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

5

IN THE MATTER OF APPLICATION NO.)	
76G 30010753 TO CHANGE WATER RIGHT)	
CLAIM NO. 76G 091377-00 BY JACK A &)	
JOHN C PERKINS)	

**PROPOSAL
FOR
DECISION**

6 Pursuant to the Montana Water Use Act and to the contested case provisions of the
7 Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-
8 307, a hearing was held on June 14, 2006, in Deer Lodge, Montana, to determine whether an
9 authorization to change a water right should be issued to John C Perkins, hereinafter referred to
10 as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-
11 402(2). Since the filing of this Application, Jack A. Perkins has become deceased. John C.
12 Perkins is successor in interest to Jack A. Perkins, and is the sole Applicant. All water rights
13 involved in the change application were listed in the required public notice.

14

APPEARANCES

15 Applicant John C Perkins appeared at the hearing by and through counsel, Mr. Terry
16 Schaplow. John Perkins, Randy Perkins, and Stan Fries testified for the Applicant.

17 Objectors Leland Lehnus (successor in interest to Objector Tom Beck); Joie Kramer;
18 Doug and Mary Tamcke; and 5 Rockin' MS Angus Ranch, Inc., appeared by and through
19 counsel John Bloomquist. Dan Kelly appeared for his Mother, Objector Hazel Kelly, and his
20 Mother-in-law, Objector Helen Schaffer. Shane Tamcke, Doug Tamcke, Joie Kramer, Tom
21 Beck, Ken Fleming, and Jason Morrison were called to testify by Mr. Bloomquist for the
22 Objectors.

23 Denise Biggar, Water Resources Specialist, Glasgow Water Resources Regional Office,
24 was called to testify by the Applicant.

1 **EXHIBITS**

2 Applicant offered twelve exhibits for the record. The Objector and Applicant together
3 offered Exhibit 1A. The Parties stipulated to the admission of Exhibits in a prehearing
4 conference. The Hearing Examiner notes that Applicant's Exhibit Nos. 2-9, and 11 are already a
5 part of the record. The Hearing Examiner accepted and admitted into evidence Applicant's
6 Exhibits 1-12, and Exhibit 1A.

7 **Applicant's Exhibit 1** is a copy of the Application consisting of five pages other than
8 page 2. The Hearing Examiner took official notice of missing copy of page two of the Exhibit.

9 **Applicant's Exhibit 2** is a two-page copy of the Tom Beck Objection.

10 **Applicant's Exhibit 3** is a three-page copy of the Kenneth and Shirley Fleming
11 Objection.

12 **Applicant's Exhibit 4** is a four-page copy of the Joie Kramer Objection.

13 **Applicant's Exhibit 5** is a three-page copy of the Doug and Mary Tamcke Objection.

14 **Applicant's Exhibit 6** is a three-page copy of the Jason Morrison and 5 Rockin MS
15 Angus Ranch Objection.

16 **Applicant's Exhibit 7** is an eight-page copy of the James and Hester Tarkalson
17 Objection.

18 **Applicant's Exhibit 8** is a two-page copy of the Helena Schaffer (Guardian for David
19 Murphy) Objection.

20 **Applicant's Exhibit 9** is a two-page copy of the Hazel Kelly Objection.

21 **Applicant's Exhibit 10** is a seven-page copy of the Environmental Assessment
22 prepared by Denise Biggar on November 12, 2004 for this Application.

23 **Applicant's Exhibit 11** is a one-page copy of the Ted Lewis Johnson Objection.

24 **Applicant's Exhibit 12** is an eight-page copy of a portion of the transcript of an October
25 21, 1991 hearing for Montana Water Court Case No. 76G-12 and 76G-W-005740-00.

1 2. Notice of the Application was properly made in the Montana Standard on November 29,
2 2004. (Department file)

3 3. The Environmental Assessment (EA), dated November 12, 2004, prepared by the
4 Department for this application was reviewed and is included in the record of this proceeding.
5 (Department file)

6 4. The noticed past use of the water under Water Right Claim No. 76G-091377 with a
7 priority date of April 30, 1866, from Dempsey Creek is diverted at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$
8 of Section 11, Township 6 North, Range 10 West, Powell County, Montana. The notice stated
9 that diversion for 202 acres of irrigation within the SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1 and the
10 NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, all in Township 6 North, Range 10 West, Powell County, Montana,
11 occurred from April 1 to November 4 at a rate of 1.29 cubic feet per second (cfs) up to 265 acre-
12 feet per year. (Department file, Public Notice)

13 5. Water Right Claim No. 76G-091377 filed by Randall (Randy) Perkins claimed 1.29 cfs of
14 Dempsey Creek water diverted at Dempsey Creek Ditch No. 5, for irrigation of 202 acres, and a
15 priority date of April 30, 1866. The decreed right is described as Right No. 5 (i.e., fifth in priority)
16 in case No. 1671, Deer Lodge County. The Claimant sold portions of the claimed place of use
17 on or before February 26, 2004, without water rights: 40 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1,
18 and 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, all in Township 6 North, Range 10 West. He sold
19 a portion of the claimed place of use with one-half of the water right (0.645 cfs): 40 acres in the
20 SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 10 West, to Objector Tarkalson. The
21 claimant, Randall Perkins, retained the remaining one-half of the water right (0.645 cfs) and 82
22 acres of the claimed place of use in the SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 10 West.
23 This Application deals only with the portion of Water Right Claim No. 76G 91377-00 (one-half of

1 1.29 cfs, or 0.645 cfs) retained by claimant Randall Perkins, which Applicant John C Perkins
2 now owns. (Department file, testimony of John Perkins)

3 6. Applicant proposes to change Applicant's portion of Water Right Claim No. 76G 91377-
4 00 or, 289.5 gallons per minute¹ (gpm) (0.645 cfs) up to 132.5 acre-feet, to an additional point
5 of diversion upstream on the North Fork off Dempsey Creek in the SE¼SE¼SW¼ of Section
6 29, Township 7 North, Range 10 West, Powell County, Montana, and to change the place of
7 use for the portion of the water right that Applicant still owns. One hundred sixty-two acres will
8 be removed from irrigation at the Applicant's old place of use (See Finding of Fact No. 5 above)
9 and the water will be used as supplemental water to irrigate 82 acres at the new place of use.
10 Specifically, the new place of use is 38 acres in the E½NE¼, 38 acres in the W½NE¼, and 6
11 acres in the E½NW¼, all in Section 33, Township 7 North, Range 10 West, Powell County,
12 Montana. The old point of diversion will continue to be used to irrigate the 40 acres sold to
13 Objector Tarkalson remaining at the old place of use. (Department file, Public Notice)

14 7. The entire decreed water right, after the proposed change, will irrigate a total of 122
15 acres². Applicant proposes to move his one-half (289.5 gpm or 26 miner's inches [mi]) of the
16 Water Right Claim No. 76G 091377-00 to the existing No. 1 Ditch and leave the remaining one-
17 half (he does not own) at the current point of diversion (No. 5 Ditch) and place of use.
18 (Department file, testimony of John Perkins)

19 8. The Application does not involve salvage water. (Department file)

¹ 0.645 cfs * 448.8 gpm / cfs = 289.5 gpm

² 122 acres includes 40 acres at the old place of use now owned by Tarkalson, and 82 acres at the proposed place of use owned by John Perkins.

1 9. The Hearing Examiner hereby takes official notice of page 2 of the Application, and of
2 *Kramer v Deer Lodge Farms, Co., et al.*, 116 Mont. 152, 151 P.2d 483. Parties may contest the
3 materials so noticed in exceptions to this Proposal. Mont. Admin. R. 36.12.221.

4 **Adverse Effect**

5 10. Historically 52 miner's inches (mi) has been diverted at the current point of diversion into
6 the Number 5 ditch in total under this claimed right. Applicant's evidence regarding adverse
7 affect of moving half of this right is: **1)** that 26 miner's inches of water is a "small amount of
8 water" and is estimated to be less than 5% of the total water diverted into the No. 5 Ditch by all
9 appropriators; **2)** that there are other rights flowing in the No. 5 Ditch which are held by other
10 appropriators; **3)** that there have been no complaints from other appropriators below the
11 previous sprinkler irrigation diversion (26 mi) from the No. 5 Ditch by Randy Perkins; **4)** that
12 Quinlan Slough is down-gradient from the historic place of use, but will not be affected "that
13 much;" or "some, but not that much;" **5)** Objector Kramer's rights will be impacted, but it "won't
14 be impacted that much," by moving 26 mi from the No. 5 Ditch and by moving a portion of the
15 place of use; **6)** any return flow that might occur from the proposed place of use "will take a lot
16 longer" to return to Dempsey Creek or Quinlan Slough. Thus, Applicant believes there won't be
17 much adverse affect by removing 26 mi from the No. 5 Ditch and moving his portion of the place
18 of use upstream. Neither Applicant nor Objectors provided reports or studies, other than
19 personal testimony of their witnesses, of how much of the decreed 26 mi was consumed at the
20 current place of use and what happened to any water that was not consumed (i.e., quantifying
21 historical consumption and return flow). Any irrigation water not consumed at the proposed
22 place of use will not in all likelihood return to Dempsey Creek. Applicant and his witness Randall
23 Perkins did not provide evidence or analysis, other than their own beliefs, of what the effects of
24 removing 26 mi from the No. 5 Ditch would be on the appropriators down-ditch in the No. 5

1 Ditch, on the effects on return flow to other Dempsey Creek or Quinlan Slough appropriators, or
2 by moving 26 mi upstream to the No. 1 Ditch on the North Fork of Dempsey Creek. All
3 witnesses are familiar with Dempsey Creek, area irrigation, and how the local water
4 commissioner regulates the water. The phrases “small amount of water, ”won’t be impacted that
5 much,” and “not affected that much” are phrases which are difficult to compare with other
6 evidence, and I struggle to give them the slightest weight. (Department file, testimony of John
7 Perkins, Randall Perkins, Stan Fries, Ken Fleming, Tom Beck)

8 11. Applicant argues that moving 26 mi upstream will decrease the shrinkage³ in Dempsey
9 Creek because less water will be in the stream channel; thus, less water will seep or evaporate
10 from the stream channel. Applicant did not identify, with other than subjective terms, the
11 consumptive use of the historic use of the water right being changed or the reduction in
12 shrinkage that may occur, and did not support these arguments with numerical or other
13 evidence. (Department file, testimony of John Perkins)

14 12. The flow rate being changed (26 mi) is a lot of water to the Objectors. Dempsey Creek is
15 water short. The Water Commissioner can measure 12.5 mi of water at the measuring boxes on
16 Dempsey Creek; thus, the amount of water proposed for change is an amount that could be
17 measured. (Testimony of Stan Fries, Shane Tamcke, Tom Beck)

18 13. Applicant’s witness opined that the historic flood irrigation use contributed to Quinlan
19 Slough and that Quinlan Slough contributes to Dempsey Creek above the No. 6 water right.
20 And, the witness believes that the historic sprinkler use would not contribute as much as the
21 historic flood irrigation did. Objectors contend that if the place of use is moved, there will be less
22 “return flow” (surface and subsurface flows as used here) to Quinlan Slough. Quinlan Slough is
23 a tributary of Dempsey Creek. There are water rights downstream of where Quinlan Slough

³ Shrinkage as used in this proceeding is the water in a stream lost to seepage and evaporation.

1 joins Dempsey Creek. Applicant did not prove that the proposed move will not decrease return
2 flows to Quinlan Slough and Dempsey Creek. (Document Officially Noticed: *Kramer v Deer*
3 *Lodge Farms, Co., et al.*, 116 Mont. 152, 151 P.2d 483 ; testimony of Randal Perkins, Joie
4 Kramer)

5 14. The No. 5 Ditch is downstream of the point of addition of “trade” water or “exchange”
6 water from another source which is added to Dempsey Creek. This exchange water has
7 historically been used to supply the No. 5 Ditch in exchange for upstream diversion of Dempsey
8 Creek by Objectors 5 Rockin’ MS and Objector Tamcke. It is this exchange water that makes
9 the No. 5 Ditch. If a portion of the No. 5 right is moved upstream of the point of addition of the
10 exchange water, the exchange water is no longer capable to make that portion of the No. 5 right
11 now moved upstream. (Testimony of Shane Tamcke, Doug Tamcke)

12 15. Moving the No. 5 right upstream of Objectors Tamcke and Objector Rockin’ 5 MS will
13 create situations where half of the No. 5 right, 26 mi (proposed change), will be taking water
14 upstream of the “exchange water” (see Finding of Fact No. 14 above). Water which now flows
15 downstream to the No. 8 right (located below Tamcke & Rockin’ 5 MS No. 12 right points of
16 diversion, and above historic No. 5 right point of diversion) and others, will now be diverted by
17 No. 5 at the proposed upstream point of diversion. Now the No. 8 right may call earlier for water
18 previously provided to the No. 5 right by the exchange water. (i.e., call upstream to Objector
19 Tamcke’s & Objector Rockin’ 5 MS’s No. 17 and/or No. 12 rights which are junior and upstream
20 of the No. 8 right). Even though Tamcke’s upstream North Fork of Dempsey Creek ditch is still
21 washed out, Rockin’ 5 MS’s diversion is still in use. An earlier call on the source results in an
22 effect that is adverse to these appropriators because the time water is available to them will be
23 reduced. (Department file, testimony of Shane Tamcke,)

1 **Adequacy of Appropriation Works**

2 16. The proposed additional point of diversion for this change (to No. 1 Ditch) is currently in
3 existence. The No. 1 Ditch below the headgate currently carries 200 mi, and can handle an
4 additional 26 mi. Objectors presented no evidence opposing Applicant's evidence on the
5 adequacy of the appropriation works (carrying capacity of the No. 1 Ditch). The proposed
6 means of diversion is adequate. (Department file, testimony of John Perkins)

7 **Beneficial Use**

8 17. Applicant will use the water at the proposed place of use to supplement the current
9 water rights used for the irrigation of alfalfa and oats in the existing field. The proposed irrigation
10 use of water is a beneficial use of water. (Department file, testimony of John Perkins)

11 **Possessory Interest**

12 18. Applicant has proven he has a possessory interest, or the written consent of the person
13 with the possessory interest, in the property where the water is to be put to beneficial use.
14 (Department file)

15 **Water Quality Issues**

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

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

21 **CONCLUSIONS OF LAW**

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

1 2. The Department shall approve a change in appropriation right if the appropriator proves
2 by a preponderance of evidence the proposed change in appropriation right will not adversely
3 affect the use of the existing water rights of other persons or other perfected or planned uses or
4 developments for which a permit or certificate has been issued or for which a state water
5 reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §
6 85-2-436, a temporary change authorization for instream use to benefit the fishery resource
7 pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439
8 when authorization does not require appropriation works, the proposed means of diversion,
9 construction and operation of the appropriation works are adequate; the proposed use of water
10 is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or
11 a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann.
12 § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory
13 interest, or the written consent of the person with the possessory interest, in the property where
14 the water is to be put to beneficial use; if the change in appropriation right involves salvaged
15 water, the proposed water-saving methods will salvage at least the amount of water asserted by
16 the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not
17 be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of
18 a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

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

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

6 85-2-402. Changes in appropriation rights. (1) The right to make a change
7 subject to the provisions of this section in an existing water right, a permit, or a state
8 water reservation is recognized and confirmed. In a change proceeding under this
9 section, there is no presumption that an applicant for a change in appropriation right
10 cannot establish lack of adverse effect prior to the adjudication of other rights in the
11 source of supply pursuant to this chapter. An appropriator may not make a change in an
12 appropriation right except, as permitted under this section, by applying for and receiving
13 the approval of the department or, if applicable, of the legislature. An applicant shall
14 submit a correct and complete application.

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

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

22

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

29
30 (italics added).
31

32 Montana's change statute simply codifies western water law.⁴ One commentator
33 describes the general requirements in change proceedings as follows:

⁴ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are
virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition
requesting permission to make such a change The change ... may be allowed provided that

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

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

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

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

25 (italics added).
26

27 See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at
28 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any
29 increase in the quantity of water diverted under the original exercise of the right; in no event
30 would an increase in the appropriated water supply be authorized by virtue of a change in point
31 of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and
32 Water Resources, at § 5.17[5] (1988)(*a water holder can only transfer the amount that he has*

the quantity of water transferred ... shall not exceed the amount of water historically diverted
under the existing use, nor increase the historic rate of diversion under the existing use, nor
increase the historic amount consumptively used under the existing use, nor decrease the historic
amount of return flow, nor in any manner injure other existing lawful appropriators.

1 *historically put to beneficial use and consumed* – the increment diverted but not consumed must
2 be left in the stream to protect junior appropriators); Robert E. Beck, 2 Water and Water Rights
3 at § 16.02(b) at 271 (“The issues of waste and historic use, as well as misuse, nonuse, and
4 abandonment, may be properly be considered by the administrative official or water court when
5 acting on a reallocation application,” citing Basin Elec. Power Coop. v. State Board of Control,
6 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a
7 reallocation, it is appropriate to consider abandonment of the water right).

8 The requirements of Montana’s change statute have been litigated and upheld in In re
9 Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d
10 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before
11 the Department and courts, and the applicant failed to meet the burden of proving that the
12 change would not adversely affect objectors’ rights; the application was properly denied
13 because the evidence in the record did not sustain a conclusion of no adverse effect and
14 because it could not be concluded from the record that the means of diversion and operation
15 were adequate).

16 Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code
17 Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the
18 change adversely affected their water right, although the law was the same in that an adverse
19 effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek
20 Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605
21 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson
22 v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point
23 upstream of the defendants because of the injury resulting to the defendants); McIntosh v.
24 Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of
25 diversion downstream, so long as he installed measuring devices to ensure that he took no

1 more than would have been available at his original point of diversion); Head v. Hale, 38 Mont.
2 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining
3 purposes cannot so change its use as to deprive lower appropriators of their rights, already
4 acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959
5 (1896)(after the defendant used his water right for placer mining purposes the water was turned
6 into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then
7 changed the place of use of his water right, resulting in the water no longer being returned to the
8 gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his
9 subsequent right).

10 The DNRC in administrative rulings has held that a water right in a change proceeding is
11 defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of
12 Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer,
13 December 13, 1991, Final Order ; In the Matter of Application for Change Authorization
14 No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

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

17
18 In a reallocation proceeding, both the actual historic consumptive use and the
19 expected consumptive use resulting from the reallocation are estimated. Such estimates
20 are usually made by civil engineers. With respect to a reallocation, the engineer
21 conducts an investigation to determine the historic diversions and the historic
22 consumptive use of the water subject to reallocation. This investigation involves an
23 examination of historic use over a period that may range from ten years to several
24 decades, depending on the value of the water right being reallocated.

25

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

30
31 2 Water and Water Rights at § 16.02(b) at 279-80.

1 5. The Applicant has not proven by a preponderance of evidence that the use of existing
2 water rights of other persons or other perfected or planned uses or developments for which a
3 permit or certificate has been issued or for which a state water reservation has been issued will
4 not be adversely affected. No party provided a quantitative or professional analysis of the
5 effects of moving Applicant's portion of the historic place of use, and of moving 26 mi upstream
6 to an additional point of diversion. Applicant has the burden to show there will be no adverse
7 effect. Applicant provided evidence of prior use in hearing testimony. Applicant's opinion is that
8 moving the historic amount diverted (26 mi) of water upstream to the No. 1 Ditch will reduce
9 shrinkage in Dempsey Creek between the existing and proposed points of diversion, and will not
10 have much adverse affect on down ditch appropriators in the current No. 5 Ditch, and that
11 moving the historical place of use will not have much affect on Quinlan Slough. Applicant
12 proposes to irrigate 82 acres at the new place of use instead of 162 acres at the current place of
13 use, but proposes to move the entire flow rate historically used at the current place of use for
14 the 162 acres. Applicant has experience with the source and irrigation, but did not present his
15 adverse affect analysis in such a manner that it appeared as a well reasoned and thought out
16 analysis. Instead the analysis seemed to rely upon the personal belief that 26 mi is a small
17 amount of water, so affects should be small. Applicant did not quantify historical consumptive
18 use or effect on return flows to Quinlan Slough or Dempsey Creek. Applicant's testimony admits
19 that there will be some effect as a result of the proposed change. Thus, the extent of the effects
20 of the proposed change remain unknown. Mont. Code Ann. § 85-2-402(2)(a). See Finding of
21 Fact Nos. 10, 11, 12, 13, 14.

22 6. The Applicant has proven by a preponderance of evidence that the proposed means of
23 diversion, construction, and operation of the appropriation works are adequate. Mont. Code
24 Ann. § 85-2-402(2)(b). See Finding of Fact No. 16.

1 7. The Applicant has proven by a preponderance of evidence that the quantity of water
2 proposed to be used is the minimum necessary for the proposed beneficial use. Mont. Code
3 Ann. § 85-2-402(2)(c). See Finding of Fact No. 17.

4 8. The Applicant has proven by a preponderance of evidence a possessory interest in the
5 property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See,
6 Finding of Fact No. 18.

7 9. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See
8 Finding of Fact No. 8.

9 10. No objection was raised as to the issue of water quality of a prior appropriator being
10 adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of
11 a permit. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of Fact No. 19.

12 11. The Department shall approve a change in appropriation right if the appropriator proves
13 by a preponderance of evidence the criteria are met. Applicant has not proven all the criteria are
14 met. Mont. Code Ann. § 85-2-402(2). See Conclusion of Law No. 5 above.

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

17 **PROPOSED ORDER**

18 Application to Change A Water Right No. 76G 30010753 by John C Perkins is **DENIED**

19 **NOTICE**

20 This Proposal for Decision may be adopted as the Department's final decision unless
21 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
22 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
23 argument. Exceptions and briefs, and requests for oral argument must be filed with the
24 Department by **March 6, 2007**, or postmarked by the same date, and copies mailed by that

1 same date to all parties.

2 Parties may file responses and response briefs to any exception filed by another party.
3 The responses and response briefs must be filed with the Department by **March 16, 2007**, or
4 postmarked by the same date, and copies must be mailed by that same date to all parties. No
5 new evidence will be considered.

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

8 Dated this 14th day of February 2007.

9

10

/ Original Signed By Charles F Brasen /

11

Charles F Brasen

12

Hearing Officer

13

Water Resources Division

14

Department of Natural Resources and
Conservation

15

PO Box 201601

16

Helena, Montana 59620-1601

17

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of PROPOSAL FOR DECISION was served upon all parties listed below on this 14th day of February 2007 by First-Class United States mail.

TERRY F SCHAPLOW
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1700 W KOCH STE 11
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HAZEL E KELLEY
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995 YELLOWSTONE TRAIL
DEER LODGE MT 59722

CC:
WATER RESOURCES REGIONAL OFFICE
PO BOX 201601
HELENA MT 59620-1601

/ Original Signed By Jamie Price /

Jamie Price
Hearing Unit
(406) 444-6615

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

**IN THE MATTER OF APPLICATION NO. 76G)
30010753 TO CHANGE WATER RIGHT CLAIM)
NO. 76G 091377-00 BY JACK A & JOHN C)
PERKINS)**

FINAL ORDER

The proposal for decision in this matter was entered on February 14, 2007. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

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

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

ORDER

Application to Change A Water Right No. 76G 30010753 by John C Perkins 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 21st day of March, 2007.

/Original signed by John E Tubbs/

John E Tubbs, Administrator
Water Resources Division
Department of Natural Resources and
Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 22nd day of March 2007 by First-Class United States mail.

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/Original signed by Jamie Price/

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