

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

IN THE MATTER OF APPLICATION NO.)	
76H-30009407 TO CHANGE WATER)	
RIGHT NOS. 76H-108772 AND 76H-108773)	PROPOSAL FOR DECISION
BY NORTH CORPORATION)	

Pursuant to the Montana Water Use Act (Mont. Code Ann. § 85-2-101 et seq.) and to the contested case provisions of the Montana Administrative Procedures Act (Mont. Code Ann. § 2-4-101 et seq.), and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on Tuesday, July 25, 2006 in Missoula, Montana to determine whether an authorization to change water right numbers **76H-108772 AND 76H-108773** should be issued to North Corporation, hereinafter referred to as “Applicant,” in accordance with the requirements set forth in Mont. Code Ann. § 85-2-402 (2).

Appearances

Applicant appeared at the hearing by and through counsel, David T. Markette. Applicant’s consultant, Tracey Turek, testified. Objectors Judy Rogers, David Fowler, Dennis M. and Donna R Burns, Donald J. and Helen Irene Golder and John N. Burns did not appear. Nevertheless, because they did not withdraw their objections, in writing, before the hearing, the Department of Natural Resources and Conservation was compelled to go forward with the hearing.

Exhibits

Applicant offered and the Hearing Examiner admitted the following exhibits into evidence:

Applicant's Exhibit A-1 consists of two maps. The first, entitled, "Koning¹ Change Application irrigated Area per POD" shows the area of irrigated ground, the existing points of diversion and the proposed new points of diversion. The second map, entitled "Koning Change Application," shows the same and a larger area.

Applicant's Exhibit A-2 is an Order issued by Judge Loble of the Water Court, dated July 2, 2003.

Applicant's Exhibit A-3 is an unattributed table of irrigation efficiencies and an unattributed flow rate estimate graph for a variety of pump sizes and vertical lift quantities bearing an unidentified equation in the upper left hand corner. Applicant's expert testified at the hearing that the latter table is a "DNRC" table.

Applicant's Exhibit A-4 is three unattributed tables of water rights relevant to the Mize and Woodmancy (No. 3) ditches.

Applicant's Exhibit A-5 is a compilation of place of use maps and abstracts of objectors' water rights.

Applicant's Exhibit A-6 is a portion of the water resources survey map showing ditches and areas of irrigation in existence at the time the map was made. Applicant introduced evidence at the hearing that it is an enlargement of a portion of the 1958 water resources survey.

Applicant's Exhibit A-7 consists of Applicant's requests for admissions, interrogatories and requests for production of documents served on Objector John Burns and his responses thereto.

Applicant's Exhibit A-8 consists of Applicant's requests for admissions, interrogatories and requests for production of documents served on all objectors and, apart from Objector John Burns, Objectors' lack of response thereto.

All of Applicant's Exhibits were admitted into evidence.

1. Departmental Records indicate that Michael and Susan Koning sold the water right to North Corporation, which, apparently, they control.

Findings of Fact

1. The Department of Natural Resources and Conservation, Missoula Regional Office, received Change Application No. 76H-30009407 on January 23, 2004 (Application).
2. The proposed change in appropriation right does not involve salvaged water. Therefore, the requirements of Mont. Code Ann. § 402 (2) (e) are not relevant.
3. Public Notice of the Application was published in the Ravalli County Republic, beginning June 4, 2004 (Department File, Public Notice).
4. Seven objections to that application were received (Department File, Letter of Heather McLaughlin, Hearings Unit, dated September 7, 2004).
5. No water quality-based objection to the application was filed, valid or otherwise.
6. By Order of April 21, 2006, a hearing was scheduled for July 25, 2006 (Departmental File).
7. Applicant is the owner of record of two water rights, 76H-108773 and 76H-108772 (Application).
8. At paragraph 10 of the application, Michael and Susan Koning affirmed that they have a possessory interest in the property where the water is to be put to beneficial use (Application).
9. Michael and Susan Koning signed the application on behalf of North Corporation (Application).
10. Water right 76H-108772 and water right 76H-108773 are “multiple uses of the same right” (General Abstract).
11. Where there are multiple uses of a right, “the use of this right for several purposes does not increase the extent of the water right. Rather it decrees the right to alternate and

exchange the use (purpose) of the water in accordance with historical practices” (General Abstract).

12. Water right 76H-108772 has a priority date of May 1, 1903, no specified flow rate, no specified volume limitation and no specified period of use, a purpose of stock watering and the notation that “no flow rate has been decreed because this use consists of stock drinking directly from the source or from a ditch system. This water right includes the amount of water consumptively used for stock watering purposes at the rate of 30 gallons per day per animal unit. Animal units shall be based on the reasonable carrying capacity and historic use of the area” (General Abstract).
13. Applicant has presented no evidence establishing the reasonable carrying capacity or historic use of the area for any species of stock.
14. At the hearing, Applicant’s counsel stated that “there may be [Applicant’s] personal stock” on the property (Hearing Recording, at 16:52).
15. Water right 76H-108773 has a priority date of May 1, 1903, (General Abstract), a flow rate of 491 gallons per minute, a period of use from April 1 to October 1 and no specified total volume modifying the notation “the total volume of this water right shall not exceed the amount put to historical and beneficial use” (General Abstract).
16. Both water right 76H-108772 and 76H-108773 use the same four points of diversion from the North Channel of Bear Creek (General Abstract).
17. These four points of diversion are as follows: 1) Mize Ditch; (served by a headgate) 2) Woodmancy/No.3 Ditch (no headgate) 3) Unnamed Ditch. (served by a headgate) 4) North Mize Ditch (no headgate) (General Abstract).
18. Inflow at two of these points of diversion, Mize Ditch and the unnamed ditch is controlled by headgate. Inflow at the remaining two ditches (North Mize, Woodmancy/No. 3) is not controlled by head gates (General Abstract).

19. Applicant has submitted no evidence on whether measuring devices exist at any of the points of diversion.
20. Applicant has submitted no evidence on whether or how flow may be controlled or shut down at the points of diversion not controlled by head gates.
21. Applicant seeks to move two of those points of diversion from the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 7 North, Range 21 West (General Abstracts, water rights 76H-108773, 76H-108772) to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1 Township 7 North, Range 21 West.
22. One of the two points of diversion applicant seeks to replace is controlled by a head gate (Diversion No. 1, Mize Ditch). One is not (Diversion No. 4, North Mize Ditch) (Hearing recording at 12:54).
23. Applicant seeks to stop diverting through points of diversion 1 (Mize ditch, via headgate) and 4 (North Mize Ditch, no headgate) and start diverting further downstream via two in-stream pump intakes in order to facilitate a change in the means of diversion from ditch-fed flood irrigation to pump-fed sprinkler irrigation (Application, paragraph 7, “additional information”).
24. The two points of diversion Applicant seeks to replace serve two ditches crossing land that does not belong to Applicant before arriving at applicant’s land.
25. Applicant has presented no evidence of recorded ditch easements.
26. Applicant seeks to continue to use points of diversion 2 and 3 (Supplement to Application to Change, page 1, paragraph A).
27. Applicant has described the pumps as 7.5 horsepower pumps (Application Additional Information, page 1, paragraph 3).
28. Applicant has supplied no information on the pump intake pipe size, output pipe size, pumping mechanics, efficiency or variability of operation capacity of the pumps.

29. Applicant has supplied the information that the “pumps will be located on the creek bank with an intake located directly in the North Channel [of] Bear Creek. The pumps and sprinkler system will be designed to only divert the flow rate allowed under the existing right” (Supplement to Application to Change a Water Right, page 2, paragraph B).
30. If the application is granted, “one pump will irrigate land south of the creek and the other will irrigate land north of the creek” (Application, additional information, paragraph 7).
31. Applicant has submitted no evidence on the nature of the pump design limiting intake to the flow rate actually diverted under the existing right (Supplement to Application to Change a Water Right, paragraph B).
32. Applicant has submitted no evidence that the flow rate allowed under the existing right is the flow rate that has historically been put to beneficial use.
33. Applicant proposes to divert 276 gallons per minute via two 7.5 horse power pumps installed in the source itself, exerting no vertical lift. Applicant has submitted a photocopied sheet from an unattributed source which Applicant’s expert testified at the hearing originated with DNRC. That sheet graphs various pump sizes and vertical lift quantities, resulting in various outputs. Applicant calls that sheet a “pump chart” in paragraph 3 of the “additional information” section of the application. A formula appears at the upper left hand corner of that sheet which reads as follows:

HP x 3000

90+depth

Assuming that HP is horse power and depth equals vertical lift, a 7.5 horsepower pump exerting no vertical lift is, according to the formula appearing at the upper left hand corner of the chart submitted, capable of pumping 250 gallons per minute, not the 138.75 g.p.m. that is the mid-point between the capacity of the 5 and 10 horsepower pumps as represented by the chart submitted or the 138.75 gallons per minute suggested by the applicant (the average of the two output quantities produced by 5 and 10 horse power

pumps at zero vertical lift according to the chart submitted.

34. Applicant has submitted no evidence on the design, capacity, demand and ability to operate at varying rate of supply of the proposed sprinkler system.
35. Applicant has submitted no specific evidence on what proportion of the rights has historically been diverted through each of the four points of diversion.
36. Applicant's counsel submitted an unsworn "application modification" dated May 15, 2006.
37. In that "application modification," Applicant's counsel submits, at the end of the first full paragraph on page 2, that "[h]istorically water has been diverted through the four ditches on a rotation basis to irrigate the entire claimed acreage."
38. The entire claimed acreage is 78 acres (Application).
39. Applicant submits no evidence on what that historic rotation basis was.
40. In the "application modification," Applicant's counsel submits, in the second full paragraph on page 2, that [t]he two ditches proposed to be replaced would require some work through several different properties to convey the applicant's water to the place of use" (Departmental Record).
41. At the hearing, Applicant's counsel and expert presented evidence that the North Mize Ditch has apparently been obstructed by the actions of a landowner between the point of diversion and the place of use (Hearing Recording, 15:06).
42. At the hearing, Applicant's counsel and expert presented unclear evidence that the Mize Ditch might also be obstructed (Hearing Recording, 40:00—end).
43. Applicant submits no evidence on how long it has been since the ditches served by the points of diversion Applicant would like to replace have been capable of delivering water to Applicant's land.

44. Applicant indicates at paragraph 3 of the application section entitled “additional information” that the historic use of this right was for irrigation of alfalfa and pasture grass (Application).
45. Applicant indicates that if the change application is granted, the intention is to continue to grow alfalfa and pasture grass (Application).
46. Applicant has submitted no evidence on the historic flood irrigation pattern of use, specifically when, how often and for what duration the fields were flood irrigated.
47. Flood irrigation is less efficient than sprinkler irrigation (“Efficiencies and Water Losses of Irrigation Systems”, Kansas State University Research and Extension Engineers Irrigation management Series, <http://www.oznet.ksu.edu/library/ageng2/mf2243.pdf>).
48. Flood irrigation application efficiencies (the percentage of water delivered to the field that’s consumed by the crop) vary by type (Kansas State University Research and Extension Engineers Irrigation management Series, <http://www.oznet.ksu.edu/library/ageng2/mf2243.pdf>.)
49. Conveyance efficiency (the amount or proportion of diverted water lost to evaporation and percolation or seepage in transportation to the place of use) is a concern in flood irrigation (Kansas State University Research and Extension Engineers Irrigation management Series, <http://www.oznet.ksu.edu/library/ageng2/mf2243.pdf>.)
50. Many factors contribute to the rate of conveyance efficiency. Among them are the permeability of the ditch surface, its degree of saturation, how much water is being conveyed and temperature.
51. A ditch lined with a relatively impermeable substance suffers less conveyance loss than an unlined dirt ditch.
52. Applicant has submitted no evidence on surface, size, profile, material make up or the conveyance loss of either the Mize or North Mize ditches, those ditches served by the points of diversion Applicant seeks to replace.

53. Applicant has submitted no evidence on the conveyance loss of the remaining two ditches through which Applicant's water rights have historically been delivered.
54. Applicant has submitted no evidence on the application efficiency at the historic place of use.
55. Applicant has submitted a section of the Montana Irrigation Guide reflecting the efficiency and quantity of water required for sprinkler irrigation of alfalfa and pasture grass in Climatic Area III (Exhibit A-3).
56. The Department's records indicate that Applicant's irrigated acreage is not classified as Climatic Area III but as Climatic Area II (DNRC database).
57. Climatic Area II has a higher water demand than Climatic Area III (Montana Irrigation Guide).
58. The general Abstract for water right 76H-108773 reads, at "volume," "the total volume of this water right shall not exceed the amount put to historical and beneficial use."
59. Without the conveyance efficiency rating of the ditches, the application efficiency of the place of use or the Montana Irrigation Guide table for the correct climatic area, the historic flood irrigation pattern and the historic rotation of ditches, it is not logically possible to determine the volume of water that has been put to historic and beneficial use.
60. Applicant's historic method of irrigation was not sprinkler irrigation (Application).
61. Applicant's historic method of irrigation was flood irrigation (Application).
62. Applicant has not demonstrated the volume of water put to historical and beneficial use for the flood irrigation of 78 acres of alfalfa and pasture grass in Climatic Area II annually.

63. Applicant has submitted no evidence on how the diversions at the points of diversion Applicant does not wish to change could be controlled or measured in order to limit the amount of water passing through them and verify that limitation.
64. Applicant's expert testified that no other water users use the North Mize Ditch (Hearing Recording, 43:52).
65. Departmental records show no other users on the North Mize Ditch.
66. Applicant has submitted no evidence on how Applicant would prevent water from flowing into the North Mize Ditch, ingress to which is not regulated by a head gate, were the application to change that point of diversion granted.
67. Applicant's counsel submitted at the hearing that Applicant did not plan to close the Mize Ditch (Hearing Recording, 44:46).
68. Several water other water rights are delivered through the Mize Ditch (General Abstracts, water rights 76H-30001382, 76H-30001383, 76H-30001384, 76H-30001385, 76H-30001386, 76H-30001387).
69. All of the water rights that share Mize ditch share the same priority date, May 1, 1903 (DNRC records, General Abstracts).
70. Applicant has submitted no evidence showing how that portion of the Mize Ditch serving Applicant's land will be prevented from delivering water to Applicant's land as it has done historically.
71. There are several other rights holders who take from the North Channel of Bear Creek downstream of Applicant (Departmental Records).

Conclusions of Law

1. 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,” that “the proposed means of diversion, construction, and operation of the appropriation works are adequate,” that “the proposed use of water is a beneficial use,” and 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.” *Id.*

2. Because no water quality-based objections were received (**FOF 5**), the requirements of Mont. Code Ann. § 85-2-402 (2) (f) and (g) are not relevant.
3. Because the proposed change in appropriation right does not involve salvaged water (**FOF 2**), the requirements of Mont. Code Ann. § 402 (2) (e) are not relevant.
4. Preponderance means “that degree of proof which is more probable than not.” Black’s Law Dictionary, 819 (6th ed. 1991).
5. The burden of proof is on the Applicant. “The plain language of the statute now clearly places the burden on the applicant” *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).
6. The Department must consider the effect of a proposed change on all existing water rights, not simply those of objectors. Mont. Code Ann. § 85-2-402 (2).

Beneficial Use

7. Applicant proposes a change in point of diversion for continued irrigation (**FOF 30**).
8. Irrigation has long been recognized as a beneficial use (“traditional beneficial uses of water, such as mining and irrigation.”) *In re Adjudication of the Existing Rights to the Use of All the Water* 2002 MT 216, ¶ 33, 311 Mont. 327, ¶ 33, 55 P.3d 396, ¶ 33.
9. Applicant’s proposed change is for a beneficial use.

Possessory Interest

10. The Applicant has a possessory interest in the property where the water is to be put to beneficial use (FOF 8).

Adequacy of Means of Diversion

11. Applicant has not demonstrated that it is more probable than not that the proposed means of diversion are adequate for the proposed change. Applicant's internally inconsistent pump chart (FOF 33), citation to incorrect Climatic Area consumptive use charts (FOF 55-56) and the absence of specific information on the pumps and the proposed sprinkler system (FOF 34), in combination with the absence of clear information on the pattern of point of diversion rotation frequency and duration of flood irrigation through those points of diversion under the historic rate of flow (FOF 34-37), and total volume of water put to historic use under the historic rate of flow (FOF 59) allow for no other conclusion. Where it is not possible to identify the flow rate and total volume of water put to historic use, it is not possible to determine the adequacy of the means of diversion even where their capacity is described as is not the case here.

Adverse Effect

Right 76H-108773

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).
13. Adverse effect includes a change in the pattern of use that reduces water availability, even for junior rights holders. A subsequent appropriator "is entitled to have the water flow in the same manner as when he located. . . he may insist that prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water." *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908).

14. “The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any rights of others to interfere with it as the rights of those before him are secure from interference by him.” *Gassert v. Noyes*, 18 Mont. 216, 216, 44P. 959, 962 (1896) citing *Proctor v. Jennings*, 6 Nev. 83.
15. A prior appropriator cannot encroach upon the rights of the subsequent appropriator by changing the use or place of use of the prior appropriator’s right. *Gassert v. Noyes*, 18 Mont. 216, 216 44 P. 959, 962 (1896).
16. The reasoning that prevents an applicant from compromising the rights of appropriators who acquired their rights subsequent to the applicants all the more strongly supports the prevention of any compromise of the rights with equal or senior priority.
17. “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 [simultaneous or subsequent] appropriators.” *In the Matter of the Application for Change of Appropriation water rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, conclusion of law No. 8.” Applicant has not introduced sufficient evidence to determine annual volume historically consumed under either right (**FOF 46-59**).

North Mize Ditch

18. Though there no other water users that take from one of the points of diversion Applicant proposes to replace, the North Mize Ditch (**FOF 64**). Applicant has not demonstrated that the proposed change of the North Mize Ditch point of diversion will actually change the diversion of water from the North Channel of Bear Creek as Applicant has not proposed to block the ditch where it meets the North Channel of Bear Creek (**FOF 66**), ingress to which is not controlled by a head gate (**FOF 22**).
19. Were Applicant allowed to replace the North Mize Ditch point of diversion with an in-channel pump intake further downstream without obstructing the entrance to the North

Mize Ditch, it appears that Applicant would not only be actively taking water from the stream via the new pump but also passively allowing water to escape from the stream via the old point of diversion, reducing the amount of water available in the stream beyond the historic amount. Despite the fact that that water entering the North Mize Ditch does not appear to be reaching Applicant's land (at the hearing, Applicant's counsel and expert submitted that the North Mize Ditch has been obstructed between the point of diversion and Applicant's land (**FOF 41**)), that testimony simply raises questions about the historic use of that ditch for the transportation of water for beneficial use to the acreage now in Applicant's possession. Perhaps obstructing the North Mize Ditch point of diversion is a simple matter of bales of straw and a tarp. Perhaps not. Mont. Code Ann. § 85-2-402 (2) places the burden of production and the burden of persuasion on the Applicant. That burden has not been met.

20. As there is no evidence of any existing means of measuring how much water would be passing through the existing North Mize Ditch point of diversion (**FOF 19**), it would not be possible for Applicant to know how much water was passing through that point of diversion and no information with which to regulate the new point of diversion in order to remain within the historical flow rate and total volume put to historic use even if that amount were in evidence, which it is not (**FOF 46-59**).
21. Applicant has not demonstrated that it is more probable than not that granting the proposed change in the North Mize Ditch point of diversion will not adversely effect other water users on the North Channel of Bear Creek via water leaving the North Channel of Bear Creek through both the existing and proposed points of diversion simultaneously, thereby exceeding the total volume put to historic and beneficial use and adversely impacting the vested property rights of other water users on the system by reducing the amount of water available, irremediably in the case of those with the same priority date or junior rights holders downstream on the North Channel of Bear Creek who cannot place a call on the system because they do not have a senior right.

Mize Ditch

22. Although the Mize Ditch is served by a head gate (**FOF 18**) because there are other water users that take from the Mize Ditch, Applicant may not close that head gate without adversely affecting other water users.
23. Applicant has not proposed to close that portion of the ditch serving its land (**FOF 67**).
24. Unless Applicant were to close that portion of the ditch serving its land, it would not be possible for the Applicant to know how much water the Applicant was continuing passively to receive via that ditch and regulate the pump at the new point of diversion in order to remain within the historical flow rate and total volume put to historic use even if that amount were in evidence, which it is not (**FOF 46-59**).
25. Applicant has not demonstrated that it is more probable than not that granting the proposed change in the Mize Ditch point of diversion will not adversely effect other water users on the North Channel of Bear Creek via applicant taking through both the existing and proposed points of diversion simultaneously, thereby exceeding the total volume put to historic and beneficial use and adversely impacting the vested property rights of other water users on the system by reducing the amount of water available, irremediably in the case of those with the same priority date or junior rights holders downstream on the North Channel of Bear Creek who cannot place a call on the system because they do not have a senior right.

Right 76H-108772

Possessory Interest

26. The Applicant has a possessory interest in the property where the water is to be put to beneficial use (**FOF 8**).

Beneficial Use

Mont. Code Ann. § 82-11-175 contemplates stock water as a beneficial use; “irrigation or stock water or for other beneficial uses” *Id.*

Adequacy of Means of Diversion

27. Applicant has introduced no evidence of the reasonable carrying capacity and historic use of the area for stock watering (**FOF 13-14**) or any definitive evidence of a current stock presence on the property (**FOF 14**) , it is not logically possible to determine whether the means of diversion are adequate.

Adverse Effect

28. Because applicant has introduced no evidence on the reasonable carrying capacity and historic use of the area associated with stock watering right 76H-108772, it is not possible to quantify historic consumptive use under that the stock watering purpose of that right (**FOF 13-14**).

29. Because it is not possible to quantify historic consumptive use under that right, it is not possible to conclude that it is more probable than not that a change in two of the four points of diversion of that right will not adversely affect other appropriators.

Proposed Order

That Application number 76H-30009407 to change water rights numbers 76H-108772 and 76H-108773 by North Corporation be **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 6, 2006**, 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 **November 22, 2006** (ten working days, not counting holidays), 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 18th day of October, 2006.

/Original signed by Britt T. Long/

Britt T. Long
Hearing Examiner
Water Resources Division
Department of Natural Resources and Conservation
PO Box 201601
Helena, Montana 59620-1601

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 18th day of October 2006 by first class United States mail.

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/Original signed by Jamie Price/
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**BEFORE THE DEPARTMENT OF
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OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION NO. 76H-)
30009407 TO CHANGE WATER RIGHT NOS.)
76H-108772 AND 76H-108773 BY NORTH)
CORPORATION)**

FINAL ORDER

BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on October 18, 2006. Applicant North Corporation filed timely exceptions to the PFD on November 6, 2006. North Corporation initially requested an oral argument hearing on their exceptions which had been scheduled for April 24, 2007, but then later withdrew the request for oral argument by filing a "Waiver of Oral Argument" on March 27, 2007.

Applicant North Corporation proposes to change two of the four points of diversion for Statement of Claim Nos. 76H-108772 and 76H-108773, which are multiple use claims (108772 is for stock, 108773 is for irrigation) utilizing the same four points of diversion on the North Channel of Bear Creek and have the same place of use. The four points of diversion are from ditches, two of which are controlled by headgates and two of which have no headgate. The change would involve ceasing to utilize two of those points of diversion and replacing those diversions by utilizing pumps which would draw water directly from the North Channel of Bear Creek. Of the two ditch diversions proposed to be replaced, one (the Mize Ditch) is controlled by a headgate and the other (North Mize Ditch) is not.

The PFD recommended denial of Application No. 76H-30009407 because the Hearing Examiner found that the Applicant did not prove by a preponderance of the evidence [or as used by the Hearing Examiner in the PFD 'that it is more probable than not'] that the proposed means of diversion are adequate, that granting the proposed change in the North Mize Ditch point of diversion will not adversely effect [sic] other water users on the North Channel of Bear Creek, that granting the proposed change in the Mize Ditch point of diversion will not adversely effect [sic] other water users on the North Channel of Bear Creek and, as to the stock water right, that it is not possible to determine whether the means of diversion are adequate or that a change in the points of diversion will not adversely affect other appropriators.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: 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.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities upon which the party relies. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. (ARM 36.12.229(1))

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Findings of Fact

Re FOF 12: Finding of Fact No. 12 – Applicant asserts as error the Hearing Examiner's finding that water right 76H-108772 has no specified period of use.

Applicant is correct. Water Right No. 76H-108772 for stock water specifies a period of use from April 1 to October 4. Finding of Fact No. 12 is modified to read:

12. Water right 76H-108772 has a priority date of May 1, 1903, no specified flow rate, no specified volume limitation a specified period of use of from April 1 to October 4, a purpose of stock watering and the notation that "no flow rate has been decreed because this use consists of stock drinking directly from the source or from a ditch system. This water right includes the amount of water consumptively used for stock watering

purposes at the rate of 30 gallons per day per animal unit. Animal units shall be based on the reasonable carrying capacity and historic use of the area” (General Abstract).

Re FOF 13: Applicant takes exception to the finding that there is “no evidence establishing the reasonable carrying capacity or historic use of the area for any species of stock.”

Applicant provided the abstract of water right as decreed by the Montana Water Court which adjudicated the right to water stock as a multiple use of water right 76H-108773 and thus the extent of right 76H-108772 is dependant upon, and based upon the extent of water right 76H-108773. Applicant asserts that no evidence establishing the “reasonable carrying capacity” is necessary because the application criteria in reference to the historic use is based upon water right 76H-108773.

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 directly on point holding that a water right in a final decree in final decrees is limited in change proceedings to their actual historical use, that conclusion is supported by the case of McDonald v. State, , 220 Mont. 519, 722 P.2d 598 (1986). See also 79 Ranch Inc. v Pitsch (1983), 204 Mont. 426, 666 P.2d 215; Galiger v. McNulty (1927), 80 Mont. 339, 260 P. 401; Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986); Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use

for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

The record in the instant case reveals no evidence of historic beneficial use by livestock, nor any way to estimate historic beneficial use, such as by a determination of carrying capacity. Finding of Fact #13 will not be modified or rejected.

Re FOF 19: Applicant takes exception to the Hearing Examiner's determination that "[a]pplicant has presented no evidence on whether measuring devices exist at any of the points of diversion."

Applicant contends that such a finding is irrelevant to these change proceedings and not within the jurisdiction of the Department, that the finding is not material to any determination of historic water use, and that none of the objections received to the application raised measuring devices as an issue.

Applicant misses the mark for two reasons. The existence of measuring devices and any information provided based upon them, may have allowed the Hearing Examiner to make an estimate of historic use from these appropriations. As stated above the, the Statement of Claim and any Water Court determination is not *prima facie* evidence of the historic use of the water right. The non-existence of measuring devices was simply the Hearing Examiners way of stating that she did not have and could not estimate the historic use of these water rights. The Applicant also overlooks the fact that without measuring devices at any (or in fact *all*) points of diversion there is no way to make a determination that if the historic use was known, that the change in points of diversion would not result in an expansion of the water right to the detriment of other water users.

Finding of Fact #19 will not be modified or rejected.

Re FOF 20: Applicant takes exception to the Hearing Examiner's finding that there is "no evidence on whether or how flow may be controlled at the points of diversion not controlled by headgates."

Applicant again relies on the Water Court determinations and the Applicant's "entire plan is . . . to cease using two of those ditches."

It is unclear to this Final Decision maker, as it apparently was to the Hearing Examiner, how a ditch, which admittedly does not have any headgate or measuring device, can be "shut down" such that no water enters the ditch and all of the water previously entering the ditch passes downstream to a new point of diversion using an instream pump. The Hearing Examiner was obviously concerned that some water may be able to enter the ditch which the Applicant would "cease to use" and then withdraw their water from a downstream point resulting in a potential increase in the size of the water right as used historically.

Finding of Fact #20 will not be modified or rejected.

Re FOF 24: Applicant takes exception to the Hearing Examiner's finding that "the two points of diversion Applicant seeks to replace serve two ditches crossing land that does not belong to Applicant before arriving at applicant's land."

Applicant contends that they produced unrefuted evidence that the two points of diversion to be replaced . . . are not used to irrigate any ground between the diversion points and the proposed new diversion points."

Water rights and ditch rights are separate and distinct rights. *Matter of Musselshell River Drainage Area*, 255 Mont. 43, 840 P.2d 577 (1992). This Final Decision maker fails to see why this Finding of Fact was included in the Proposal for Decision or its relevancy to the criteria for a change in water right as found in MCA § 85-2-402.

Finding of Fact #24 is rejected.

Re FOF 25: Applicant takes exception to the finding that Applicant has presented no evidence of recorded ditch easements.

Finding of Fact #25 is rejected (see Re FOF 24).

Re FOF 28: Applicant takes exception to the finding that "[a]pplicant has supplied no information of pump intake size, output pipe size, pumping mechanics, efficiency or variability of

operation capacity of the pumps.”

Applicant contends that they “provided evidence as to pump size and calculations of flow rate capacities . . . including evidence that the pumps . . . are designed to only divert a combined maximum of 276 gallons per minute and evidence that the mechanical setup of the pumps will prevent any taking of excessive water.” Applicant supports their exception by referring to the Hearing Recording at 30:09 and 30:14 along with the Hearing Examiners Finding of Fact No. 29.

Applicant is correct to the extent that they provided testimony that the proposal is to divert, using pumps, a maximum of 276 gallons per minute and that the mechanical setup of the pumps will prevent any taking of excessive water. The Hearing Examiner is correct in the finding that there is no evidence of pump intake or output sizes, actual pumping mechanics, efficiency or variability of operation capacity of the pumps. In reading the Proposal for Decision, this Final Decision maker notes that there are no Conclusions of Law in the PFD that rely on this Finding of Fact, therefore if there is error in making this Finding of Fact it constitutes harmless error.

Finding of Fact #28 will not be modified or rejected.

Re FOF 31: Applicant takes exception to the finding that there is no evidence limiting pump intake to the flow rate actually diverted under the existing right.

Applicant relies on their statement in the Application Supplement which states “the pumps and sprinkler systems will be designed to only divert the flow rate allowed under the existing right . . . and can be shut down fully when water is not available” and the testimony in the Hearing Recording at 30:09.

Applicant again misperceives the Hearing Examiners finding. The Hearing Examiner’s finding relates to the fact that there is no evidence in the record to show the actual historic use of the water right. As stated above in Re FOF 13, the amount of water that the appropriator is allowed to change is not the amount of water in a Statement of Claim or Water Court decree,

but is that amount of water that the appropriator actually placed to historic beneficial use. E.g., *Bailey v. Tintinger* (1912), 45 Mont. 54, 122 P. 575 (beneficial use is the base, measure and limit of the right). Without evidence of the actual historic beneficial use, it was impossible for the Hearing Examiner to find that the pumps could or would take no more than that amount.

Finding of Fact #31 will not be modified or rejected.

Re FOF 32: Applicant takes exception to the finding that “[a]pplicant has submitted no evidence that the flow rate allowed under the existing right is the flow rate that has historically been put to beneficial use.”

Applicant asserts that “all matters pertaining to historical beneficial use were fully adjudicated by the Water Court” and that the Department has no authority to question facts established by the Water Court’s adjudication. In addition Applicant states that the Department has conducted two field investigations, both confirming the historical diversions at issue and that the Hearing Recording at 18:29 – 23:48 establishes unrefuted evidence that the full extent of the water rights has historically been diverted and put to beneficial use by North Corporation.

Applicant may be right as a matter of law that the Department has no authority to “question the facts and rights established [by the Water Court]” but that is not what the Department is doing in this proceeding. As was stated in the Department’s Order *In the Matter of Change of Appropriation of Water Right No. 41H-1223599 by MGRR #1, LLC* (2005):

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); Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165 (the right to change a water right is limited in quantity by the historic use of the water at the original point of diversion; to determine that

a requested change will not amount to an enlargement, historical use must be quantified).

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 § 5.17[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*); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271(“The issues of waste and historic use, as well as misuse, nonuse, and abandonment, may properly be considered by the administrative official or water court when acting on a reallocation application,” citing Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation, it is appropriate to consider abandonment of the water right).

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).

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)028708-41I 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).

In the instant matter the Department is not questioning the adjudicative determination made by the Water Court but is only attempting to determine the amount of water historically used which may be available to change. Applicant’s reliance on the Department’s purported field investigations (which I do not see in the record) and the testimony relied on in the Hearing Recording at 18:29 – 23:48 only provides evidence that the Applicant’s property has been historically irrigated, “by flood irrigation,” going “way back” but provides no information as to the quantity of water, either through measurement or through anecdotal evidence of the quantity of water historically used for that irrigation.

Finding of Fact #32 will not be modified or rejected.

Re FOF 33: Applicant takes exception to the Hearing Examiner’s independent calculation of pump capacity using a hand written formula appearing on a “pump chart” supplied with the

application and finding that it is inconsistent with the Applicant's evidence and testimony to the contrary.

This Final Decision maker notes that the only Conclusion of Law in the PFD which relies on Finding of Fact No. 33 is Conclusion of Law #11 relating to the adequacy of the means of diversion criteria. Conclusion of Law #11 states in part "[a]pplicant's internally inconsistent pump chart (FOF 33), citation to incorrect Climatic Area"

I can find no evidence in the record that the Applicant relied on the hand written formula appearing on the "pump chart" and that the "internal consistency" was created by the Hearing Examiner's independent calculation.

Finding of Fact #33 is modified to read:

33. Applicant proposes to divert 276 gallons per minute via two 7.5 horse power pumps installed in the source itself, exerting no vertical lift. Applicant has submitted a photocopied sheet from an unattributed source which Applicant's expert testified at the hearing originated with DNRC. That sheet graphs various pump sizes and vertical lift quantities, resulting in various outputs. Applicant calls that sheet a "pump chart" in paragraph 3 of the "additional information" section of the application. On the chart the mid-point between the capacity of a 5 and 10 horsepower pump is estimated to be 138.75 gallons per minute. Applicant's expert testified that the average of the two output quantities produced by 5 and 10 horsepower pump (representing a 7.5 horsepower pump) is 138.75 gallons per minute.

Re FOF 34: Applicant takes exception to the finding that Applicant "has submitted no evidence on the design, capacity, demand and ability to operate at varying rate of supply of the proposed sprinkler system."

Applicant contends that the information purported to be "required" under this finding is completely beyond statutorily authorized scope of review and that as long as the pumps to be used have limited capacity and will be used so as to not exceed North Corporation's rights, then the type of system employed to put the water to beneficial use makes little difference.

As with Finding of Fact #33, Finding of Fact #34 is only used in Conclusion of Law #11 of the PFD relating to the adequacy of the "means of diversion, construction, and operation of the appropriation." MCA § 85-2-402(2)(b). The Hearing Examiner used the information (or lack thereof) to support the conclusion that without such information, in conjunction with the lack of information concerning historic use, the Applicant did not meet the burden of proof required under the statute. While the Hearing Examiner is technically correct in making this finding, any mistake of its application to a Conclusion of Law will be addressed in that section.

Finding of Fact #34 will not be modified or rejected.

Re FOF 35: Applicant takes exception to the finding that “[a]pplicant has submitted no evidence on what proportion of the rights has historically been diverted through each of the four points of diversion.”

Applicant asserts that “the full extent of the decreed water right has historically been diverted and put to beneficial use at [Applicant’s] property by means of the four points of diversion . . . through any combination of historic diversions.”

The Hearing Examiner was justly concerned about such a situation. There is no evidence in the record on how much water was actually diverted through *each* of the four ditches to fulfill the decreed right (or the actual historic use). Without such evidence it is impossible to determine how much water the Mize Ditch and the North Mize Ditch historically diverted – which would be the amount authorized to change. The situation is similar to the situation in *Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo. 2002). There, the applicant applied for a change the point of diversion for a well to irrigate his land which also had a surface water right attached. The Court pointed out:

The acreage under irrigation is a common basis of measuring the use of water in the adjudication of priorities, 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 deducting 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 with some way of differentiating the contributions of the various rights involved.

This matter presents the same problem except instead of differentiating the contributions from the water rights, the Hearing Examiner needed to determine the differentiating contributions from the various ditches. Without such information the Hearing Examiner was unable to determine if the change would enlarge the historic use of the water rights at issue.

Finding of Fact #35 will not be modified or rejected.

Re FOF 39: Applicant takes exception to the finding that the Applicant submitted no evidence on what the historic rotation basis was.

Applicant refers the Final Decision maker to “exceptions to Findings #13, 33, 35, et. al., above.”

Except for Finding of Fact #33, the referenced Findings of Fact have not been modified or rejected. The historic rotation of the ditches is directly related to the contribution of each ditch as explained above.

Finding of Fact #39 will not be modified or rejected.

Re FOF 41: Applicant takes exception to the finding that evidence was presented to the effect that the North Mize Ditch has apparently been obstructed by the actions of a landowner between the point of diversion and place of use.

Applicant asserts that there is evidence that the Mize Ditch is currently obstructed but the North Mize Ditch is functional, and that there is no issue of abandonment.

Upon review of the Hearing Recording this Final Decision maker finds that the Hearing Examiner erred if finding that the North Mize Ditch has been obstructed – it is the Mize Ditch which was currently obstructed.

Finding of Fact #41 will be modified to read:

At the hearing, Applicant's counsel and expert presented evidence that the Mize Ditch has apparently been obstructed by the actions of a landowner between the point of diversion and the place of use. (Hearing Recording, 15:06)

Re FOF 42: Applicant takes exception to the finding that they "presented unclear evidence that Mize Ditch might also be obstructed (based on the Hearing Recording, 40:00 – end).

Applicant contends that the Hearing Examiner has apparently confused one ditch with another.

This Final Decision maker, after reviewing the Hearing Recording, agrees with the Applicant that there was some confusion as to which ditch was blocked and in addition finds no evidence that the [North] Mize Ditch may also be obstructed. This Final Decision maker makes note that none of the Conclusions of Law in the PFD rely on Finding of Fact #42.

Finding of Fact #42 is rejected.

Re FOF 43: Applicant takes exception to the finding that there is no evidence on "how long it has been since the ditches served by the points of diversion Applicant would like to replace have been capable of delivering water to Applicant's land."

Applicant simply states that the finding is clearly erroneous and refers to their exceptions to Finding of Fact Nos. 41 and 42.

Finding of Fact Nos. 41 and 42 primarily relate to the confusion surrounding which ditches may have been blocked. The testimony is clear that the blocked ditch is the Mize Ditch and that such obstruction has occurred only recently and that efforts are underway to correct the situation but there is no evidence as to when the last time water was actually delivered through any of the ditches involved. This Final Decision maker notes that Finding of Fact #43 is not relied upon in any of the Conclusions of Law in the PFD, however, such a finding may be relevant to historic use of the water right.

Finding of Fact #43 will not be modified or rejected.

Re FOF 46: Applicant takes exception to the finding that there is “no evidence on the historic flood irrigation pattern of use, specifically when, how often and for what duration the fields were flood irrigated.”

Applicant responds by simply stating “[a]gain, the purported requirement is improper. Applicant’s water rights, and all questions pertaining to beneficial and historic use, were conclusively determined by the Water Court in 2003.”

Applicant is wrong. As was explained in **Re FOF 32**, above, when 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.

Finding of Fact #46 will not be modified or rejected.

Re FOF 47 – 54: Applicant takes exception to Finding of Fact Nos. 47 – 51 (which are findings related to flood versus sprinkler irrigation methods, conveyance efficiencies and ditch losses) and to Finding of Fact Nos. 52 – 54 (which are findings related to historic use).

Applicant asserts that Finding of Fact Nos. 47 – 51 are incompetent and not based on any evidence presented at the hearing and/or the Department is precluded from “interposing its own objections within the context of a contested case.

An agency’s “experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence” in a contested case proceeding. MCA § 2-4-612. It is this Final Decision makers understanding that, in this matter, the Hearing Examiner included these findings in the PFD merely to demonstrate some of the technical aspects of flood versus sprinkler irrigation and conveyance losses. These findings are not the Department’s own objections, but are rather simply statements of fact known to the Department.

Finding of Fact Nos. 47 – 51 will not be modified or rejected.

As to Applicants exceptions to Finding of Fact Nos. 52 – 54, Applicant asserts that these findings “interpose issues which were not raised by objection and/or which are outside the authority of the Department.”

The issues raised in this matter were clearly articulated by the Hearing Examiner in her July 25, 2006, Conference Call Scheduling Order. Specifically, the Hearing Examiner noted in that Order that “[o]bjectors have raised questions regarding the historic use and possible non-use of ditches associated with this right. Evidence in the change application specifically on that issue is absent. If Applicant is to meet the burden of proof on the issue of adverse effect provided in [MCA § 85-2-402], Applicant must demonstrate the extent of the historic beneficial use of the ditches and the water represented by the right and demonstrate that the proposed

change of use does not exceed either.”

An Applicant is not relieved of the duty to show by the proper standard of proof the statutory criteria have been met even when all objectors to the application default, withdraw, or stipulate to certain conditions. See Mont. Code Ann. 85-2-402; In the Matter of the Application for Beneficial Water Use Permit No. 88504-s76F by Janice E. Dietz; In the Matter of the Application for Beneficial Water Use Permit No. 86859-40J by USA, Department of Interior, Bureau of Land Management.

Finding of Fact #'s 52 – 54 will not be modified or rejected.

Re FOF 59: Applicant takes exception to the finding that without the conveyance efficiency, application efficiency, the correct climatic area information, the historic flood irrigation pattern and the historic rotation of the various ditches, it is not possible to determine the volume of water that has been put to historic beneficial use.

Applicant again asserts that this requirement is an interposition by the Department of an “objection” and that the Department should not be permitted to interject conclusory statements.

As was explained above, the Department is required to make a determination of the statutory requirements, and it is the duty of the Applicant to show that those criteria are met. While this Finding of Fact may perhaps be better characterized as a conclusion of law based on the evidence in the record (or lack thereof), this Final Decision maker cannot find that it is not based on competent substantial evidence (or lack thereof). The lack of evidence in the record constitutes a failure of proof on the part of the Applicant. *In the Matter of Application to Change Water Right No. 41H-1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision, adopted by DNRC Final Order (2005).

Finding of Fact #59 will not be modified or rejected.

Re FOF 61: Applicant takes exception to the finding that the Applicant’s historic method of diversion was not sprinkler irrigation.

Applicant contends that this finding is irrelevant.

This Final Decision maker can find no reference in the PFD’s Conclusions of Law section which cite this Finding of Fact. It is also not clear to this Final Decision maker what the relevancy of this finding is in relation to the statutory criteria for a change in appropriation.

Finding of Fact #61 is rejected.

Re FOF 62: Applicant takes exception to the finding that Applicant has not demonstrated the volume of water put to historic and beneficial use for the flood irrigation of 78 acres.

Applicant once again relies on the Water Court determination of Statement of Claim Nos. 76H-108772 and 76H-108773 and contends that Applicant’s expert utilized the Department’s

own guidelines to make a determination of the amount of water required for the irrigation of 78 acres.

Applicant's own exception belies the error of their argument when they state "[t]here should be no dispute that the total *irrigable* property at issue is 78 acres (emphasis supplied). What the Hearing Examiner in the instant matter found was that the Applicant has not demonstrated the volume of water put to *actual* historical and beneficial use. Applicant contends that the Department asks for the impossible. The Hearing Examiner may have accepted affidavits of those who utilized these water rights in the past, water commissioner records, or other evidence to support the number of acres historically irrigated – but the Hearing Examiner apparently could not find, nor can this Final Decision maker find evidence that can support a finding of the actual historical use of these rights.

Finding of Fact #62 will not be modified or rejected.

Re FOF 63: Applicant takes exception to the finding that there is no evidence on how the diversions at the points of diversion Applicant does not wish to change could be controlled or measured in order to limit the amount of water passing through them and verify that limitation.

Applicant contends that such a requirement is outside the scope of the Department's authority and that the Applicant must answer to its neighbors and the water commissioner if it winds up using more water than it is entitled to.

It is the responsibility of the Department however to determine whether a change in appropriation will adversely affect the use of the existing water rights of other persons, and the burden is upon the applicant to show by a preponderance of the evidence that such an adverse affect will not occur. *Matter of Application for Change of Appropriation of Water Rights for Royston* (1991), 249 Mont. 425, 816 P.2d 1054. It was obviously unclear to the Hearing Examiner, as it is to this Final Decision maker, how an uncontrolled diversion in combination with the proposed new pumping system may not result in the expansion of the historic use of these rights. An uncontrolled and unmeasured diversion from the stream will by necessity result in an uncontrolled and unmeasured volume of water being taken from the source, thus potentially increasing the burden on that source, even with the presence of a water commissioner. Applicant has simply not supplied a preponderance of evidence that no such expansion of the water right will occur.

Finding of Fact #63 will not be modified or rejected.

Re FOF 66: Applicant takes exception to the finding that there is no evidence on how Applicant would prevent water from flowing into the North Mize Ditch, which is not regulated by a headgate.

Applicant contends that the North Mize Ditch would be “closed” and that that point of diversion would be removed from Applicant’s water right. Thus the point of diversion could no longer be used and the water commissioner or the Department could enforce any illegal use.

The record does show that the Applicant intends to “close” the North Mize Ditch (Hearing Recording, 43:31; Department File). In addition, the record reveals that the North Mize Ditch has no other water users other than the Applicant. While it is true that there is no evidence on “*how Applicant would prevent water from flowing into the North Mize Ditch . . .*” (emphasis supplied), there is evidence that the Applicant intends to prevent such use. Any enforcement actions which may be required to ensure that such an intent is carried out is beyond the scope of this proceeding.

Finding of Fact #66 is rejected.

Re FOF 70: Applicant takes exception to the finding that there is no evidence showing how that portion of the Mize Ditch . . . will be prevented from delivering water to Applicant’s land as it has done historically.

Applicant relies on the reasoning in their exception to Finding of Fact #66.

This Final Decision maker can find no similar statements such as “the ditch will be closed.” In fact, the record reveals that the Mize Ditch will remain open because there are other water users that may take water from that ditch. There is a lack of information in the record regarding how the Applicant will prevent water from reaching their place of use.

Finding of Fact #70 will not be modified or rejected.

Conclusions of Law

Applicant makes a “General Exception to all Conclusions of Law” wherein Applicant asserts that they have identified “serious errors in close to one-half of the Department’s proposed finding of fact” and thus it would be impossible for the Department to reach any correct conclusion of law. This “General Exception” points to no parts of the record other than those portions of the Findings of Fact to which they already take exception.

“Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record . . . will be accorded little attention.” ARM 36.12.229. With that in mind, Applicant’s “General Exception” will not be addressed.

Re COL 11: Applicant takes exception to the Conclusion of Law that they have not demonstrated [by a preponderance of the evidence] that the proposed means of diversion are

adequate for the proposed change.

Applicant asserts that “they have filed exceptions . . . to the Findings on which the Department purportedly relies in reaching this conclusion”, that they presented evidence on the historic beneficial use of the water rights under consideration for change, that the proposed changes would have no adverse effect, and that their historic water rights are protected as confirmed by the Montana Water Court.

The Hearing Examiner relies on Finding of Fact Nos. 33, 34 – 37, 55 – 56, and 59 in reaching this Conclusion of Law. This Final Decision maker notes that of those findings only Finding of Fact #33 has been rejected. Findings of Fact 34 – 37, 55 – 56, and 59 are in large part concerned with the historic use of the water rights at issue in this matter (with the exception of Finding of Fact #34). For example, Finding of Fact #35 is concerned with “the proportion of the right[s] historically . . . diverted”; Finding of Fact #'s 36 – 37 relate to “historically water has been diverted through the four ditches on a rotation basis”; Finding of Fact #'s 55 – 56 relate to “the efficiency and quantity of water required”; and Finding of Fact #59 relates to “it is not . . . possible to determine the volume of water that has been put to historic and beneficial use.”

Historic use is an element in the determination of whether or not a change in appropriation will result in an enlargement of that appropriation to the detriment of other water users. As has been stated “[a]s 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), p. 277 – 78 (emphasis supplied).

In the context of the instant proceeding (i.e. ignoring salvage water issues and water quality issues) Montana’s change statute, MCA § 85-2-402 consists of four distinct elements:

- (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.

The issue of adverse affect is an element of only subparagraph (a) of the Montana

change statute and is not an element of subparagraph (b) which relates only to the means of diversion, construction, and operation of the proposed appropriation works. The Hearing Examiner in this case has applied historic use evidence (or lack thereof) to the criteria of whether the *proposed* physical means of diversion are adequate to deliver the *proposed* amount of water to be changed to the place of use. Historic use of these water rights is not an element, and by necessity could not be an element, in a determination of the adequacy of the *proposed* means of diversion of the *proposed* amount. There is no such historic use.

That being said, the Applicant must prove by a preponderance of the evidence that proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant in this matter has proposed to change two points of diversion (the Mize Ditch and the North Mize Ditch) to two points downstream of those ditch points of diversion by utilizing two pumps. The Applicant proposes to pump a maximum of 276 gallons per minute from the two pumps for a total annual volume of 169.6 acre-feet. The record reveals that each of the two pumps (7.5 horse power each) can pump a maximum of 138 gallons per minute. By analogy, if an applicant proposed to move a point of diversion from a ditch that diverted 10 cfs to another ditch that had a capacity of only 5 cfs, the applicant would be hard pressed to prove that he could move the entire 10 cfs. That however is not the case in the matter at hand. The Applicant has proposed to move 276 gallons per minute from the old places of diversion and divert that same amount utilizing two pumps with a combined capacity of 276 gallons per minute.

Proposed Conclusion of Law #11 is rejected and will be replaced by the following:

11. Applicant has demonstrated that it is more probable than not that the proposed means of diversion are adequate for the proposed change. (Finding of Fact 33)

Re COL 13: Applicant takes exception to the conclusion that “[a]dverse effect includes a change in the pattern of use that reduces water availability, even for junior rights holders” and that subsequent appropriators are entitled to have the water flow in the same manner as when they located “and may insist that prior appropriators be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.” Quoting *Spokane Ranch & Water Company v. Beatty*, 37 Mont. 342, 96 P. 727 (1908)

Applicant contends that this conclusion is improper because the Hearing Examiner misunderstands “the nature of the objections filed” and that the Hearing Examiner may not interpose “irrelevant matters and matters never raised by objectors.”

This Final Decision maker sees this Conclusion of Law as simply a statement of the law

in Montana, ostensibly to make the decision more understandable. There can be no error in simply reiterating the law.

Conclusion of Law #13 will not be modified or rejected.

Re COL 17: Applicant takes exception to the conclusion that there is “insufficient evidence to determine annual volume historically consumed under either right.”

Once again Applicant relies on the determination of the Montana Water Court and the assertion that there is “no alteration in the amount or location of historically irrigated acres or the types of crops historically cultivated thereon.”

For the reasons discussed earlier, the Applicant is simply mistaken in their sole reliance on the Montana Water Court determination.

Conclusion of Law #17 will not be modified or rejected.

Re COL 18: Applicant takes exception to the conclusion that “[a]pplicant has not demonstrated that the proposed change of the North Mize Ditch point of diversion will actually change the diversion of water from the North Channel of Bear Creek as Applicant has not proposed to block the ditch”

Applicant argues that they intend to close the North Mize Ditch.

Conclusion of Law #18 relies primarily on Finding of Fact #66 which this Final Decision maker has previously rejected.

Conclusion of Law #18 is rejected.

Re COL 19 & 20: Applicant takes exception to the conclusion that “[w]ere Applicant allowed to replace the North Mize Ditch point of diversion with an in-channel pump intake . . . without obstructing the entrance to the North Mize Ditch” (COL #19) and “[a]s there is no evidence of any existing means of measuring how much water would be passing through the existing North Mize Ditch point of diversion, it would not be possible for Applicant to know how much water was passing through that point of diversion and no information with which to regulate the new point of diversion in order to remain within the historical flow rate and total volume put to historic use” (COL #20)

Applicant contends that these conclusions and the underlying findings do not conform to the information contained in the application or the evidence presented at hearing.

For the same reason stated in Re COL 18, above, Conclusion of Law #19 is rejected.

As for Conclusion of Law #20, which relies on Finding of Fact Nos. 19, 46 – 59, this Final Decision maker determines that this “conclusion” is simply a summary of those underlying Findings of Fact to support the Hearing Examiner’s conclusion that there is insufficient evidence to show the historic use of these water rights which has been previously concluded in

Conclusion of Law #17. As such, Conclusion of Law #20 is surplusage.

Conclusion of Law #20 is rejected.

Re COL 21: Applicant takes exception to the conclusion that they have not demonstrated that it is more probable than not that granting the proposed change . . . will not adversely effect other water users on the North Channel of Bear Creek . . .”

For the same reason state above for Conclusion of Law #20, this conclusion is surplusage.

Conclusion of Law #21 is rejected.

Re COL 23 – 25: Applicant takes exception to these conclusions regarding essentially the same issues in Conclusion of Law Nos. 18 – 21 which relate to the North Mize Ditch. The Hearing Examiner here applies those same principles to issues regarding the Mize Ditch.

For the same reasons given above in Re COL 18 – 21, this Final Decision maker determines that Conclusions of Law Nos. 23 – 25 are surplusage.

Conclusion of Law Nos. 23 – 25 are rejected.

Re COL 27 – 29: Applicant takes exception to the conclusions that because there is not evidence of the reasonable carrying capacity and historic use of the area for stock watering it is not possible to determine whether the means of diversion are adequate (COL #27), that because the applicant introduced no evidence on the reasonable carrying capacity and historic use of the area associated with stock watering it is not possible to quantify historic consumptive use for stock watering purposes (COL #28), and because it is not possible to quantify historic consumptive use under the stock watering right it is not possible to conclude that the change in point of diversion will not adversely affect other appropriators (COL #29)

Applicant relies on the Montana Water Court determination to support their argument that these conclusions are error.

As to Conclusion of Law #27, for the same reasons given in Re COL 11, above, Proposed Conclusion of Law #27 is rejected and replaced by the following:

27. Applicant has demonstrated that it is more probable than not that the proposed means of diversion are adequate for the proposed change. (Finding of Fact 33)

As to Conclusion of Law Nos. 28 and 29, because they are analogous to Conclusion of Law #17 (i.e. absent quantification of annual volume historically consumed the evidence of record will not sustain a conclusion of no adverse affect) they will not be disturbed.

Conclusion of Law Nos. 28 and 29 will not be modified or rejected.

Summary

Because Applicant provided no evidence of the historic beneficial use, and relied on the Montana Water Court's determination of Statement of Claim Nos. 76H-108722 and 76H-108773, Applicant has not shown by a preponderance of the evidence that the proposed change 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. The Proposal for Decision entered in this matter on October 18, 2006, as modified by this Final Order, is hereby adopted by reference.

ORDER

Application number 76H-30009407 to change water rights numbers 76H-108772 and 76H-108773 by North Corporation 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 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 4th day of January, 2008.

/Original signed by David A Vogler/

David A. Vogler
Hearing Examiner
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Water Resources Division
P.O. 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 4th day of January, 2008 by first class United States mail.

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