

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

* * * * *

IN THE MATTER OF APPLICATION TO CHANGE A)
WATER RIGHT NO. 41I 30002512 BY BREWER) FINAL
LAND CO, LLC) ORDER

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on November 6, 2003. Applicant filed timely exceptions to the Proposal. Objector J.T. M^cCurry is now deceased. No timely response to Applicant's exceptions were filed by his estate. Applicant did not request an oral argument hearing.

The Proposal recommended denying authorization to change the place of use of water right Nos. 41I 02143000 and 41I 02143100 to take 168.3 acres out of irrigation at one location and move it to irrigate 168.3 acres at another location.

In general Applicant excepted to the Proposal stating the finding as to the historical volume beneficially used is erroneous. Although Applicant attached documentation of historic use from witness Otto Ohlson to the exception as Exhibit A, the record was closed by the Hearing Examiner at the end of the hearing. The information in the Exception Exhibit A is, therefore, not properly a part of the record and cannot be used in deciding this matter. Mont. Adm. R. 36.12.229(2).

Applicant's exception to Finding of Fact No. 6

Applicant excepted to Finding of Fact No. 6, page 4, wherein the Hearing Examiner found the record does not disclose the volume of water flowing through Higgins Reservoir during the second filling of the reservoir, and that the maximum historic volume used supported by the record is 575 acre-feet. Applicant states it is not realistic to

irrigate 705 acres with a diverted volume of 575 acre-feet, and the Hearing Examiner completely ignores the volumes set forth in water right claim Nos. 41I-W-021430 and 41I-W-021431. Applicant contends the claims are clearly part of the record, and must be considered as prima facie proof of their content until the issuance of a final decree in Basin 41I, pursuant to Mont. Code Ann. § 85-2-227(1). The Claims are part of the record. However, Applicant overlooks the limitation of the prima facie statute to the adjudication: "[F]or purposes of adjudicating rights pursuant to this part, a claim...of an existing right filed...constitutes prima facie proof of its content...until a final decree is issued." (emphasis added) This statute is found in Part 2 of Title 85 Chapter 2, the part of the Water Use Act dealing with the adjudication of water right claims by the Water Court. The application in this matter was filed under the provisions of Part 4, of Title 85 Chapter 2, the part of the Water Use Act dealing with the utilization of water, specifically changes of water rights. The prima facie status for claims does not apply to the present Part 4 change of use proceeding.

Applicant argues there is no evidence in the record to show that the claimed volume is not being used, and that the uncontroverted testimony of Rod Brewer, Jim Higgins, and Otto Ohlson was ignored. The record shows that the Hearing Examiner found a contradiction between the testimony of Jim Higgins and the actual claimed historic use. The evidence of historic use offered by Jim Higgins and the testimony of Otto Ohlson based on the requirements of the crop rather than actual use differ by almost 4000 acre-feet per year. At hearing the explanation offered by Applicant was that there was water flowing through Higgins Reservoir during the second filling. However, no evidence of the volume of this flow was offered into evidence by the Applicant. The Hearing Examiner noted that had the volume of water flowing through Higgins Reservoir during the second filling been

known, it could have been included in the historic volume used. The only numerical evidence of all waters historically diverted was presented *after* the record was closed (Exhibit A of Applicant's exceptions), and therefore cannot be considered. Pursuant to the Department's hearing rules, Admin. R. Mont. 36.12.223 (9);

The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the hearing examiner have agreed should be received into the record, whichever occurs latest.

At the close of the hearing in this case the Hearing Examiner declared the record closed, and there was no agreement between the parties and the Hearing Examiner for receipt of late filed exhibits. It would be unfair and prejudicial absent a prior agreement of the parties to allow the late receipt of evidence not subject to cross-examination or rebuttal. See Mont. Code Ann. § 2-4-612(5).

In any event, the Hearing Examiner properly found the testimony of historic use provided by Jim Higgins more believable as to historic use than the crop requirements computed by Otto Ohlson.

Finally, Applicant states this Finding of Fact No. 6 is in direct contravention to the Department's (Department of Natural Resources and Conservation) own Water Rights Claims Examination Manual. The referenced manual (used to examine claims filed under Title 85, Chapter 2, Part 2), however, is not relevant to the pending change application (filed under Title 85, Chapter 2, Part 4). Part 2 addresses adjudication of water rights (water right quantification) by the Water Court in formal district court proceedings, and Part 4 addresses utilization of water (including changing an existing water right) by the Department in contested case proceedings under the Montana Administrative Procedures Act. The water right has not been finally adjudicated by the Water Court. Even if the water rights sought to be changed in this case had been finally adjudicated by the

Montana Water Court, the Applicant must still prove, and the Hearing Examiner must still find, what the *actual* historic use of the water right was in order to make a determination of adverse effect. 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 described in a decree. A recent *en banc* Colorado Supreme Court case, *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1169-70 (Colo. 2002) (en banc), describes this universal feature of western water law:

In the past, we have explained this limitation by noting that "over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes." *Midway Ranches*, 938 P.2d at 521. The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. [FN9] *Orr*, 753 P.2d at 1223; *Weibert*, 200 Colo. at 317, 618 P.2d at 1371-72. "Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion." *Orr* 753 P.2d at 1223; see also *Farmers Res. & Irr. Co.*, 44 P.3d at 248 (citing *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1156, for the proposition that the enlargement doctrine prohibits an appropriator from expanding its historic appropriation).

An absolute decree, whether expressed in terms of a flow rate or a volumetric measurement, is itself not an adjudication of actual historic use but implicitly is further limited to actual historic use. In order to determine that a requested change of a water right is merely that, and will not amount to an enlargement of the original appropriation, actual historic use must therefore, in some fashion and to some degree of precision, be quantified. As we have previously observed, once an appropriator exercises the right to change a decreed water right, he runs the real risk of requantification of the right based upon actual historic consumptive use *at an amount less than his original decree*. *Midway Ranches*, 938 P.2d at 522; *Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist.*, 717 P.2d 955, 959 (Colo.1986).

The acreage under irrigation is a common basis of measuring the use of water in the adjudication of priorities, *Farmers Res. & Irr. Co.*, 44 P.3d at 247, but if the same acreage is also being

irrigated by water from appropriations other than the one for which a change is sought, some measure of the applicable appropriation's historic contribution to the duty of water is necessary to determine its historic use and ensure that the appropriation will not be enlarged by the change. Whether this is accomplished by directly gauging the quantity of water applied to the decreed beneficial use from the right to be changed or by deducing it from the contributions of other appropriations and the overall duty of water, it is impossible to know that a change will not exceed the historic use of any particular appropriation without some way of differentiating the contributions of the various rights involved. In such cases, calculation of the productivity and needs of the acreage alone can never be sufficient.

(FN9. The term "historic use" refers to the "historic consumptive use," see, e.g., *Farmers Res. & Irr. Co. v. City of Golden*, 44 P.3d 241, 247 (Colo.2002), or "historic beneficial consumptive use," see, e.g., *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1147 (Colo.2001), attributable to the appropriation the quantity of water historically consumed by application to the beneficial use for which it was decreed. Although we have often used the term in describing the quantity of water historically diverted, the amount of water diverted and applied to any beneficial use that entails less than 100% consumption will necessarily be greater than the historic consumptive use. In light of the further implied limitation on diversions to an amount sufficient for the purpose for which the appropriation was made, without waste or excessive use, the allowable historic diversion is clearly determined by historic consumptive use.)

(emphasis added).

See also McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986) (no matter how water right is expressed in decrees of water courts, either in flow rate or in acre feet or in a combination thereof, such expression of amount is not final determining factor; instead, beneficial use is the basis, measure, and limit of all rights to use of water). Finding of Fact No. 6 will not be altered.

Applicant's exception to Finding of Fact No. 8

Applicant excepted to Findings of Fact No. 8, page 6, wherein the Hearing Examiner finds "it does not appear that the amount proposed to

be 'not used' has ever been captured in Higgins Reservoir, and thus, historically beneficially used." The exception totally ignores the testimony of historical use by witness Jim Higgins. Finding of Fact No. 8 references Finding of Fact No. 6 where the Hearing Examiner makes his finding on historic use. Finding of Fact No. 8 states, "Adverse effect to other water users would occur if irrigation *requirements* are used to determine the extent of historic use instead of the maximum past volume actually *historically* diverted and used." The Hearing Examiner found the claimed amounts to be *statements of crop requirements* rather than historic practice. Again, as the foregoing Colorado Supreme Court case makes clear, in such cases the "calculation of the productivity and needs of the acreage alone can never be sufficient." *Id.* The statement to which Applicant takes exception when viewed in context with the rest of Finding No. 8 and Finding No. 6 is not a finding that beneficial use is measured by what is captured, but a finding that the only measure of actual historic use provided by Applicant was the filling of Higgins Reservoir. Finding of Fact No. 8 will not be altered.

Applicant's exception to Finding of Fact No. 9

Applicant excepted to Findings of Fact No. 9, page 6, stating the finding relies upon Finding of Fact No. 6, which erroneously found that the maximum historic volume for the rights changed as 575 acre-feet and ignored the prima facie status of the claims themselves. The Hearing Examiner must weigh all the evidence even if it all comes from the Applicant. Here, the Hearing Examiner found Jim Higgins provided a statement of historic use. The remainder of the evidence on historic use are not statements of actual historic use, but instead speculative statements of potential need described with phrases such as "would be," "705 acres of flood irrigation **would** require," and "the historic system **could potentially use**" (Rod Brewer 9/17/02 letter to Lewistown

Regional Office). The Hearing Examiner did not find the evidence of mere crop requirements to be better proof of actual historic use than Jim Higgins' testimony. The prima facie claim status issue is discussed above on page 2. Findings of Fact No. 9 will not be altered.

Applicant's exception to Finding of Fact No. 10

Applicant excepted to Findings of Fact No. 10, page 6, stating the Regional Office "concern" was not based upon any evidence. It is the job of the Regional Office to evaluate applications for change. In this case the Regional Office questioned whether the evidence was sufficient to show lack of adverse effect because it saw the potential for better coverage on the remaining flooded acreage by use of the "saved" water. The Regional Office was doing its job. The Hearing Examiner, after a review of all testimony and factual evidence submitted, also had that concern. That being said, Finding of Fact No. 10 found the Applicant did not intend to leave the "saved" water in Sixteenmile Creek, but in Higgins Ditch. The finding is that leaving the "saved" water in Higgins Ditch will not benefit downstream users on Sixteenmile Creek affected by the proposed change. The record shows no adjustments will be made at the Sixteenmile headgate to not divert the "saved" water as is suggested in the exception. Findings of Fact No. 10 will not be altered.

Applicant's exception to Conclusion of Law No. 3

Applicant excepted to Conclusion of Law No. 3, page 9-10, stating the conclusion that the conversion from flood to sprinkler will result in an increase over the 575 acre-feet historically diverted and used is based on erroneous findings, especially Finding of Fact No. 6. Finding of Fact No. 6 will not be altered, nor will this portion of Conclusion of Law No. 3.

Applicant excepted to Conclusion of Law No. 3, page 10, wherein it states: "[T]he 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" is a gross misstatement of the law in Montana. As *In re Application for Water Rights in Rio Grande County* makes clear, however, that is not misstatement of the law at all, but is a proper statement of the law in line with other western states' interpretation of western water law. The requirements of Montana's change statute have been litigated and upheld. *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).

As the Proposal for Decision makes clear, the Department in administrative rulings has previously properly 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)028708-41I by Hedrich/Straugh/Ringer, December 13, 1991, Final Order; In the Matter of Application for Change Authorization No. G (W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order. Finally, as also pointed out in the Proposal for Decision, the process of making sure changes of water rights are limited by the actual historic use of those water rights, no matter how recently decreed by the Water Court, was recommended by the report to the legislature, Evaluation of Montana's Water Right Adjudication Process, prepared for the Water Policy Committee of the Legislature of the State of Montana by the Denver law firm of Saunders, Snyder, Ross & Dickson, P.C., Denver, Colorado, September 30, 1988 ("Ross Report"): **"Even a 100% accurate, final decree water right should be subject to historical use inquiry if it is changed in the future."** Id. at 62. (emphasis added).

Therefore, 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.

Applicant contends that *McDonald v. State*, 220 Mont. 519, 530, 722 P2d 598, 605 (1986) does not hold that applicant must prove historical use in a change proceeding, but only that water rights are defined by actual beneficial use. Applicant is correct that *McDonald* makes it very clear that water rights are defined by actual beneficial use. However, if a water right is being changed it follows from *McDonald* and everything else cited above that the change applicant must prove the actual amount historically used is not exceeded to prove there will be no adverse effect to other appropriators. Additionally, the Department processing procedure, '*Department of Natural Resources and Conservation, Water Resources Division, Water Rights Bureau, Administrative Policy No. 15* (1997), reflects the requirements of existing statutory and case law where it states a change application requires "the applicant shall provide proof there is a water right to change...", page 21, and "The flow rate and volume to be changed must not exceed the amount of water historically diverted.", Page 23.

Applicant is correct that the Department has no jurisdiction to actually adjudicate existing water rights, and that a change proceeding is not the proper forum for water right adjudication. However, a change proceeding is not the adjudication of a water right - it is instead only a determination of whether a water right can be changed without adversely affecting other water rights. That requires looking at the historic use of the water right sought to be changed: "The issues of waste and historic use, as well as misuse, nonuse, and abandonment, may be properly be considered by the administrative official or water court when acting on a reallocation [change] application." *Water and Water Rights* § 16.02(b) at 271, citing Basin

Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo. 1978).

The Department does not adjudicate water rights when determining whether to authorize a change of water use. An adjudication of a water right occurs when the elements of the water right are determined for administration relative to other water rights on a source. See Albert W. Stone, *The Long Count on Dempsey: No Final Decision on Water Right Adjudication*, 31 Mont. L. Review 1; See, e.g., *Holmstrom Land Company, Inc. v. Meagher County Newlan Creek Water District*, 185 Mont. 409, 605 P.2d 1060 (1979). The Department agrees and is well aware that since 1979 the Water Court has exclusive jurisdiction to adjudicate pre-July 1, 1973 water rights in Montana. Mont. Code Ann. § 3-7-501: *State ex rel. Jones v. District Court*, 283 Mont. 1, 938 P.2d 1312 (1997).

The elements of a water right to be determined by the Water Court are ownership, source, priority date, flow rate and volume, period of use, purpose of use, place of use, and point of diversion, and means of diversion. Mont. Code Ann. § 85-2-234(6). Ultimately, the adjudication of a particular source is to establish a list or tabulation, called a decree, of the water rights and their priority dates so that the rights can be administered relative to each other. Mont. Code Ann. § 85-2-234(4). Under Montana's prior appropriation system of water rights administration, priority date is critical because when there is not enough water for both senior and junior appropriators, the senior has the right to full exercise of the water right before the junior can use any water. See Mont. Code Ann. § 85-2-401. Of course, quantity of the water right, in its various forms, is also essential. See *McDonald v. State of Montana*, 220 Mont. 519, 722 P.2d 598 (1986). Other elements such as point of diversion, place of use, and period of use help define how a water right may be exercised. See *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940). These elements are all interrelated in that they are all established at the

time water is first appropriated and quantity is in part defined by place and purpose of use. All of these elements are determined by examining the use and operation of the water right being adjudicated.

The absence of adverse effect parameters in an adjudication contrasts noticeably with the relevant criteria that are considered in the change authorization process. These criteria are provided in part by Mont. Code Ann. § 85-2-402(2) (a) ("the proposed change in appropriation right will not adversely affect the use of the existing water rights...." (emphasis added)). As can be seen, these "402 criteria" or "change criteria" are entirely different from the parameters of an existing water right that are determined in an adjudication. As noted by the Montana Supreme Court in *Castillo v. Kunneman*, 197 Mont. 190, 642 P.2d 1019 (1982), the essential criteria in the change authorization process is a determination of adverse effect to other water users – a criteria that is noticeably absent from an adjudication of a water right. The principal case interpreting the Department's function and the criteria in change authorization proceedings is *Royston, supra*. The *Royston* case is clear that the Water Court, not the Department, adjudicates water rights. Consequently, argument cannot be advanced that the Department adjudicates water rights in a change authorization proceeding since the Supreme Court has previously held that the Department does not adjudicate in a change proceeding. As for certifying to the Water Court pursuant to Mont. Code Ann. § 85-2-319, the adjudication of underlying water rights, that is discretionary on the part of the Department, and was not needed in this case. As previously discussed, even after certification an applicant is still required to prove actual historical use in a change proceeding.

Thus, a change can only be granted in a manner related to actual historic use such that other water right holders will not be adversely affected. In a change proceeding before the Department, other

appropriators have a vested right to have stream conditions maintained substantially as they existed at the time of their appropriation.

Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908).

In a change proceeding the Applicant must show by a preponderance of evidence the proposed change will not adversely affect the use of existing water rights of other persons. Mont. Code Ann. § 85-2-402; *Royston, supra*. If a change is not granted, the change applicant can continue their historic water use as long as it is not challenged by other water users - they simply can't obtain authorization from the Department to change it as they sought.

As stated above on page 2, Statement of Claim prima facie proof of a water right status is limited to the statewide adjudication process, and does not apply to a change proceeding before the Department. See Mont. Code Ann. § 85-2-227(1) ("For purposes of adjudicating rights pursuant to *this part* [i.e., the adjudication statutes, but not the permit or change authorization statutes] a claim of an existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree.") The Department has the authority to make and must make a threshold determination on the existence and extent of the water rights proposed for change. See *In The Matter of Application 41QJ-G(W)001422 by Anderson Ranch Co.*, Final Order (1994). An increase in the burden on the stream by the Department granting an authorization to change a right to a use *which is larger than its historical use* is an adverse affect. *Anderson Ranch Co., supra*. Thus, the Department has an obligation to inquire into all aspects of the historic use of the right(s) being changed to determine if other appropriators on the stream will be adversely affected by an increase in stream burden under a proposed change of a water right. This inquiry is not a determination of the water right but a statutory and case law obligation to make an assessment of actual historic use

to compare with the proposed change. See *In The Matter of Application 41F-G(W)031227-02 by Combs Cattle Co.*, Final Order (1991) and Proposal For Decision (1990). Although larger or smaller rights may be claimed by an appropriator in the on-going state-wide water adjudication than their actual use, they are prima facie only in the adjudication, and are not binding in a change proceeding. Mont. Code Ann. § 85-2-227(1). Applicant's exception asserts that because the Hearing Examiner based his conclusion on the finding that return flows exceed the volume diverted, the entirety of Conclusion of Law No. 3 is suspect and should be disregarded. The record supports the Hearing Examiner with regard to the historic volume of water used. It is Applicant's own witnesses that provided evidence that all water used for irrigation comes through Higgins Reservoir and that Higgins Reservoir has historically filled only 1.25 times per year. Applicant attempted to provide evidence after the record was closed with their exception that may have provided a substantially different answer to the volume of historic use. For whatever reason it was not provided at hearing, and it cannot now be used to make this decision. Conclusion of Law No. 3 will not be altered.

Applicant's exception to Conclusion of Law No. 7

Applicant excepted to Conclusion of Law No. 7, page 12. Applicant states that because the conclusion, which states more water is claimed to be "saved" than has been diverted, is based on erroneous Finding of Fact Nos. 6, 8, and 10 (discussed above), it too is erroneous. For the reasons discussed above, Conclusion of Law No. 7 will not be altered.

Applicant's additional exceptions to the Proposal for Decision provided by Otto Ohlson

Applicant's attorney exceptions have thus far been addressed. Applicant's attorney exceptions reference and incorporate a letter (from Otto Ohlson) attached to Applicant's attorney exceptions. To the

extent that letter offers evidence not in the record, it will be disregarded. Some parts of that attached letter refer not to specific evidence, but instead to a scenario, or the comments did not clearly specify what was in the record (as opposed to what may be new evidence). Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be afforded little attention. Mont. Admin. R. 36.12.229(1). A few matters in Mr. Ohlson's letter not already covered in previous responses in this final order are addressed below.

Applicant excepted to Finding of Fact No. 9, page 6. The third line indicates Higgins Brothers "sold the entire water rights...". The testimony of Jim Higgins is that the entire rights associated to *this* Application were sold to Applicant and Higgins Brothers retained the right to store some water in Higgins Reservoir. Finding of Fact No. 4 properly recognized "the seller Higgins retained 10% of the stored water in Higgins Reservoir", and that does not contradict Finding of Fact No. 9. It finds that the seller retained storage in Higgins Reservoir, but the water for the storage does not come from *these* water rights (which Higgins sold to Brewer). Finding of Fact Nos. 4 and 9 are thus sufficiently clear in this context, are supported by the record, and do not need to be changed.

Applicant excepted to Finding of Fact No. 10, page 6 & 7. The exception states Applicant will not increase the volume of water applied to the remaining flood irrigated land (not under the pivot) because of completed water conservation measures. The record does not contain evidence of the alleged water conservation measures to support a finding that more water will not be applied to the remaining flood irrigated lands. More importantly, the record did not contain sufficient evidence to allow the Hearing Examiner to conclude the water to be saved will be available to downstream appropriators. The

record shows the saved water will just not be diverted from Higgins Ditch by Applicant. Therefore, the saved water will be available to Higgins Ditch appropriators instead of downstream appropriators who historically had the benefit of the return flow water. Finding of Fact No. 10 will not be changed.

Applicant excepted to Finding of Fact No. 12, page 7. The exception is a discussion of matters not in the record, and will therefore not be addressed.

Applicant excepted to Conclusion of Law No. 3, pages 9-11. Applicant believes they proved that the other users and uses will not be adversely affected by this change. However, Applicant did not prove to the satisfaction of the Hearing Examiner the amount of water to be "saved" was even historically diverted. The record supports the Hearing Examiner, and Conclusion of Law No. 3 will not be changed.

Applicant excepted to Conclusion of Law No. 7, page 12. Applicant agrees they did not claim salvage water in the Application. The exception then claims they will make 923.5 acre-feet available to the stream system for fish, wildlife, downstream and upstream junior rights. The exception agrees with the conclusion of law in the Proposal in that the Applicant did not claim salvage water. Applicant attempted to use "saved water" to mitigate adverse effects. However, the Hearing Examiner found the amount alleged to be saved exceeded the amount diverted. The record does not support the amount saved exceeds the amount diverted. Conclusion of Law No. 3 will not be changed.

Applicant excepted to Conclusion of Law No. 9, pages 12-13. This exception relies on facts not in the record. Therefore, this exception will not be addressed.

For this review the law provides the Department in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision, but may not reject or modify the findings of fact unless the agency first

determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3)(2003) and Mont. Admin. R. 36.12.229 (1994). The Department has considered the exceptions and reviewed the record under these standards, and finds no reason to reject any of the Proposal for Decision findings of fact or conclusions of law. The Department finds the Proposal's findings of fact are based on competent substantial evidence supported by the record, and finds that the facts were properly applied to the proper law.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 6, 2003, Proposal for Decision, and incorporates them by reference into this Final Order.

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

ORDER

Application for Change of Appropriation Water Right 41I 30002512 by Brewer Land Co., L.L.C. is hereby **DENIED** without prejudice.

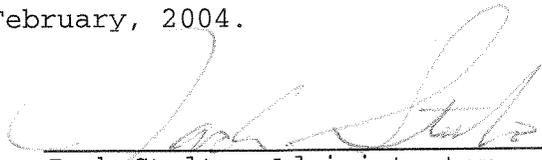
NOTICE

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

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the

Department will transmit only a copy of the tape of the oral proceedings to the district court.

Dated this 20th day of February, 2004.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 24th day of February, 2004, by First Class United States mail.

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

IN THE MATTER OF APPLICATION TO CHANGE A)	PROPOSAL
WATER RIGHT NO. 41I-30002512 BY BREWER)	FOR
LAND CO, LLC)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on September 10, 2003, in White Sulphur Springs, Montana, to determine whether an authorization to change Water Right Nos. 41I 02143000 and 41I 02143100 should be issued to Brewer Land Co., L.L.C., hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-402(2). All water rights involved in the change application were listed in the required public notice.

APPEARANCES

Applicant appeared at the hearing by and through counsel Cindy E. Younkin. Rod Brewer; Jim Higgins, area rancher; and Otto Ohlson, NRCS Soil Technician (retired); testified for the Applicant. Objector J.T. M^cCurry appeared and testified in his own behalf.

Andy Brummond, Water Resources Specialist, Lewistown Water Resources Regional Office, was called to testify by the Hearing Examiner.

EXHIBITS

Applicant offered one exhibit for the record. The Objector offered no exhibits. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit A1.

Applicant's Exhibit A1 is a one-page 11"x17" map.

PRELIMINARY MATTERS

At the time set for the hearing Objector M^cCurry was not present and the hearing was started. Applicant moved that the Objector be found in default. The Hearing Examiner granted the motion, noting that

the information on the Objection form would remain in the record. Later during the hearing Objector M^cCurry appeared. Consequently, the Hearing Examiner REVERSED the ruling finding Objector in default.

After the public notice of the application and prior to the hearing Applicant reduced the water volume to be changed by the application and requested that the application be a ten-year consecutive temporary change instead of a permanent change. The temporary change will allow the Applicant ten years to determine if a change in power costs makes sprinkler irrigation too costly. A temporary change will allow the Applicant to convert back to flood irrigation without losing any water not used in the conversion from flood to sprinkler; however, a temporary change cannot become permanent. Mr. Brummond informed the Hearing Examiner that the regional office processing and area to be noticed would be the same for a temporary change as it would for the original application. Although the public notice for a temporary change would inform water users of the temporary nature of the change, the Hearing Examiner finds that existing water users and parties are not prejudiced by the reduction in volume or temporary nature of the change, and re-notice is therefore not required for the amendment.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for a Temporary Change of Appropriation Water Right 41I 30002512 in the name of Brewer Land Co., L.L.C., and signed by Rod Brewer was filed with the Department on June 27, 2002.
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. The temporary change is for ten consecutive years. Claim of more efficient irrigation is made; however, the water "saved" is not to be diverted and its intended use is to minimize impacts of the proposed

change. The applicant did not apply for the use of salvage water.
(Department file, testimony of Otto Ohlson)

4. Applicant purchased a portion of the 705 acres of land from Higgins Brothers Ranch (Higgins) which the water rights being changed are appurtenant to (see attached map). The portion purchased is that land shown on the attached map in yellow lying north of the St. Paul and Pacific Railroad and south of the dashed line labeled "Ditch". The yellow and green area on the map is the land historically flood irrigated. At the time the land was purchased, Applicant purchased two of the water rights being changed from Higgins, except that the seller Higgins retained 10% of the stored water in Higgins Reservoir, and Higgins agreed to not irrigate 168.3 acres of the historic place of use because the water rights for the land were conveyed to Applicant. The 168.3 acres are shown in green on the attached map and are adjacent to Sixteenmile Creek and south of the St. Paul and Pacific Railroad. Applicant is now applying to move these 168.3 acres of the historic place of use from Higgins' land to land owned by Applicant. The portion of the gray circle on the attached map that is north of the "DITCH" and not underlain with yellow color is where the 168.3 acres is being moved. The new place of use is 168.3 acres which lies adjacent to Applicant's flood irrigated field. Applicant is then converting 76.7 acres of former flood irrigated acres (portion of gray circle underlain by yellow) and 168.3 acres of moved flood irrigated acres (portion of gray circle north of the "Ditch" running east-west through the gray circle) for a total of 245 acres¹ of former flood irrigated land to center pivot sprinkler irrigation (gray circle on attached map). (Department file, testimony of Rod Brewer, Jim Higgins)

5. Historically, 25 cubic feet per second (cfs) was diverted from Sixteenmile Creek under water right claim number 41I 02143000 into the Higgins Ditch at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15, Township 6 North, Range 8 East, between May 1 to September 30, inclusive. Also, 25 cfs was diverted from Woodson Creek under water right claim number 41I 02143100 into the Higgins Ditch at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of

¹ 168.3 acres moved in this Application + 76.7 acres of Applicant's historic irrigation = 245 acres to sprinkler irrigated with a center pivot

Section 9, Township 6 North, Range 8 East,, between May 1 to September 30, inclusive. The water from both diversions is carried by the Higgins Ditch to Higgins Reservoir, with a capacity of 460 acre-feet and located in Section 9, Township 6 North, Range 8 East, Meagher County, Montana. Water is released from Higgins Reservoir for flood irrigation of the historic place of use of 705 acres capable of receiving water from the water rights being changed located in Section 13, Township 6 North, Range 7 East; Section 17 and 18, Township 6 North, Range 8 East, Meagher County, Montana. The **claimed** volume diverted under these two rights in the statewide water adjudication is 2284.2 acre-feet from each right for a total of 4568.4 acre-feet. (Department file, testimony of Rod Brewer, Jim Higgins)

6. The ditch capacity of the Higgins Ditch is sufficient to carry 25 cfs from Sixteenmile Creek and 25 cfs from Woodson Creek. The capacity of Higgins Reservoir is 460 acre-feet. Historically, Higgins Reservoir is full at the beginning of the irrigation season. Historically, the stored water was applied to 705 acres and it drained the reservoir. Second fills of Higgins Reservoir were attempted but were typically limited by call of other senior appropriators on the Higgins Ditch and lack of sufficient water in the source at that time of year. Historically, attempts to fill the reservoir a second time resulted in capturing a volume equivalent to one-fourth of the capacity, or 115 acre-feet². The record does not define the volume of water flowing directly through Higgins Reservoir to the irrigated fields during the second filling. The maximum historic volume used supported by the record for the rights being changed is 575 acre-feet³. The volume of water flowing through Higgins Reservoir during the second filling could be included in the historic volume used were it known. (Department file, testimony of Jim Higgins, Otto Ohlson)

7. Applicant seeks to change the flood irrigation place of use of the acres being removed from irrigation by the seller south of the railroad tracks and adjacent to Sixteenmile Creek (green area on attached map) to an irrigation center pivot on Applicant's land north

² 460 af * .25 = 115 af

³ 460 af + 115 af = 575 af

of the railroad tracks (portion of gray circle not underlain by yellow on attached map). Applicant has an agreement with the seller whereby the seller will stop irrigating the acreage from which the water right is being moved (green portion on attached map). The acres being moved are 32.0 acres in Section 17, Township 6 North, Range 8 East, 136.3 acres in Section 18, Township 6 North, Range 8 East for a total of 168.3 acres. Applicant proposes to move the 168.3 acres to land adjacent to a portion of the historic flood irrigated place of use (portion of gray circle north of the ditch through the circle on attached map) and convert 245 acres to sprinkler irrigation using a center pivot. The total number of acres irrigated would remain unchanged. (See Att #1, Applicant's Exhibit A1 [scanned and reduced]). (Department file, testimony of Rod Brewer, Jim Higgins)

Adverse Effect

8. There is much discussion and calculation of the volume of water needed to fill the irrigation requirements of alfalfa, and how much water has run off as return flow from the 705 acres under the historic flood irrigation scheme. The purpose of the discussion and calculations was to determine the impact on downstream appropriators of moving the 168.3 acres and converting 245 acres to sprinkler irrigation from flood irrigation. Applicant determined the crop requirement to flood irrigate 705 acres to be 4568.4 acre-feet annually. Applicant determined the crop requirement to sprinkler irrigate 245 acres to be 726.2 acre-feet annually. The crop requirement to flood irrigate the 460 remaining flood irrigated acres⁴ is 2587.3 acre-feet. Thus, the total irrigation volume for crop requirements after conversion to sprinkler would be 3313.5 acre-feet⁵. Applicant assumed reservoir losses, including seepage and evaporation, would be 10% of this amount or 331.4 acre-feet. Thus, total volume to be diverted after conversion would be 3644.9 acre-feet⁶. Applicant planned to not divert the difference between the claimed 4568.4 and 3644.9 acre-feet, 923.5 acre-feet, at the headgate to eliminate any

⁴ Historic 705 ac - 245 ac converted to sprinkler = 460 ac remaining flood irrigation

⁵ New irrigation requirement: 2587.3 af + 726.2 af = 3313.5 af

⁶ Volume after conversion: 726.2 af + 2587.3 af + 331.4 af = 3644.9 af

adverse effect to existing rights on the source. However, it does not appear that the amount proposed to be 'not used' has ever been captured in Higgins Reservoir, and thus historically beneficially used. See Finding of Fact No. 6 above. Adverse effect to other water users would occur if irrigation *requirements* are used to determine the extent of historic use instead of the maximum past volume actually *historically* diverted and used. (Department file, testimony of Otto Ohlson, Jim Higgins)

9. The Applicant did not purchase the total historic place of use of the two rights being changed. Rather, the seller sold the entire *water rights* to Applicant, but did not sell the place of use located south of the railroad tracks (See Att #1, Applicant's Exhibit A1). Applicant's Exhibit A1 suggests this is more than half of the historic place of use. In the sales agreement, the seller agreed to not irrigate 168.3 acres which are the same acres sought to be moved in this Application. The seller used to irrigate the land with the water rights sold, 41I 02143000 and 41I 02143100. Higgins, the seller, indicates there are other water rights which are available to irrigate the land retained by the seller, but which ones are not in the record. Applicant's estimate of historic return flows from flood irrigation return flow is 1424 acre-feet from the entire 705 acre place of use. How actual return flow will be or has been effected by these land and water right transactions, and by the proposed change is not known since return flow appears to exceed the actual amount diverted. No numerical evidence was presented to explain this discrepancy. See Finding of Fact No. 6 above. (Department file, testimony of Jim Higgins)

10. The Lewistown Water Resources Regional Office staff was concerned that the water claimed available by the Applicant because of increased efficiency of sprinkler irrigation would be used by the Applicant to increase coverage of the remaining historic flood irrigation not covered by the proposed center pivot. This would increase the volume of water applied to the remaining flood irrigated acres (yellow portion outside gray circle on attached map) to above the historical use on these acres. Such increase over historic use would constitute

an adverse effect to other water rights downstream. Applicant agreed to not divert from the Higgins Ditch the water "saved" by the increased efficiency of sprinkler irrigation. If the water not used after the conversion is left in the Higgins Ditch, there will be no adverse effect to other Higgins Ditch appropriators who are senior to the Applicant, and so water not diverted by Applicant from the Higgins Ditch into Higgins Reservoir would be used by other Higgins Ditch appropriators rather than be available to appropriators who would have historically received the flood irrigation return flow. Adjustment to actually leave the water not used or "saved" in Sixteenmile Creek would have to occur at the actual headgate on Sixteenmile Creek so the "saved" water would reach the historic benefactors. (Department file, testimony of Rod Brewer, Otto Ohlson, Andy Brummond)

11. Objector M^cCurry has no recorded water rights for his instream stock use which has occurred. However, M^cCurry stock have drunk from the stream prior to July 1, 1973 implying exempt stock water rights exist. (Testimony of J.T. M^cCurry)

12. Diminished return flows from the historic flood irrigation being removed from irrigation and converted to sprinkler irrigation with less runoff will decrease the return flows to Sixteenmile Creek downstream of the point of diversion of Higgins Ditch. Not diverting the water into Higgins Reservoir would not benefit the appropriators downstream of where the return flows historically reentered the creek. Instead, it would benefit the other Higgins Ditch users and not other downstream appropriators. Unless the "saved" water remains in Sixteenmile Creek, there will be adverse effect to appropriators downstream of the place of use being removed from irrigation who historically relied on those return flows. (Department file, testimony of Rod Brewer, Jim Higgins, J.T. M^cCurry, Andy Brummond)

13. Objector M^cCurry has been unable to water stock from Sixteenmile Creek in recent years because of an upstream diversion by Applicant. Also, a pipe installed in the creek bed by the County to withdraw fire suppression water from the creek no longer has water flowing at its location. The point of diversion allegedly causing Objector M^cCurry's lack of water is a point of diversion which does not relate to this

proposed change. Objector M^cCurry does not direct his claim of adverse effect or the dry stream to Applicant's proposed change unless water is diverted into Higgins Reservoir year round. Applicant, though, acknowledges that enlarging the period of appropriation to year round cannot be done under the guise of a change application. There will be no adverse effect to Objector M^cCurry from year round diversion since the application does not ask for year round diversion into Higgins Reservoir. (Testimony of J.T. M^cCurry)

Adequacy of Appropriation Works

14. Applicant installed and used the proposed center pivot in 2000. The pivot was not used in 2001 because of insufficient water; the pivot was used as water was available in 2002 and 2003. The diversion from the source, conveyance to Higgins Reservoir, and conveyance to the edge of the pivot are unchanged from historic practice and are adequate. The new conveyance ditch to get water to the pivot pump intake has been used for parts of three irrigation seasons and is adequate. (Department file, testimony of Rod Brewer, Otto Ohlson)

Beneficial Use

15. Applicant has proven the proposed irrigation use of water is a beneficial use of water. Application of 726.2 acre-feet to 245 acres is a reasonable amount for sprinkler irrigation. (Department file, testimony of Otto Ohlson)

Possessory Interest

16. Applicant has proven they have 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. (Department file)

Water Quality Issues

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

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a *preponderance of evidence* 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; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, 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; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).
3. The Applicant has not proven by a preponderance of evidence that the use of 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 will not be adversely affected. Changing 3644.9 acre-feet and not diverting the 923.5 acre-feet "saved" by the conversion to sprinkler

irrigation on 245 acres will still result in an increase over the 575 acre-feet historically diverted and used. It is possible that more than 575 acre-feet was historically diverted and used, but the record does not support more than 575 acre-feet of historic use. The DNRC in administrative rulings has held, consistent with Montana case law that developed for over a century, that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. See *In the Matter of Application for Change Authorization No. G(W)028708-41I 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). 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. 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), as well as by the study done on Montana's adjudication at the request of the legislature, *Evaluation of Montana's Water Right Adjudication Process*, prepared for the Water Policy Committee of the Legislature of the State of Montana by Saunders, Snyder, Ross & Dickson, P.C., Denver, Colorado, September 30, 1988 ("Ross Report"). Here, a change of a water right in amounts that exceed historical use would result in lower flows in Sixteenmile Creek and adverse effects to other water users. In a change proceeding, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. See *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, *2 Waters and Water Rights* § 16.02(b) 1991 edition; W. Hutchins, *Selected Problems in the Law of Water Rights in the West* 378 (1942). Appropriators have a right to return flows. The late Professor Al Stone described the right of appropriators to return flows in part as follows:

Frequently the change in place of use results from a city's purchasing water rights, to transport the water out of the watershed for municipal use. (Except for the possible eminent domain element, the fact that it is a city makes no legal difference.) The biggest problem is the deprivation of other users' water rights to the return flow. Generally, such a purchase can only remove the amount of water which its predecessor consumed: if there was previously a 50% return flow, then only 50% of the purchased right can be taken.

Albert W. Stone, *Selected Aspects of Montana Water Law* 41 (1978) (emphasis added).

In the present case, the return flow estimations become suspect when they too exceed the volume historically diverted. Decreases in the amount of return flow may cause adverse effect to existing appropriators downstream of where the return flow historically entered the stream. In a change proceeding, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. See *Spokane Ranch & Water Co. v Beatty*, 37 Mont. 342, 96 P. 727 (1908). One water law expert describes the law as follows:

Perhaps the most common issue in a reallocation dispute is whether other appropriators, especially junior appropriators, will be injured because of an increase in the consumptive use of water. Consumptive use may be defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream system through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." An appropriator may not increase, through reallocation [changes] or otherwise, the 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 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 appropriations.

Robert E. Beck, 2 *Water and Water Rights* at § 16.02(b) 277-78 (1991 edition). See also A. Dan Tarlock, *Law of Water Rights and Water Resources* § 5.17[5] (1988) (a water holder can only transfer the amount that he has historically put to beneficial use and consumed - the increment diverted but not consumed must be left in the stream to

protect junior appropriators); Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13.

4. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 14.

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

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

7. The application did not directly claim salvaged water to increase Applicant's number of irrigated acres over historic use. "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods. Mont. Code Ann. § 85-2-102(16). Applicant alleges sprinkler irrigation is more efficient than the historic flood irrigation, and that not diverting the difference, the water "saved" through greater efficiency, will make up for return flows not available after the conversion. Thus, indirectly, Applicant is relying upon water allegedly "saved" by using sprinkler irrigation. Use of Applicant's modeling effort to show how much water will be "saved" by the flood to sprinkler conversion shows more water is "saved" than is actually diverted, which is physically impossible. Mont. Code Ann. § 85-2-402(2)(e). See Finding of Fact Nos. 3, 6, 8, 10, 12.

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

9. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the Mont. Code Ann. § 85-2-402 criteria by a preponderance of the evidence. Applicant has not

proved by a preponderance of the evidence the criteria for issuance of an authorization to change an appropriation water right. *In re Application for Change of Appropriation of Water Rights for Royston*, 249 M 425, 816 P2d 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).

Montana has over a century of cases upholding the "no injury" rule in change proceedings. *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). The Water Use Act requirement for an applicant to prove lack of adverse effect is simply a continuation of that requirement, and the "no injury" case law remains as applicable today as it was 100 years ago. See Albert W. Stone, *Selected Aspects of Montana Water Law* 40 (1978).

See Conclusion of Law No. 3 above. Mont. Code Ann. §§ 85-2-402(2), (8).

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

PROPOSED ORDER

Application for Change of Appropriation Water Right 41I 30002512 by Brewer Land Co., L.L.C. is hereby **DENIED**.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by November 26, 2003, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by December 16, 2003, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

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

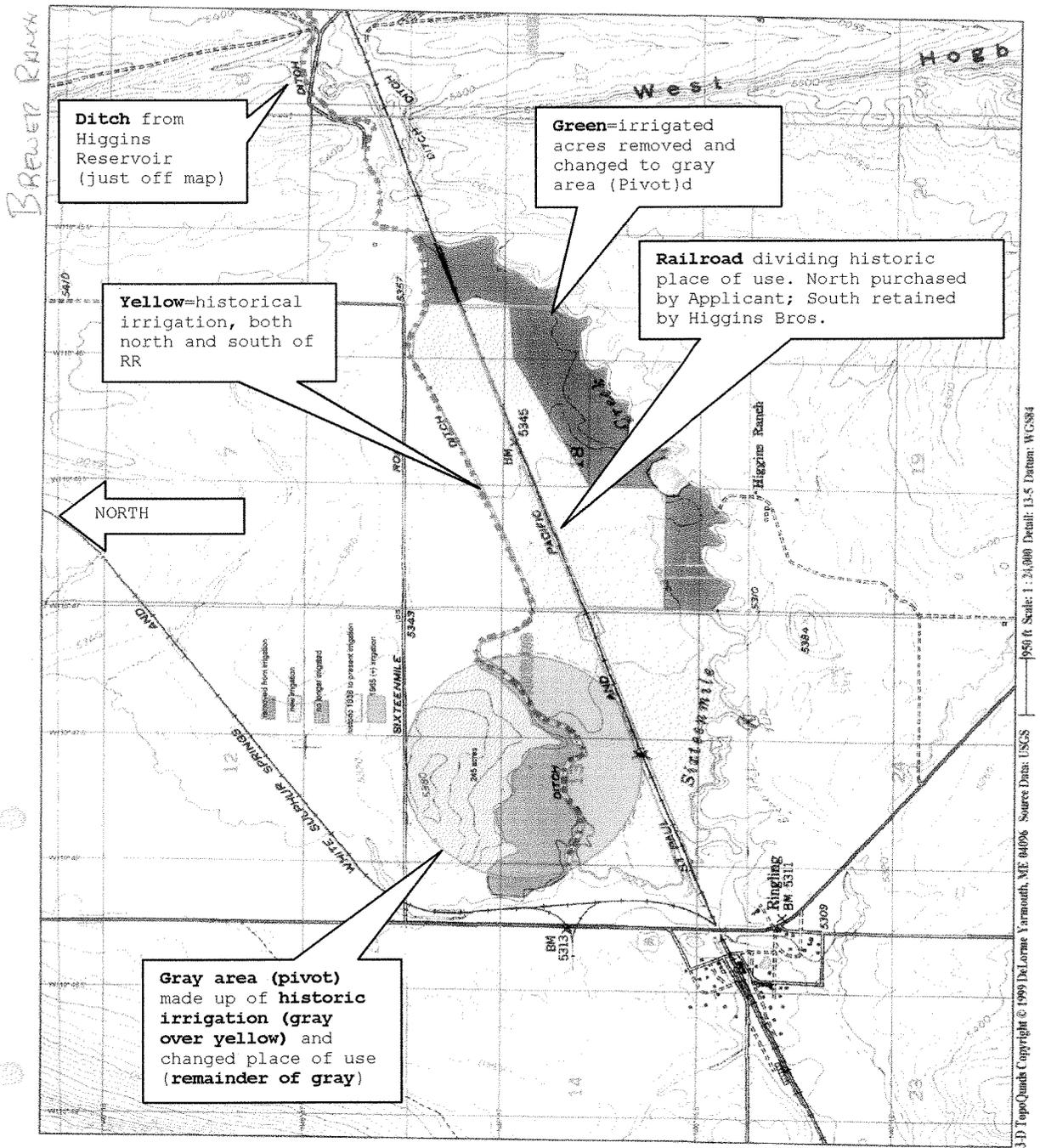
Dated this 6th day of November, 2003.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

Att #1: Exhibit A1 (scanned and reduced)

Exhibit
A #1



Att #1: Applicant's Exhibit A1 (Callouts & North arrow added by Hearing Examiner)

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 6th day of November, 2003, by First Class United States mail.

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