional lands not under actual or contemplated irrigation at the time the right was established, "to the injury of subsequent appropriators." Quigley v. McIntosh, 110 Mont. 495, 505 (1940). See also Thayer v. City of Rawlins, 594 P.2d 951 (Wyo., 1979).

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the parties developed a full record and the evidence weighed against the Applicant, the proposed order is made without prejudice so that the Applicant may reapply for change authorization at such time as he is in possession of the necessary evidence.

Until such time as a change authorization may be granted in this matter, the Applicant may legally divert water only within the parameters of his claimed water rights; that is, he may divert water at the claimed points of diversion and use it on the claimed historical places of use, in the amounts and during the periods of appropriation claimed as the historic use.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Applications for Change of Appropriation Water Rights Nos. G136329-41O, G136330-41O, and G136331-41O by Lloyd DeBruycker hereby are denied without prejudice.

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

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adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §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 pertaining to its exceptions before the Water Resources 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. MCA §2-4-621(1). 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

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in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 8th day of October, 1987.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 8, 1987, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION by the Department on the Application for Change of Appropriation Water Right Nos. G136329-41O, G136330-41O, and G136331-41O, by Lloyd DeBruycker, addressed to each of the following persons or agencies:

Lloyd DeBruycker
Box 7700
Dutton, MT 59433

Glen E Baker
224 1st Avenue NW
Conrad, MT 59425

Harold and Fay V Baker
Route 2
Choteau, MT 59422

Elizabeth M Hawley
Box 579
Choteau, MT 59422

New Rockport Colony
Route 2 Box 131
Choteau, MT 59422

John D Baker
Route 2 Box 124
Choteau, MT 59422

Charles and Janet Danreuther
Box 43
Loma, MT 59460

Charles M Joslyn
P O Box 843
Choteau, MT 59422

Gough, Shanahan, Johnson &
Waterman
P. O. Box 1715
Helena, MT 59624

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Rhett Hurless
Consultant
P O Box 3474
Bozeman, MT 59772

Bob Larson
Field Manager
P O Box 1828
Havre, MT 59501

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

On this 8th day of October, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, 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.

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1990

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