

FINDINGS OF FACT

General

1. Application to Change Water Right No. 30002264 in the name of Charles and Celeste Schwend was filed with the Department on June 5, 2002. (Department File)
2. This Application to Change a Water Right proposes to change a portion of the place of use and add a point of diversion of Water Right Statement of Claim No. 43D-198608. The General Abstract for this Statement of Claim describes it as a decreed right with a priority date of October 1, 1894. A temporary preliminary decree has been issued for Basin 43D by the Water Court. (Department File, Abstract of Claim No. 43D-198608)
3. Statement of Claim No. 43D-198608 is a supplemental claim with Statement of Claim Nos. 43D-198604, 43D-198605 and 43D-198607 which means the rights have overlapping places of use. The existing point of diversion for Statement of Claim 43D-198608 is listed as being in the SWSENE Sec. 3, T5S, R21E. The existing place of use for this right is listed as 31.70 acres in the S2SE Sec. 35, 4.30 acres in the SWSW Sec. 35, T4S, R21E, 43.60 acres in the N2NW Sec. 2, and 12.00 acres in the NWNE Sec. 2, T5S, R21E, all in Carbon County, Montana for a total of 91.60 acres. Statement of Claim No. 43D-198608 lists a maximum flow rate as decreed by the Water Court in Basin 43D of 1.75 cfs without listing a specific volume. The General Abstract of this Statement of Claim contains the Water Court remark that “the water rights following this statement of claim [as listed above] are supplemental which means the rights have overlapping places of use. The rights can be combined to irrigate only overlapping parcels of the claimants total 91.60 acres. Each right is limited to the flow rate and place of use of that individual right. The sum total volume of these water rights shall not exceed the amount put to historical and beneficial use.” (Department File, Abstract of Claim No. 43D-198608)
4. Application to Change a Water Right No. 43D-30002264 proposes to change the point of diversion and place of use of 0.5 cfs up to 85.3 acre feet of water under Statement of Claim No. 43D-198608. If approved, the new point of diversion for the 0.5 cfs and 85.3 acre feet will be located in the NWNWSE Sec. 35, T4S, R21E (the Carbonado Ditch). The Application to Change states that 31.7 acres (identified as Place of Use ID 1 on the abstract of claim) will be taken out of irrigation in the S2SE Sec. 35, T4S, R21E, and the water previously dedicated to that acreage will be used

- for irrigation on 33.6 acres in the W2SE Sec. 29, T4S, R22E. (Application, Department File)
5. The Environmental Assessment (EA) prepared by the Department for this Change Application was reviewed and is included in the record of this proceeding. The EA concludes that no significant environmental impacts were identified and that no EIS is required. (Department File)
 6. A public notice describing facts pertinent to this Change Application was published in the *Carbon County News*, a newspaper of general circulation, printed and published on April 14, 2005, and was mailed to persons listed in the Department file on April 8, 2005. (Department File)

Historical Use

7. The Abstract for Statement of Claim No. 43D-198608 lists a maximum flow rate of 1.75 cfs for the purpose of irrigation on 91.60 acres in Sec. 35, T4S, R21E and Sec. 2, T5S, R21E (more particularly described above) from Rock Creek through the Beerwart Ditch with a period of diversion from April 1 to November 4. The Statement of Claim as decreed by the Water Court in the temporary preliminary decree contains the remark that the “sum total volume of these water rights [the instant right and the rights supplemental to it] shall not exceed the amount put to historical and beneficial use.” Statement of Claim No. 43D-198608 is a supplemental claim with Statement of Claim No. 43D-198604 which has a place of use consisting of 12.00 acres in the NWNE Sec. 2, 37.00 acres in the NENW Sec. 2 and 3 acres in the NWNW Sec. 2, T5S, R21E. It is also a supplemental claim with Statement of Claim Nos. 43D-198605 and 43D-198607. Statement of Claim 43D-198605 has a place of use consisting of 4.30 acres in the SWSW Sec. 35, T4S, R21E, 15.00 acres in the NWNW Sec. 2 and 3.40 acres in Sec. 2, T5S, R21E. Statement of Claim 43D198607 has a place of use consisting of 12.00 acres in the NWNW Sec.2, T5S, R21E and 4.30 acres in the SWSW Sec. 35, T4S, R21E. (Department Records, Abstract of Claim Nos. 43D-198604, 43D-198605, 43D-198607, 43D-198608)
8. While these claims are supplemental to each other, the specific 31.70 acres that applicant proposes to retire from irrigation (Place of Use ID 1 in Statement of Claim 43D198608) is not listed as being a place of use in any of the supplemental claims (43D-198604, 43D-198605, 43D-198607). The other parcels listed in Statement of Claim 43D-198608 (Parcels 2, 3, 4 consisting of 59.90 acres) appear to be able to be

- served (irrigated), at least in part, under the various supplemental claims based on the Abstracts for each of those supplemental claims. However, the record does not reveal the actual sum total of the water applied to any of the four parcels identified in Statement of Claim 43D-198608 under that right or any of the supplemental rights thereto. (Department Records, Abstract of Claim Nos. 43D-198604, 43D-198605, 43D-198607, 43D-198608)
9. Applicant states that “we will not be using any more water than was used before.” (Department File, Application)
 10. The Billings Regional Office of the Department of Natural Resources and Conservation acknowledges that “the right to be changed has been used based on the Carbon County Water Resources Survey.” While Water Resources Surveys indicate irrigated acreage, they do not quantify or indicate the amount of water used on any irrigated acreage. The application and information submitted at hearing fail to provide any information or evidence of the historic amount actually used. (Department File – Form 606 Checklist)
 11. The record does not contain any description, estimate, or analysis of the actual historic use (either diverted flow rate, diverted volume, consumptive use or pattern of use) of Statement of Claim No. 43D-198608. (Department File, Hearing Record)

Adverse Effect

12. Applicant has not identified if there are any water users between the historic point of diversion for Claim No. 43D-198608 and the proposed point of diversion, between the historic place of use and the proposed place of use, or the historic point of return flow and the proposed point of return flow. Applicant has not identified any water users above the historic place of use or below the proposed place of use. (Application File, Hearing Record)
13. Applicant states that 31.7 acres will be taken out of irrigation in the S2SE Sec. 35, T4S, R22E, and the water previously used on that acreage will now be used on 33.6 acres in the W2SE Sec. 29, T4S, R22E. This represents a potential expansion in irrigated acres of 1.90 acres. (Application, Supplement to Application)
14. The existing place of use (31.7 acres in the S2SE Sec. 35) is in close proximity (perhaps ½ mile) to the source, Rock Creek, served by a fairly short section (approximately 1 mile) of the existing Beerwart Ditch and it appears to the Hearing Examiner, based on the USGS Boyd 7.5 minute Quadrangle map, that any potential

return flows from the irrigation of those 31.7 acres would return to what is labeled Stanley Creek within a very short distance. Stanley Creek appears to be a wasteway which provides some of the water in the Carbonado and Hoyle Ditches. The record is unclear as to whether these return flows eventually reach Rock Creek or if they run down the Carbonado and/or Hoyle Ditches to provide water to other users.

The proposed new place of use lies approximately 2 miles (as the crow flies) due east of the point of diversion (either existing or proposed) on the source, Rock Creek, to be served by well over 3 miles of the Carbonado Ditch. Based on the Hearing Examiner's analysis of the topographical map, any potential return flows to Rock Creek from the new place of use would need to travel down an unnamed tributary of Rock Creek for a distance of at least 1.75 miles, but more importantly, at a distance of at least 6 river miles downstream from the vicinity of the existing place of use and potential return flow. It is apparent from the record that the potential for ditch loss and a significant change in the potential amount, timing, and location of return flows will result from this proposed change. (Department File, USGS Boyd 7.5 minute Quadrangle Map, Exhibit A)

15. The record does not contain any description, estimate, or analysis of the actual historic use (either diverted volume, flow rate, or consumptive use) of Statement of Claim No. 43D-198608 or any analysis of potential adverse effect to the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (Department File, Hearing Record)

Means of Diversion

16. Applicant proposes to cease using water previously diverted through the headgate and ditch known as Beerwart Ditch and then subsequently diverting that water through the headgate and ditch downstream known as Carbonado Ditch, both off Rock Creek. (Application, Hearing Record)
17. The Carbonado Ditch has the capacity to carry the amount of water requested. (Department File, Hearing Record, Exhibit B)

Beneficial Use

18. Applicant proposes to utilize 0.5 cfs up to 85.3 acre feet to irrigate 33.7 acres in the W2SE Sec. 29, T4S, R22E. (Application, Supplement to Application)

19. The use of water for irrigation is a beneficial use. (MCA § 85-2-102(2))
20. Applicant's proposed place of use consisting of 33.7 acres in the W2SE Sec. 29, T4S, R22E appears from the record to be a subsection of two other Water Court Statements of Claim (Statement of Claim Nos. 43D-19152 and 43D-19169, supplemental to each other) both encompassing a total of 143.10 acres. Statement of Claim No. 43D-19152 lists a flow rate of 1.25 cfs and Statement of Claim No. 43D-19169 lists a flow rate of 2.50 cfs for a combined flow rate of 3.75 cfs to irrigate the 143.10 acres (of which 33.7 appears to be a subpart thereof). Neither of these claims have a volume associated with them other than the standard Water Court statement "[t]he sum total volume of these water rights shall not exceed the amount put to historical and beneficial use." (Statement of Claim Nos. 43D-19152, 43D-19169)
21. The proposed addition of 0.5 cfs from Statement of Claim No. 43D-198608 to the 33.7 acres (apparently contained within the 143.10 acres as listed above) would bring the total flow rate authorized for the 143.10 acres to 4.25 cfs.

Possessory Interest

22. Applicant has provided deeds demonstrating his possessory interest in the W2SE Sec. 29, T4S, R22E. (Department File)

CONCLUSIONS OF LAW

General

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in Mont. Code Ann. § 85-2-402. For the instant application the requirements of Mont. Code Ann. § 85-2-402(2)(e,f,g) are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (Finding of Fact 2, Department File)
2. Montana Code Annotated § 85-2-402(2) states, inter alia, and as applicable to the instant application:

Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of the evidence that the following criteria are met:

- a. The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
 - b. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
 - c. The proposed use of water is a beneficial use.
 - d. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.
3. The public notice requirement of Mont. Code Ann. § 85-2-307 has been met.
(Finding of Fact 6)

Adverse Effect

4. Applicant has not proven by a preponderance of the evidence that there will be no adverse affect the use of existing water rights of other persons. In an application for a change in a water right, there must be evidence of the actual historic use made of the water right.

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992). Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, , 220 Mont. 519, 722 P.2d 598 (1986).

In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation - Final Decision (2008).

In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont.

342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

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

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

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

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a

1. Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

2. When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.
Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition).

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

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

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)(“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators.

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

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

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

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

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication.

In the instant case the only evidence of historic use is the Abstract of Claim No. 43D-198608, the Carbon County Water Resources Survey, and the naked assertion by the Applicant that "we will not be using any more water than was used before." However, there is no indication of the actual flow rate, volume of water historically used for irrigation or the pattern of use for irrigation. Applicant failed to prove the extent of the historic water right to be changed.

While the Applicant's belief that he will use no more water than was used before is credible, the facts of the Application indicate, given the large increase in the length of run in the Carbonado Ditch versus the Beerwart Ditch and the great increase in the

potential distance and timing of return flows, that the potential for adverse affect in the granting of this permit is very high. (Finding of Fact Nos. 7 – 15)

“Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation water rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, (1989) conclusion of law No. 8. Applicant has not introduced sufficient evidence to determine annual volume historically consumed under the right proposed to be changed.

5. Applicant has not identified any other water right users in the vicinity of the proposed change that may be adversely affected should the change be granted. Applicant only makes the assertion that no more water will be used than was used before. (Finding of Fact No. 12) The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991). Mont. Code Ann § 85-2-402 (2) provides that the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not “adversely affect the use of the existing water rights of other persons.”

By a preponderance of the evidence is meant such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it.

Ekwortzel v. Parker 156 Mont. 477, 484-485, 482 P.2d 559, 563 (1971) (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added)

The Applicant in the instant matter, having not identified other water users who may be affected either near the old point of diversion or place of use nor the new point of diversion and place of use, or addressed the issue of change return flow, has failed

to clear the evidentiary hurdle necessary for the Department to determine that the change application will not adversely affect the use of the existing water rights of other persons. It is the applicant's burden to produce the required evidence and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Rights No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision, adopted by DNRC Final Order (2005). Applicant has not proven by a preponderance of the evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

Means of Diversion

6. Applicant proposes to use an existing ditch which is administered by a water commissioner (the Carbonado Ditch) for conveyance of the water proposed to be changed. While it is not expressly indicated in the record that the Carbonado Ditch is adequate for this purpose, the Hearing Examiner accepts, and imputes from, Exhibit B that it is so. Applicant has proven by a preponderance of the evidence that the means of diversion, construction, and operation of the appropriation works are adequate. (Finding of Fact No. 16, 17)

Beneficial Use

7. Applicants proposal to utilize the water under this change authorization for irrigation is a recognized beneficial use. Applicant's proposal to utilize 0.5 cfs up to 85.3 acre feet from Statement of Claim No. 43D-198608 to irrigate 33.7 acres within the already authorized 143.10 acres under Statement of Claim Nos. 43D-19152 and 43D-19169 will result in a total flow rate for those 143.10 acres of 4.25 cfs or 1907.40 gpm² without an indication of the total volume to be applied to the 143.10 acres. While the total *flow rate* (13.33 gpm per acre) after the proposed change appears to be a rate needed to sustain the proposed beneficial use (See *Water Right Claim Examination Rules Amended by the Montana Supreme Court* (2006) at rule

2. $4.25 \text{ cfs} \times 40 \text{ miner's inches/cfs} = 170 \text{ miner's inches}$. $170 \text{ miner's inches} \times 11.22 \text{ gpm/miner's inch} = 1907.40 \text{ gpm}$. $1907.40 \text{ gpm}/143.10 \text{ acres} = 13.33 \text{ gpm/acre}$.

14(b); and *Olson v. McQueary* 212 Mont. 173, 687 P.2d 712 (1984)), the record is devoid of any evidence of the total *volume* of water which would be applied to the 143.10 acres. It is not possible to determine from the record if the existing water rights (43D-19152 and 43D-19169) have historically been able to provide a volume adequate to irrigate the 143.10 acres, and it is therefore not possible to determine if the addition of 85.3 acre feet from Statement of Claim No. 43D-198608 is necessary to sustain the beneficial use. The applicant has not proven that the proposed change in use is a beneficial use. (Finding of Fact Nos. 18, 19, 20, 21)

Possessory Interest

8. Applicant has proven by a preponderance of the evidence that he has a possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact 22)

RESPONSE TO COMMENTS ON DRAFT FINAL ORDER

Applicant Chester Schwend filed comments to the Draft Final Order. Applicant notes that Objector MT Fish, Wildlife & Parks withdrew their Objection to the Application and that Objector Luloff is located 3 to 5 miles above the point of diversion to be changed. The Department of Natural Resources, in considering a water right change application, nonetheless must consider the impact of such a change to all of the water users. The record in this matter does not support a finding of no adverse effect due to the lack of evidence regarding the actual historic use of the water right to be changed, the issue of ditch loss and return flow, and failure to identify all of the water users potentially impacted by this change. (Conclusion of Law Nos. 4, 5)

Applicant points specifically to Finding of Fact 14. Again, the record is unclear as to the amount of the actual historic use, and the potential change in the amount, timing and location of return flow on water users in the vicinity.

Applicant also points to Conclusion of Law 1 [apparently 7] regarding Beneficial Use. The Hearing Examiner is aware that a 1900 water right is relatively junior in the Rock Creek drainage, but the record still does not indicated the amounts of water provided by the existing water rights at the new place of use which would be supplemented by the water right proposed to be changed. Applicant provides in his response to the Draft Final Order information

regarding the availability of the 1900 water right. The Hearing Examiner notes that the transmittal letter sent with the Draft Final Order specifically states that “[t]his is not an opportunity to expand on the record. The record is closed and new evidence will not be accepted.” Applicant’s submissions with his response to the Draft Final Order can not be considered.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

FINAL ORDER

Application to Change a Water Right No. 43D-30002264 by Chester and Celeste Schwend is **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 and payment 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 17th day of October, 2008.

/Original signed by David A Vogler/

David A. Vogler
Hearing Examiner
Department of Natural Resources

and Conservation
Water Resources Division
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Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 17th day of October, 2008 by first-class United States mail.

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Cc:
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