

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

IN THE MATTER OF APPLICATION TO)	
CHANGE A WATER RIGHT NO. 43BV 30001540)	FINAL ORDER
BY BROCKWAY FAMILY PARTNERSHIP)	

The proposal for decision in this matter was entered on August 8, 2006. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

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

ORDER

Application to Change a Water Right No. 43BV-30001540 is hereby **DENIED**.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 5th day of September 2006.

/ Original Signed By Terri McLaughlin /

For the Acting Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of FINAL ORDER was served upon all parties listed below on this 5th day of September 2006 by First Class United States mail.

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LYLE K AND KATHERINE LOUISE JONES
858 LOWER SWEET GRASS ROAD
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/ Original Signed By Jamie Price /

Jamie Price
Hearing Unit
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1 **FINDINGS OF FACT**

2 **General**

3 1. Application To Change A Water Right No. 43BV 30001540 in the name of Brockway
4 Family Limited Partnership and signed by John Brockway was filed with the Department on
5 March 3, 2004. (Department file)

6 2. Notice of the Application was properly made in the Big Timber Pioneer on April 30, 2004.
7 (Department file)

8 3. The Environmental Assessment (EA) dated March 31, 2004, prepared by the
9 Department for this application was reviewed and is included in the record of this proceeding.
10 (Department file)

11 4. Applicant proposes to change Water Right Claim No. 43BV 012262-00. The claim as
12 filed is for irrigation water to flood irrigate 136.9 acres out of Sweet Grass Creek at 4.8 cubic
13 feet per second (cfs), up to 384 acre-feet per year, with a priority date of May 15, 1893. The
14 water is diverted by a headgate into the Boggs Ditch between May 15 and September 19,
15 inclusive, in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 1 North, Range 16 East, Sweet Grass
16 County, Montana. The Boggs Ditch carries the water to the place of use in Sections 29 and 30,
17 Township 1 North, Range 16 East, Sweet Grass County, Montana. (Department file)

18 5. The Applicant proposes to change the place of use and to increase the size of the place
19 of use to a total of 203.08 acres. The total acres irrigated will change from 136.9 acres of flood
20 irrigation to 17.97 acres of flood irrigation remaining at their current place of use, and 185.11
21 acres of pivot sprinkler irrigation at a new changed place of use. The place of use after the
22 change will be 129.61 acres in the NE $\frac{1}{4}$, 35.26 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, 6.87 acres in the
23 N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, 1.66 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, 29.68 acres in the N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$, all in Section
24 29, Township 1 North, Range 16 East, Sweet Grass County, Montana. (Department file)

1 6. The project does not involve salvage water. (Department file, testimony of David
2 Schmidt)

3 7. The Hearing Examiner hereby takes **Official Notice** of the *Montana Irrigation Guide* and
4 specifically the three pages scanned and attached on page 17, 18, and 19 of this Proposal.
5 Parties may contest the materials so noticed in exceptions to this proposal. Mont. Admin. R.
6 36.12.221(4).

7 **Historic Use**

8 8. Applicant described the historic water right as being for irrigation water diverted from
9 Sweet Grass Creek as it was claimed. See Finding of Fact No. 4 above. Applicant's portion of
10 the total 75.03 cfs diverted into the Boggs Ditch is 4.8 cfs. A portion of the historically irrigated
11 field was cut off from irrigation by the Boggs Ditch when Sweet Grass Creek cut through the
12 irrigated field sometime after the *Montana Water Resources Survey, Sweet Grass County*, was
13 published. (Department file; testimony of David Schmidt)

14 9. Applicant's expert, Mr. David Schmidt, estimated the consumptive use of the 136.9 flood
15 irrigated acres of alfalfa using the *Montana Irrigation Guide* (hereafter, Guide). The historic flood
16 irrigation takes place in climatic area II (moderately high consumptive use) at a 45% efficiency
17 according to Mr. Schmidt. Using the Guide Mr. Schmidt estimated the historic consumptive use:
18 (1) in a year of normal precipitation to be 3.58 acre-feet per acre; (2) in a semi-drought year to
19 be 4.19 acre-feet per acre; and (3) in a drought year to be 4.81 acre-feet per acre. (Department
20 file, testimony of David Schmidt)

21 **Adverse Effect**

22 10. Applicant is removing 118.23 acres from historic flood irrigation on fields adjacent to
23 Sweet Grass Creek. Applicant has shown that no additional water will be **diverted** from Sweet
24 Grass Creek if the irrigated acreage is increased. Applicant's "Justification for Increase In Acres

1 Irrigated” (table contained in Application based on the *Montana Irrigation Guide*) sets forth the
2 reasoning for the increase in the number of acres irrigated, while leaving the diversion at the
3 Boggs Ditch headgate unchanged. The “Justification for Increase In Acres Irrigated”
4 (Justification) table estimates 490.1 acre-feet (normal year) was historically **applied** to the fields
5 to flood irrigate the 136.9 acres. Then, the table estimates the volume of water proposed for use
6 on 185.11 acres of sprinkler irrigation and 17.97 acres of flood irrigation at 490.08 acre-feet.
7 Although the acres irrigated under the proposal increases from 136.9 to 203.08, the volume of
8 water **applied** to the fields according to the Justification remains the same. The assertion in this
9 Justification works because it compares the amount of water applied to the field by an
10 application method and not the amount of water consumed by the crop in an irrigated field. That
11 is, sprinkler irrigation is considered “more efficient” than flood irrigation. The Justification table
12 compares historic water **applied** to the field by the two irrigation methods but does not compare
13 historic consumptive use on the historic irrigated acreage with that of the proposed consumptive
14 use of the increased acreage. Both the historic and the proposed acres are in the same climatic
15 area. The consumptive use of each acre of crop in the old and in the proposed place of use is
16 the same. While less water may be required to be **applied** under sprinkler irrigation than flood
17 irrigation due to efficiency, it stands to reason that if more acres (203.08 vs. 136.9) are
18 consuming water [evapotranspiration], the proposed consumptive use will exceed the historic
19 consumptive use. (Department file [*Justification for Increase In Acres Irrigated*], testimony of
20 David Schmidt, Attachment on page 19)

21 11. Applicant attempts to show that the water diverted at the headgate (4.8 cfs) minus the
22 water pumped to the (new) pivot (2.47 cfs), does not place an additional burden on Sweet Grass
23 Creek by the proposed change. However, the historic volume of: (1) water diverted, (2) water
24 applied to the fields, (3) return flow, and (3) waste are not known. Applicant measured the flow
25 of water wasted from the Boggs Ditch below the proposed pivot pump site for a little over two

1 months in the spring during a wet year. Applicant described the path of water returning (wasting)
2 to Sweet Grass Creek, and described the path of excess water reaching the end of the Boggs
3 Ditch. Applicant installed measuring weirs in three places where overland flows return (waste) to
4 Sweet Grass Creek from the historic irrigated field. A fourth weir was installed where the Boggs
5 Ditch dumps (wastes) into the East Harrison Ditch which is the next ditch downstream. Applicant
6 measured flows in these four locations which are downstream of the sprinkler pivot pump in the
7 Boggs Ditch in May, June, and part of July 2005. The weirs washed out July 8. The
8 measurement of water returning to Sweet Grass Creek in each weir was greater than 4.33 cfs
9 during the 2005 measurements. However, the record is not clear if these four weir
10 measurements are additive, or how they relate to one another or to flows applied to the field.
11 Early 2005 was a wet precipitation period. To get to the weir locations, water had to leave the
12 Boggs Ditch and flow overland (in tributaries) to the weirs. Applicant did not provide historic
13 subsurface return flow evidence. Applicant did not provide evidence describing what was
14 happening upstream of the measurement weirs (such as diversion rate into Boggs Ditch,
15 amount in Boggs Ditch above pivot pump, amount pumped to pivot, etc.) at the time the
16 measurements were taken. Other than the 2005 measurements of waste (or surface water
17 return flow), Applicant did not provide evidence of the waste by the typical operation of the
18 historic irrigation. Applicant did not provide convincing evidence that this change from the
19 historic flood irrigation would not adversely affect existing water rights. (Department file,
20 testimony of David Schmidt)

21 12. Objector Schuman irrigates his upstream fields in a similar manner as Applicant
22 historically irrigated their fields. In Objector Schuman's case, water appears on the stream
23 banks of Sweet Grass Creek as flow from the sub-surface about four days after irrigation has
24 begun. Applicant is removing 118.23 acres from historic flood irrigation on fields adjacent to
25 Sweet Grass Creek. Objector Schuman believes and Hearing Examiner concurs that the stream

1 banks between Applicant's historic flood irrigated fields and Sweet Grass Creek would show
2 return flow just as Objector's fields do when he flood irrigates his fields adjacent to Sweet Grass
3 Creek. Objector Schuman is concerned that changing the flood irrigation to sprinkler irrigation
4 will diminish the "recharge" that historically returned to Sweet Grass Creek from Applicant's
5 flood irrigation. Water applied to the field that evaporates and transpires from the crop is the
6 consumptive need of the crop being irrigated. The amount of consumptive use for a particular
7 crop does not change with the method used to apply the water to the crop (see *Montana*
8 *Irrigation Guide* and specifically the three pages scanned and attached on page 17, 18, and 19).
9 Thus, the consumptive needs of the proposed increased acreage will be greater than the
10 consumptive needs of the historic irrigated acreage. There will be an increase in water
11 consumed from the increased acreage. That is, the increase in water transpired by the
12 increased acreage will not be available to return to Sweet Grass Creek by whatever means
13 (waste, seepage, or return flow) as it historically did. Any part of the water consumed under the
14 proposed change which historically was return flow will not now return to Sweet Grass Creek as
15 it historically did. Instead it will be consumed by the increased acreage. When there is less
16 water downstream because of the decreased return flow from increased consumption,
17 downstream senior appropriators may call upstream and shut down the upstream junior
18 Objectors (e.g., Schuman) earlier than has historically occurred. There are senior appropriators
19 downstream from the area of Applicant's historic irrigation. An earlier call on the source results
20 in an effect that is adverse to other appropriators because the time water is available to them
21 will be reduced. (Department file, testimony of Claude Mulholland, Phil Schuman, Cathy Jones,
22 Keith Goodhart)

23 13. Mr. Schmidt testified that he used the Guide to arrive at the estimated consumptive use.
24 However, Applicant's expert includes an "efficiency" amount in his estimates of the consumptive
25 use of a crop. Because the sprinkler irrigation efficiency is greater than the flood irrigation

1 efficiency, it gives the impression that there is water available to add irrigated acres since less
2 water needs to be applied to the crop to achieve the same consumption. The consumptive use
3 of a crop grown in Climatic Area II is the same whether it is irrigated by flood or sprinkler,
4 although the amount of water that may need to be applied to the crop may vary because of the
5 efficiency of method of application (i.e. sprinkler v. flood irrigation). The record does not contain
6 sufficient evidence to show there will not be an adverse affect to other appropriators when more
7 acres are irrigated even though the application rate is reduced. (Department file, testimony of
8 David Schmidt, Phil Schuman, Cathy Jones, Keith Goodhart, Matters Officially Noticed)

9 **Adequacy of Appropriation Works**

10 14. The Applicant has used the ditch and sprinkler irrigation pivot since the 1999 irrigation
11 season. The proposed appropriation works and operation of the proposed works are adequate.
12 (Department file, testimony of David Schmidt)

13 **Beneficial Use**

14 15. Applicant has shown there will be a benefit to the appropriator by use of the water for
15 irrigation. The irrigation volumes for the proposed flood and sprinkler irrigation acreages shown
16 in the Justification are the minimum amount necessary. The proposed irrigation use of water is a
17 beneficial use of water. (Department file)

18 **Possessory Interest**

19 16. Applicant has proven they have a possessory interest, or the written consent of the
20 person with the possessory interest, in the property where the water is to be put to beneficial
21 use. (Department file)

1 **Water Quality Issues**

2 17. No valid objections relative to water quality were filed against this application nor were
3 there any objections relative to the ability of a discharge permit holder to satisfy effluent
4 limitations of his permit. (Department file)

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

7 **CONCLUSIONS OF LAW**

8 1. The Department has jurisdiction to approve a change in appropriation right if the
9 appropriator proves the criteria in Mont. Code Ann. § 85-2-402.

10 2. The Department shall approve a change in appropriation right if the appropriator proves
11 by a preponderance of evidence the proposed change in appropriation right will not adversely
12 affect the use of the existing water rights of other persons or other perfected or planned uses or
13 developments for which a permit or certificate has been issued or for which a state water
14 reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §
15 85-2-436, a temporary change authorization for instream use to benefit the fishery resource
16 pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439
17 when authorization does not require appropriation works, the proposed means of diversion,
18 construction and operation of the appropriation works are adequate; the proposed use of water
19 is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or
20 a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann.
21 § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory
22 interest, or the written consent of the person with the possessory interest, in the property where
23 the water is to be put to beneficial use; if the change in appropriation right involves salvaged
24 water, the proposed water-saving methods will salvage at least the amount of water asserted by

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

4 3. The Hearing Examiner may take notice of judicially cognizable or generally recognized
5 technical or scientific facts within the Department's specialized knowledge. Parties shall be
6 notified either before or during the hearing or by reference in the proposal for decision of the
7 material noticed. Parties may contest the materials first noticed in this proposal for decision by
8 filing exceptions to the proposal for decision. ARM 36.12.221(4); ARM 36.12.229. See Finding
9 of Fact No. 7.

10 4. In a change proceeding, it must be emphasized that other appropriators have a vested
11 right to have the stream conditions maintained substantially as they existed at the time of their
12 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert
13 E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems
14 in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

15 85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the
16 provisions of this section in an existing water right, a permit, or a state water reservation
17 is recognized and confirmed. In a change proceeding under this section, there is no
18 presumption that an applicant for a change in appropriation right cannot establish lack of
19 adverse effect prior to the adjudication of other rights in the source of supply pursuant to
20 this chapter. An appropriator may not make a change in an appropriation right except, as
21 permitted under this section, by applying for and receiving the approval of the
22 department or, if applicable, of the legislature. An applicant shall submit a correct and
23 complete application.

24 (2) Except as provided in subsections (4) through (6), the department shall
25 approve a change in appropriation right if the appropriator proves by a preponderance of
26 evidence that the following criteria are met:

27 (a) *The proposed change in appropriation right will not adversely affect the use of*
28 *the existing water rights of other persons* or other perfected or planned uses or
29 developments for which a permit or certificate has been issued or for which a state water
30 reservation has been issued under part 3.

31
32 (italics added).

1 Montana’s change statute simply codifies western water law.¹ One commentator
2 describes the general requirements in change proceedings as follows:

3 Perhaps the most common issue in a reallocation dispute is whether other appropriators,
4 especially junior appropriators, will be injured because of an increase in the consumptive use of
5 water. Consumptive use may be defined as “diversions less returns, the difference being the
6 amount of water physically removed (depleted) from the stream system through
7 evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing,
8 power generation or municipal use.” An appropriator may not increase, through reallocation
9 [changes] or otherwise, the historic *consumptive* use of water to the injury of other
10 appropriators. *In general, any act that increases the quantity of water taken from and not*
11 *returned to the source of supply constitutes an increase in historic consumptive use.* As a
12 limitation on the right of reallocation, historic consumptive use is an application of the principle
13 that appropriators have a vested right to the continuation of stream conditions as they existed at
14 the time of their initial appropriations.
15

16 Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

17 In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy
18 District, 717 P.2d 955 (Colo. 1986), the court held:

19 [O]nce an appropriator exercises his or her privilege to change a water right ... the
20 appropriator runs a real risk of *requantification of the water right based on actual historical*
21 *consumptive use.* In such a change proceeding a junior water right ... which had been strictly
22 administered throughout its existence would, in all probability, be reduced to a lesser quantity
23 because of the relatively limited actual historic use of the right.
24

25 (italics added).
26

27 See also A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5.17[5]
28 (1988)(*a water holder can only transfer the amount that he has historically put to beneficial use*
29 *and consumed* – the increment diverted but not consumed must be left in the stream to protect
30 junior appropriators); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271(“The
31 issues of waste and historic use, as well as misuse, nonuse, and abandonment, may be
32 properly be considered by the administrative official or water court when acting on a reallocation
33 application,” citing Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo.
34 1978)).

¹ See, e.g., Wyo. Stat. § 41-3-104.

1 The requirements of Montana's change statute have been litigated and upheld in In re
2 Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d
3 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before
4 the Department and courts, and the applicant failed to meet the burden of proving that the
5 change would not adversely affect objectors' rights; the application was properly denied
6 because the evidence in the record did not sustain a conclusion of no adverse effect and
7 because it could not be concluded from the record that the means of diversion and operation
8 were adequate).

9 Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code
10 Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the
11 change adversely affected their water right, although the law was the same in that an adverse
12 effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek
13 Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605
14 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson
15 v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point
16 upstream of the defendants because of the injury resulting to the defendants); McIntosh v.
17 Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of
18 diversion downstream, so long as he installed measuring devices to ensure that he took no
19 more than would have been available at his original point of diversion); Head v. Hale, 38 Mont.
20 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining
21 purposes cannot so change its use as to deprive lower appropriators of their rights, already
22 acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959
23 (1896)(after the defendant used his water right for placer mining purposes the water was turned
24 into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then
25 changed the place of use of his water right, resulting in the water no longer being returned to the

1 gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his
2 subsequent right).

3 In a change proceeding, the *consumptive* use of the historical right has to be
4 determined:

5 In a reallocation proceeding, both the actual historic consumptive use and the
6 expected consumptive use resulting from the reallocation are estimated. Such estimates
7 are usually made by civil engineers. With respect to a reallocation, the engineer
8 conducts an investigation to determine the historic diversions **and** the historic
9 consumptive use of the water subject to reallocation. This investigation involves an
10 examination of historic use over a period that may range from ten years to several
11 decades, depending on the value of the water right being reallocated.

12

13 Expected consumptive use may not exceed historic consumptive use if, as would
14 typically be the case, junior appropriators would be harmed. If an increase in
15 consumptive use is expected, the quantity or flow of reallocated water is decreased so
16 that consumptive use is not increased.

17
18 2 Water and Water Rights at § 16.02(b) at 279-80. (bold added). See also, In The Matter of
19 Application For Change Of Appropriation Water Right No.9782-c76M By Thomas and Lydia
20 Bladholm, (1985); In The Matter Of Application to Change A Water Right No. 40M 30005660 By
21 J. Harry Taylor II and Jacqueline R. Taylor, (2005). A reduction in return flow to the source can
22 cause adverse effect to existing water rights. Matter of Application for Change of Appropriation
23 Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d
24 1054 (application was properly denied because evidence did not sustain conclusion of no
25 adverse effect to others, in part because of the increased distance of the new places of use to
26 the creek under the proposed sprinkler irrigation system that there would be significantly less
27 immediate return flow to Ross Fork Creek.).

28 5. The Applicant has not proven by a preponderance of evidence that the use of existing
29 water rights of other persons or other perfected or planned uses or developments for which a
30 permit or certificate has been issued or for which a state water reservation has been issued will
31 not be adversely affected. Applicant has provided evidence of prior use, and that the proposed

1 future uses will not **divert** more water than has historically been diverted. That is, Applicant
2 intends to continue diverting into the same ditch the same amount of water that was historically
3 applied to 136.9 acres and now apply it to 203.8 acres. Objectors allege and the Guide (of
4 which the Hearing Examiner took official notice) shows that the increase in acres irrigated will
5 increase the amount of water consumed over and above what was historically consumed by the
6 Applicant's flood irrigation. Applicant did not compare historic consumptive use with the
7 consumptive use after the proposed change. Instead Applicant estimated the volume of water
8 **applied** to the historic flood irrigation acreage. Then that volume was used to determine how
9 many acres could be sprinkler irrigated without increasing the volume. Using the Guide, the
10 Hearing Examiner finds that the consumptive use of 203 acres of irrigation will exceed the
11 amount historically consumed by 136.9 acres. The Applicant did not estimate or analyze historic
12 return flows to Sweet Grass Creek and return flows under the proposed change from flood
13 irrigation to primarily sprinkler irrigation except to measure 2005 flows of water that did return
14 overland to Sweet Grass Creek. How these measured flows relate to each other (4.33 cfs in
15 each weir) or to the 4.8 cfs diverted from Sweet Grass Creek was not explained. Without
16 evidence of the historical amounts applied to the field, subsurface return flows, and waste
17 (surface return flows) before and after the proposed change, the Applicant did not prove by a
18 preponderance of the evidence that there would be no adverse effect to existing water rights
19 from any change in return flows to Sweet Grass Creek. Applicant did not show that calls on the
20 source by downstream appropriators would not occur earlier and shorten the time water is
21 available to upstream appropriators if this change is authorized. The burden is on the Applicant
22 to prove that this adverse effect will not occur. See In The Matter Of Application To Change A
23 Water Right No. 40M-30005660 by J. Harry Taylor II and Jacqueline R. Taylor, Final Order
24 (2005); In The Matter Of Application For Change Of Appropriation Water Rights No. 101960-
25 41S and 101967-41S by Keith and Alice Royston, DNRC Final Order (1989), 249 Mont. 425,

1 816 P.2d 1054 (1991). The applicant in a change proceeding in Montana must prove the historic
2 consumption will not increase and not just that the amount of water diverted will not increase.
3 Applicant did not do so here. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 10,
4 11, 12, 13.

5 6. The Applicant has proven by a preponderance of evidence that the proposed means of
6 diversion, construction, and operation of the appropriation works are adequate. Mont. Code
7 Ann. § 85-2-402(2)(b). See Finding of Fact No. 14.

8 7. The Applicant has proven by a preponderance of evidence that the quantity of water
9 proposed to be used is the minimum amount necessary for the proposed beneficial use. Mont.
10 Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 15.

11 8. The Applicant has proven by a preponderance of evidence a possessory interest in the
12 property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See
13 Finding of Fact No. 16.

14 9. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See
15 Finding of Fact No. 6.

16 10. No objection was raised as to the issue of water quality of a prior appropriator being
17 adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of
18 a permit. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See Finding of Fact No. 17.

19 11. The Department may approve a change subject to terms, conditions, restrictions, and
20 limitations it considers necessary to satisfy the criteria for authorization to change a water right.
21 There are no conditions offered by any Party to show the criteria for authorization to change a
22 water right can be met. Mont. Code Ann. § 85-2-402(8).

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

1 **PROPOSED ORDER**

2 Authorization to Change A Water Right No. 43BV 30001540 by Brockway Family Limited
3 Partnership is hereby **DENIED**.

4 **NOTICE**

5 This Proposal for Decision may be adopted as the Department's final decision unless
6 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
7 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
8 argument. Exceptions and briefs, and requests for oral argument must be filed with the
9 Department by August 28, 2006, or postmarked by the same date, and copies mailed by that
10 same date to all parties.

11 Parties may file responses and response briefs to any exception filed by another party.
12 The responses and response briefs must be filed with the Department by September 7, 2006, or
13 postmarked by the same date, and copies must be mailed by that same date to all parties. No
14 new evidence will be considered.

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

17 Dated this 8th day of August 2006.

18
19 / Original Signed By Charles F Brasen /

20 Charles F Brasen
21 Hearing Officer
22 Water Resources Division
23 Department of Natural Resources
24 and Conservation
25 PO Box 201601
26 Helena, Montana 59620-1601

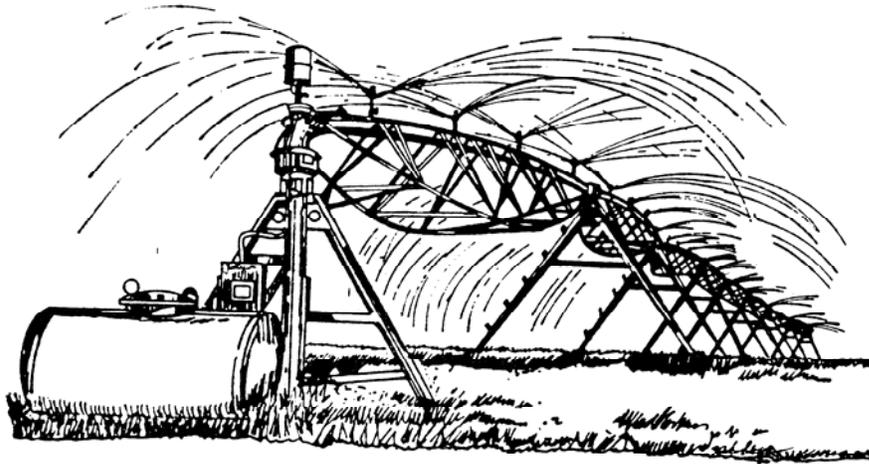
State of Montana
Department of
Agriculture

Soil
Conservation
Service

Bozeman,
Montana



Montana Irrigation Guide

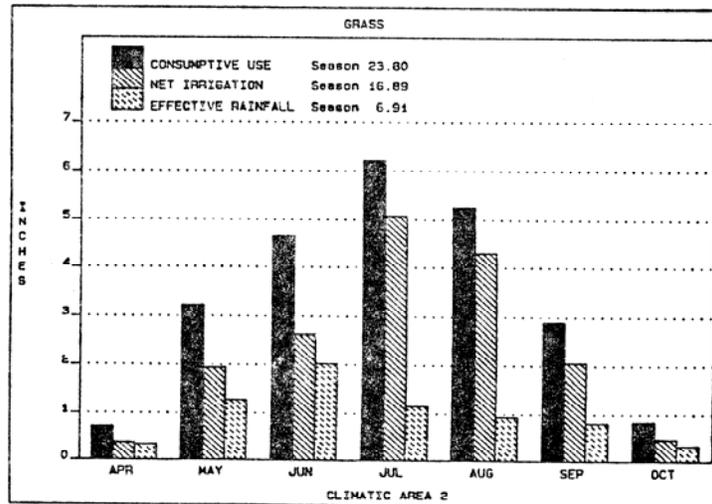
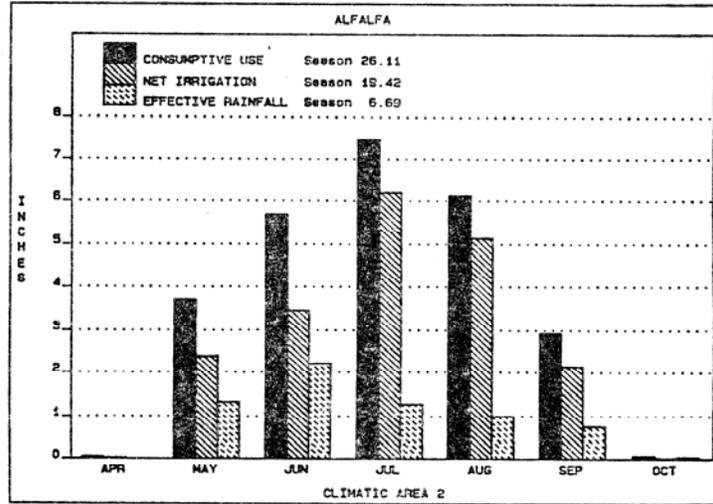


Department of Natural Resources
and Conservation
Water Quality Bureau
1000-6th Street
Bozeman, MT 59717
FIELD OFFICE
4-17-87

MONTANA IRRIGATION GUIDE (Cover Page)

Figure 4.2 (cont)
 CONSUMPTIVE USE ESTIMATES BY CLIMATIC AREA
 (Normal year - 50% chance rainfall)

CLIMATIC AREA 2



APPENDIX B
ESTIMATED MONTHLY AND SEASONAL CONSUMPTIVE USE
(SCS, TR-21 Balaney-Criddle Method)

County Sweet Grass
Weather Station Big Timber 4550 N, 10957 W
Climatic zone Moderately High (2) Elevation 4100 FT

MONTH	CONSUMPTIVE USE INCHES	EFFECTIVE PRECIPITATION:		NET IRRIGATION 1/	
		Normal Year (50%)	Dry Year (80%)	Normal Year (50%)	Dry Year (80%)
Crop <u>Alfalfa</u>		Normal net irrigation application			<u>4.5</u> in
Planting date <u>April 29</u>		Harvest date <u>October 5</u>			

JAN	:	:	:	:	:
FEB	:	:	:	:	:
MAR	:	:	:	:	:
APR	: .06	: .03	: .03	: .00	: .00
MAY	: 3.74	: 2.08	: 1.76	: .00	: .00
JUN	: 5.61	: 2.10	: 1.77	: 2.94	: 3.60
JUL	: 7.32	: 1.01	: .85	: 6.31	: 6.47
AUG	: 6.06	: 1.02	: .86	: 5.04	: 5.20
SEP	: 3.32	: 1.01	: .85	: .22	: .40
OCT	: .30	: .14	: .12	: .00	: .00
NOV	:	:	:	:	:
DEC	:	:	:	:	:
TOTAL	: 26.40	: 7.40	: 6.24	: 14.51	: 15.66

Crop Grain, Spring Normal net irrigation application 3.6 in
Planting date April 13 Harvest date August 21

JAN	:	:	:	:	:
FEB	:	:	:	:	:
MAR	:	:	:	:	:
APR	: .41	: .36	: .30	: .00	: .00
MAY	: 2.86	: 1.95	: 1.64	: .00	: .00
JUN	: 6.24	: 2.14	: 1.81	: 3.27	: 3.96
JUL	: 6.20	: .93	: .78	: 3.86	: 4.09
AUG	: .91	: .52	: .44	: .00	: .00
SEP	:	:	:	:	:
OCT	:	:	:	:	:
NOV	:	:	:	:	:
DEC	:	:	:	:	:
TOTAL	: 16.62	: 5.90	: 4.98	: 7.12	: 8.05

1/ Included in computations is carry-over moisture which is assumed to be available within crop root zone at planting time or spring growth time. This value represents non-growing season precipitation equal to a normal net irrigation application, and is split between beginning and end of growing season.

MONTANA IRRIGATION GUIDE (from Appendix B)

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of PROPOSAL FOR DECISION was served upon all parties listed below on this 8th day of August 2006 by First Class United States mail.

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/ Original Signed By Jamie Scow /

Jamie Scow
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