

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

**IN THE MATTER OF APPLICATION NO. 76M-)
30028036 TO CHANGE WATER RIGHT NOS.)
76M-45464-00 AND 76M-99081-00 BY)
CLAYTON T AND DAWN S CHRISTIAN)**

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Parts 1 and 4, Montana Code Annotated (MCA)), the Montana Administrative Procedure Act (MAPA) (Title 2, Chapter 4, Part 6, MCA), and the Administrative Rules of Montana (ARM) (Title 36, Chapter 12, Sub-Chapter 2), and after notice required by § 85-2-307 MCA, a hearing was held on October 23, 2008 in Missoula, Montana, to determine whether an authorization to change appropriation water right should be issued to Clayton T. and Dawn S. Christian, hereinafter referred to as "Applicant," in response to the above-titled application.

APPEARANCES

Applicant appeared by and through counsel, Suzanne Taylor. Clayton T. Christian; Lyle Grimes, Messiah Lutheran Church; Robert (Bob) Boller, Messiah Lutheran Church; and Karl Uhlig, Water Resource Specialist, PBS&J; testified for the Applicant.

Objector David Klapwyk appeared by and through counsel, John J. Ferguson. Dennis L. Sain and Anna D. Sain testified for Objector Klapwyk.

Objectors Dennis L. and Anna D. Sain appeared *pro se*. Desmond McDonald testified for Objectors Sains.

PRELIMINARY MATTERS

Immediately prior to opening the hearing, I ruled on several pre-hearing motions. Near the close of the hearing, I postponed ruling on an objection by Applicant to the introduction of certain evidence by Objectors Sains. Argument on this objection was allowed to be included as part of written closing briefs filed by November 24, 2008. All parties filed timely written closing briefs that are included as part of the record. For the ease in defining the record, my rulings on each of these motions and objections were and are as follows:

Pre-Hearing Motions

- 1) **Request for Subpoenas:** A written request for subpoenas of three witnesses from Applicant's counsel was received, but owing to the fact that there was only three days between the time that I received that request and the day of the hearing, I **denied** that request in writing. These witnesses were included in Applicant's disclosure and could have testified voluntarily.
- 2) **Karl Uhlig's qualification as expert witness:** As we discussed during the final prehearing conference, the parties **agreed** to accept Mr. Uhlig as an expert in his area of expertise, but objections were to be allowed in the event that his testimony strayed outside that expertise.
- 3) **Judicial Notice of Public Records:** Applicant requested that I allow admission of certain facts into the record from public records by judicial notice despite the deadline for discovery and disclosure having passed. **I take judicial notice** of the 15 items presented in Applicant's "Request for Judicial Notice of Facts in the Record," dated October 16, 2008. (Department File)
- 4) **Motion to Dismiss Klapwyk Objection:** This motion was **denied** at the pre-hearing conference. I am satisfied that Objector Klapwyk has sufficient standing to make a valid objection in accordance with § 85-2-308(3) MCA, despite issues as to the ownership records of Water Right No. 76M-149111.
- 5) **Pre-Filed Motion to Exclude for Failure to Comply with Discovery and Disclosure:** Ms. Taylor submitted a motion supported by brief to exclude several items submitted by both Objectors as part of Discovery and Disclosure in this matter, and Mr. Ferguson submitted a response brief in opposition to the motion. The items specifically requested to be excluded were:
 - i. Klapwyk and Sain Discovery Responses because they were filed with the Hearing Examiner. This motion was **denied**.
 - ii. Klapwyk references to trespass and nuisance. This motion was **denied**.
 - iii. Klapwyk disclosure of water rights. This motion was **denied**.
 - iv. Objector witnesses who do not now or never had water rights on Cobban Ditch. This motion was **denied**.
 - v. Sain exhibits which have never been provided to Applicant. This motion is **denied**. I agreed to consider objections on any such individual exhibits or testimony as it was introduced if it lacked probative value, it was

irrelevant, immaterial or unduly repetitious, or its admission would be unfair surprise.

I denied Applicant's Motion to Exclude items i, ii, iii, iv and v because this proceeding was not operating under the formal rules of evidence, and in this circumstance I generally prefer to err on the side of having too much information in making this decision as opposed to not enough. All parties were thus granted considerable leeway in presenting evidence that had not been fully disclosed by the pre-hearing deadline if that information had been at least accurately summarized in disclosure or it was provided at least a few days prior to the hearing. The parties were informed that the weight given the evidence so admitted might not be great. One of the fundamental purposes of the Department's contested case procedural rules is to prevent unfair surprise. Parties were warned that I could sustain subsequent objections to the introduction of specific exhibits or testimony that lacked probative value or that might be considered surprise because it constituted material facts or expert analysis for which all parties had not had a reasonable opportunity to review and prepare a response.

Objection at Hearing

Applicant Objection to Objector Exhibit OS-9: At the hearing, Objectors Sains moved for admission of a fifteen-page document titled "October 22, 2008 Flow Measurements, Cobban Ditch" by Howard Newman, Hydrogeologist, which was labeled Exhibit OS-9. Mr. Newman was not present at the hearing prior to the record being closed. Applicant objected to admission of Exhibit OS-9 for failing to disclose that information and provide it to all parties prior to the hearing. This objection is **sustained** because this document purports to provide expert information and material facts that the Applicant and their expert did not have an opportunity to review prior to the hearing and could not meaningfully cross-examine. As such, its admission would constitute unfair surprise. (See *Final Order In the Matter of Application for Beneficial Water Use Permit No. 41H-115487-00 by PC Development*). Exhibit OS-9 is not included as part of the official record of this proceeding upon which I make this proposed decision.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits were admitted into the record to the extent noted below. Applicants prefiled prepared direct expert testimony. Except when evidentiary objections are sustained, prefiled exhibits (filed with direct testimony) are part of the record.

The Applicant offered and the Hearing Examiner admitted the following testimony and exhibits:

Pre-Filed Direct Testimony of Karl Uhlig

Exhibit A-1 – two-page copy of DNRC Acknowledgement of Water Ownership Update with Christian’s ownership of 76M-54564 and 76M-99081

Exhibit A-2 – thirteen-page copy of Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985)

Exhibit A-3 – three-page Corporate documents regarding Rattlesnake Valley Irrigation Company

Exhibit A-4 – two-page Curriculum Vitae of Karl Uhlig (pre-filed testimony)

Exhibit A-5 – five-pages that consists of the Missoula County Water Resource Survey for the properties involved in this case, including aerial photos

Exhibit A-6 – one-page Quitclaim Deed of water rights from Messiah Lutheran Church to Christians dated May 11, 2006

Exhibit A-7 – twenty-six pages of DNRC claim files 76M-116805 and 76M-116804

Exhibit A-8– four-page copy of DNRC water right transfer certificate form for claim file 76M-149111

Exhibit A-10– one-page map entitled “Christian Project Map”, created by PBS&J

Exhibit A-11– two-page copy of job estimate to have pump installed from AG Sales

Exhibit A-12– one-page memorandum from Suzanne Taylor, Attorney to Clayton Christian re: phone call with Mr. Neil Dahlstrom, dated 10/10/2008

Objector Klapwyk offered and the Hearing Examiner admitted the following exhibits:

Exhibit O-KLP1 – one-page consisting of October 9, 2008 photograph taken by John Ferguson depicting water from the Cobban Ditch pooling on David Klapwyk’s property

Exhibit O-KLP2 – one-page consisting of October 9, 2008 photograph taken by John Ferguson depicting water in the Cobban Ditch on David Klapwyk’s property

Exhibit O-KLP3 – one-page consisting of October 9, 2008 photograph taken by John Ferguson depicting water from the Cobban Ditch pooling on David Klapwyk’s property

Exhibit O-KLP4 – one-page consisting of October 9, 2008 photograph taken by John Ferguson depicting water in the Cobban Ditch on David Klapwyk’s property

Exhibit O-KLP5 – one-page consisting of April 20, 2006 Aerial photograph of David Klapwyk property, with numbers 1 through 4 indicating the location of the photographs depicted in Exhibits O-KLP 1-4

Objectors Sains offered and the Hearing Examiner admitted the following exhibits:

Exhibit OS-1 – one-page letter with 7 pages of copies of warranty deeds titled “Turner Land Sales” dated October 23, 2008

Exhibit OS-2 -- one-page letter with one page copy of warranty deed titled “Messiah Lutheran Church water rights history” dated October 23, 2008

Exhibit OS-3 – one-page letter titled “Christian actions #76M-45464 & #76M-99081-00” dated October 23, 2008

Exhibit OS-4 – one-page letter titled “2 hp electrical pump and control panel” dated October 23, 2008

Exhibit OS-5 – two-page letter with 5 pages of attached maps and photographs titled “Questions Needing Answers” dated October 23, 2008

Exhibit OS-6 – two-page letter with 7 pages of attached documents titled “Impact Our Water Rights” dated October 23, 2008

Exhibit OS-7 – two-page letter with 2 pages of attached documents titled “Alas, Sain’s Conditions to Christian” dated October 23, 2008

Exhibit OS-8 – one undated DVD recording, titled “Cobban Ditch – Church Section”

Objectors Sains offered and I denied admission and sustained Applicant’s objection to the following exhibit:

Exhibit OS-9 – fifteen-page document titled “October 22, 2008 Flow Measurements, Cobban Ditch” by Howard Newman, Hydrogeologist

Having reviewed the record in this matter and being fully advised in the premises, I hereby make the following:

FINDINGS OF FACT

General

1. Application No. 76M-30028036 to Change Water Right Nos. 76M-45464-00 and 76M-99081-00, in the name of and signed by Applicants was filed with the Department on May 30, 2007. (Department file)
2. The Environmental Assessment prepared by the Department for this Application and dated October 3, 2007, was reviewed and is included in the record of this proceeding. The EA concludes that no significant environmental impacts were identified and that no EIS is required. (Department file)

3. A public notice describing facts pertinent to this Application was published in the Missoulian, a newspaper of general circulation, on November 7, 2007, and was mailed to persons listed in the Department file. (Department file; § 85-2-307, MCA)

4. In the Application and as noticed, the Applicants seek to change the place of use for a portion of two water rights (half of each of Water Right Nos. 76M-45464-00 and 76M-99081-00). Both water rights are diverted from Rattlesnake Creek through the Cobban Ditch and have priority dates of September 1, 1895. As claimed in the Water Court's Temporary Preliminary Decree for Basin 76M, these water rights are for irrigation of two adjacent parcels now owned exclusively by the Messiah Lutheran Church (Church). Applicants acquired an undivided one-half interest to both rights by quit claim deed from the Church. (Exhibit A-6, Department file). Applicant seeks to combine one-half the Water Court decreed flow rate of Water Right No. 76M-45464 (60 gallons per minute (gpm), half of which is 30 gpm) with one-half the Water Court decreed flow rate of Water Right No. 76M-99081 (0.13 cfs, half of which is 29.2, or as hereafter rounded, 30 gpm) for irrigation of one acre on a parcel of Applicant's land adjoining the Church property to the north. The Applicant states that the Church would relinquish the right to irrigate one-half of the historically irrigated area of both its adjoining parcels under each water right. This would mean the removal of irrigation from the Cobban Ditch of 0.22 acre on the west parcel that the Church occupies (referred to as the Church parcel), and 0.875 acre on the east parcel owned by the Church (referred to as the parsonage parcel). The point of diversion from Rattlesnake Creek would remain the same, although there would be an additional secondary point of diversion from the Cobban Ditch upditch of the historical secondary diversions from the Cobban Ditch by the Church. As described in the Public Notice, Applicant intends to divert 60 gpm) and a volume of 2.2 acre-feet per year for irrigation of 1 acre on the applicant's property, which will be offset by the reduction of the same flow rate and volume consumed through elimination of the irrigation of a total of 1.095 acres on the Church's two properties. Applicant's water use estimates for full service sprinkler irrigation of 1 acre of turf grasses are derived from the NRCS Montana Irrigation Guide in Climatic Area 3. (Application Appendix D and Public Notice, Department file). There is no evidence in the record that specifically supports Applicant's contention that the historic irrigation provided a full service supply to the place of use, nor was there any contradiction of this assumption by Objectors.

5. Applicant stated an intent to size it's diversion from the ditch (a pump) so that it would divert only 50 gpm, and leave the remainder of its combined flow rate to both water rights (9.2 or 10 gpm, depending on rounding and rate conversion methods) in the Cobban Ditch. The intent is to account for Applicant's share of carriage water and what would have been the ditch loss

between Applicant's proposed new secondary point of diversion and the down-ditch historic secondary point of diversions of the Church and parsonage properties. Applicant's proposed pumpsite from the Cobban Ditch has not been exactly located but based on the map provided by Applicant, will be less than 300 yards up-ditch of the Church's existing secondary diversion (Letter from Karl Uhlig to Patrick J. Ryan dated August 30, 2007, Exhibit A-10, Department file)

6. Two timely objections to the Application determined by the Department to be valid were received. Dennis L. and Anna M. Sain (Objector Sains) objected on the basis of adverse effect to their water rights (Statements of Claim 76M-116804 and 76M-116805) downstream on the Cobban Ditch. Their concern was that an additional use of water upstream is really an expansion of the water rights proposed for change and that the additional diversion out of the ditch would further reduce the water available for their diversion from the Ditch. The second objection was filed by David Klapwyk (Objector Klapwyk). Objector Klapwyk owns property at the end of the Cobban Ditch that he claims is served by a water right from the Ditch (76M-149111) that is listed in DNRC records as being owned by the City of Missoula. Objector Klapwyk claims that the DNRC ownership record for this water right is erroneous, and that this water right number was incorrectly included on a water right ownership update form involving a different property transaction between himself and the City of Missoula that did not include the Cobban Ditch water right. Objector Klapwyk is also concerned that the diversion from the Cobban Ditch up-ditch for irrigation of an acre of the Christian parcel will adversely effect the amount of water available in the Ditch for use of this water right. (Department file). Objectors did not raise the issue of return flows from the historic use proposed to be changed, and no analysis of the fate of return flows in terms of amount, timing or location was provided by the Applicant.

Historic Use

Water Right Claim No. 76M-45464

7. The 1960 Missoula County Water Resource Survey (WRS) supports that the place of use listed for Water Right Claim No. 76M-45464 seeking to be changed by Applicant was historically irrigated. This is the water right that covers the western parcel owned by the Church (Church parcel). The WRS was prepared by the State Engineer's Office and based on its interpretation of August 11, 1955 aerial photographs. (Exhibit A-5)

8. Up until sometime in the 1970s, the Cobban Ditch was one of several ditches used to convey stored water from three dams on natural lakes in the Upper Rattlesnake for the Rattlesnake Valley Irrigation Co. (RVIC). The RVIC was disincorporated and the dams on the

upper lakes washed out. The RVIC has been defunct for at least 30 years, was described in the 1960 Missoula County Water Resources Survey as “inactive,” and no party to this case is claiming this historical water use. It is unclear whether the private irrigation depicted in the WRS was irrigated under the decreed water rights at issue in this case or under the water rights of the RVIC at that time. (Exhibit A-3, Exhibit OS-6)

9. Water Right No. 76M-45464 was the subject of Montana Water Court Case 76M-7. Objectors Sains and Klapwyk were parties to that case. Objector Sains argued before the Water Court, and presented evidence again in this proceeding, regarding a previous owner’s intent to sever the water right from this parcel in the 1960s. (Exhibit OS-1). After reviewing the property transfer records on file with Missoula County, the Water Court ruled that the water right remained appurtenant to the Church property. The Water Court’s decision in this matter is based on the fact that a deed was filed for this property that was silent as to the transfer of water rights, and a subsequent filing was made by the previous seller that severed the water rights. The Court’s Order Adopting the Master’s Report was filed on February 23, 1995. (Master’s Report and Order Adopting Master’s Report, Case 76M-7, Appendix C, Application, Department file)

10. The Church’s historic beneficial use of Water Right No. 76M-45464 was described in the testimony of the water users at the hearing. The Church was built on this parcel in the 1970s, and there was a large addition built in 1997, along with the expansion of the parking lot in 1998. Robert Boller is a Trustee for the Church and testified on behalf of the Applicant as the person most familiar with the irrigation practices of the Church over the last ten years. Mr. Boller testified that since 1998, when an underground sprinkler irrigation system was installed on the Church parcel, most of the irrigation of that parcel has been done with that system. The water source for that system is a well. Water use on the Church parcel from the Cobban Ditch under Water Right No. 76M-45464 has been limited to the irrigation of a few trees, a strip of land about 50-100 feet wide along the west side of the Ditch, and small areas not reached by the underground sprinkler system but only in dry years. (Boller testimony at Part 5)

11. In the 1995 Water Court Case 76M-7, the Water Court revised the flow rate for Water Right No. 76M-45464 based on evidence that the Church was actually only diverting 20 gpm from the Cobban Ditch at the secondary point of diversion on this parcel. It assigned a flow rate for the right of 60 gpm measured at the Cobban Ditch headgate to account for ditch loss. The Water Court also decided it was necessary for administration purposes to assign an annual volume of 1.67 acre-feet for this water right (Master’s Report in Case 76M-7, p 15-16). The

irrigated acreage was reduced from 1 acre to 0.44 acres, and the priority date was changed to September 1, 1895, which is now the same as most of the other water rights from the Cobban Ditch.

12. I find that the water right is as described in Water Court Case 76M-7 for purposes of authorizing a change in the water right such that no expansion of the historic use will occur. (FOF 11). This includes, within the 60 gpm flow rate assigned to this water right, 40 gpm attributed to ditch loss or carriage water and 20 gpm diverted at the secondary point of diversion from the Cobban Ditch.

Water Right Claim No. 76M-99081

13. Water Right No. 76M-99081 was also included in the Temporary Preliminary Decree for Basin 76M, but received no objections before the Water Court at this stage of the Adjudication. This water right was filed and claimed for irrigation of the parsonage property, a 1.75 acre parcel that adjoins the Church parcel to the west that during the claim filing period was owned by Neil Dahlstrom, and was purchased by the Church in 2004. The water right is claimed for 0.13 cfs (58.34, or rounded, 60 gpm) to irrigate the entire 1.75 acre parcel (DNRC Water Rights Records Database and Montana Cadastral Project map, Department File). The flow rate is to be measured at the Cobban Ditch headgate, and there is no information in the record regarding the portion of that flow rate that is attributed to ditch loss. However, it is the same ditch reach as was considered by the Water Court in Case 76M-7. The result of that case was that the ditch loss to this point was about 2/3 of the total diverted flow. Absent any other quantitative efforts to estimate ditch loss in the record, I find this the best available information on this question. The amount available from the ditch at this location to irrigate the parsonage parcel would only be 1/3 of that claimed flow rate, or rounded off, 20 gpm. (FOF 12)

14. The WRS does not unequivocally support the claim that 100% of the decreed place of use for this water right was irrigated. I find that the original hand-drawn mylar map and the coloring on the 1955 aerial photograph for the 1960 WRS indicate that the entire place of use was irrigated, but for some reason the final published map for the WRS did not include the southern half of that place of use as irrigated (Exhibit A-5 and Application), and the northern half includes the homestead building footprint.

15. Mr. Boller testified based on his experience with the property that the parsonage property covered by this water right is primarily irrigated from the Cobban Ditch by a pump serving six hoses with sprinklers, and not all of these hoses are used at the same time. He also testified that the irrigation involved pumping for 24 hours and then not using the pump for a day

or two. He stated that the southern one-quarter of this parcel is not being irrigated (Boller Testimony at Part 5). This right as included in the Temporary Preliminary Decree did not include a volume for administration purposes, as the Water Court found necessary for Water Right 76M-45464 in Case 76M-7.

16. Exhibit A-12, prepared by Counsel for Applicant, is a summary of a phone conversation between said Counsel and Mr. Neil Dahlstrom dated October 10, 2008. Mr. Dahlstrom owned the parsonage property served by this water right from 1946 to 2004. He said he used a pump in the Cobban Ditch that served 5 sprinkler heads to irrigate 1.5 acres of the 1.75 acre parcel (Exhibit A-12). Upon reviewing Exhibit A-12, I determined that I may have erred in accepting this exhibit as a statement by counsel. Statements of counsel should not be accepted as evidence. (*State v. Stuart*, 2001 MT 178 ¶ 22, 306 Mont. 189 ¶ 22, 31 P.3d 353 ¶ 22). In this case, since this written statement was accepted but the evidence was not subject to cross-examination, I shall regard it as hearsay without giving it much weight.

17. I find that the historical use under this water right on the parsonage property is limited to withdrawing 20 gpm at the secondary point of diversion from the Cobban Ditch for 1.3125 acres. The 1.3125 acres is based on Mr. Boller's testimony of $\frac{3}{4}$ of the 1.75 acre parcel having been historically irrigated. These are the amounts that can be changed without expanding the water right based on the evidence in the record, and half of this water right, after ditch loss and as measured at the secondary POD, is 10 gpm to irrigate 0.656 acres. (FOF 13-16)

Historic Use—Cobban Ditch

18. All of the existing legal water uses from the Cobban Ditch occur between three-quarters and one mile south from the headgate on Rattlesnake Creek. Cobban Ditch splits into two branches on Applicant's property; one branch veering to the southwest and the other directly south. Below the split, the east branch of the ditch extends a little over another one-quarter mile and the west branch extends less than one-quarter mile. The split in the ditch occurs on the Applicant's property very near the Applicant's proposed pumpsite and if granted, the change would allow the Applicant to become the uppermost water user on the ditch. The Church and parsonage properties are served next on the eastern branch of the ditch, which then proceeds down to Objectors Sains and terminates on the property of Objector Klapwyk. Desmond McDonald is the only active user on the western branch of the Cobban Ditch, although there is another claimed water right in the name of Devoe that could only be served by the western branch of the ditch. Mr. McDonald testified that where the ditch splits, approximately $\frac{2}{5}$ of the

flow goes down the western branch and 3/5 goes down the eastern branch (McDonald Testimony at Part 12). Table 1 depicts all the known water right claims that utilize the Cobban Ditch. (DNRC Water Rights Records Database)

Table 1. COBBAN DITCH WATER RIGHTS[1]

| WR Number | Owner | Purpose | Branch | Flow (gpm) | Acres |
|---------------|--|------------|--------|------------|-------|
| 76M 9815 | Devoe | Irrigation | West | 94.25 | 8.75 |
| 76M 12687 | McDonald | Irrigation | West | 13.5 | 1.33 |
| 76M 45464 | Messiah Lutheran Church (Church Property) | Irrigation | East | 60.0 | 0.44 |
| 76M 99081 | Messiah Lutheran Church (Parsonage Property) | Irrigation | East | 58.36 | 1.75 |
| 76M 116761 | Blair | Irrigation | East | 22.44 | 1.7 |
| 76M 116804 | Sain | Stock | East | | |
| 76M 116805 | Sain | Irrigation | East | 278.26 | 6 |
| 76M 149111 | Missoula (Klapwyk) | Irrigation | East | 16.8 | 1 |
| 76M 149116 | Missoula | Stock | East | | |
| 76M 149672 | Kelley | Irrigation | East | 162.0 | 1 |
| Totals | | | | 705.61 | 21.97 |

19. Many of the water rights that use the Cobban Ditch do not appear to have claimed carriage water as part of their flow rates, as those claimed flows are supposed to be measured at the Cobban Ditch headgate. Rather, many of these water rights appear to claim the amount of flow they require at their secondary points of diversion from the Ditch.[2]

20. The delivery of water from Rattlesnake Creek through the Cobban Ditch involves considerable ditch loss, as is typical of century old ditches through relatively gravelly soils. The headgate is described in the Application as a 4' x 4' slide gate on a sixteen foot long, 4 foot high concrete wingwall. Immediately below the headgate, the Ditch is about 4 feet wide at the top, 2 feet deep, and about 1.5 feet wide at the bottom. Using Manning's Equation the estimated full capacity of the ditch just below the headgate is 7.4 cfs. It is doubtful that the ditch can be

[1] This table includes 8 water rights that were identified by the Applicant in the original Application and 2 more that came to light after public notice.

[2] For example, flow rates claimed for Water Right Nos. 76M-12687, 76M-116761, and 76M-149111.

operated anywhere near this capacity under existing conditions. (See FOF 26-29). One measurement of the flow in the Cobban Ditch was taken on May 20, 2008 near the headgate. The flow at this time and location was 2.18 cfs, with a maximum depth of water in the ditch of 0.8 feet (Application Review Form Response by Karl Uhlig, May 22, 2008, Department File). The size of this diversion structure and ditch seem overly large given the size of the existing water rights remaining from the Ditch, and is probably a legacy of its use in earlier times to divert water for the Rattlesnake Valley Irrigation Company.

21. For comparison purposes, the Cobban Ditch near the proposed new pumpsite and about $\frac{3}{4}$ miles down ditch from the headgate, was estimated by Applicant to be 2 feet wide at the top and 8 inches deep for purposes of estimating flow measurement described in Finding of Fact No. 49. Robert Boller and Dennis Sain estimated the ditch to be 12-16 inches wide but did not estimate the depth just down ditch on the Church property. (Testimony of Robert Boller and Dennis Sain)

22. There is no permanent water measurement structure anywhere along the Cobban Ditch, and no records of a Water Commissioner having ever been appointed to admeasure and allocate the water flowing into or among the Ditch users was presented for the record. No irrigation rotation schedule or system of sharing ditch flows during times of shortage has been established. This indicates that the source of water has been reliable, and modestly weighs in support of Applicant's presumption that irrigators along the ditch generally received full service irrigation. At least for the past decade, headgate operation and ditch maintenance have occurred largely from the voluntary efforts of Mr. & Mrs. Sain, Mr. Desmond McDonald, and Robert Boller on behalf of the Church. (Testimony of Dennis Sain, Desmond McDonald, and Robert Boller)

23. Over the last half century, the land use around the Cobban Ditch in the Rattlesnake Valley has changed from one that was primarily rural commercial agricultural to one that has been heavily subdivided and is now mostly residential. This finding is based on a comparison of the 1955 NRCS aerial photography used to produce the Missoula County WRS (Exhibit A-5) with the 2005 aerial photography (Exhibit A-10).

24. Today, Objectors are very concerned about the adequacy of the Cobban Ditch to convey sufficient water to meet Christian's proposed new use and also continue to fulfill their water rights. Considerable evidence exists in the record on the reasons for reduced flow in the ditch and problems they've had with flow reductions in the Ditch in approximately the past ten to

fifteen years. (Department file, Exhibits OS-3, OS-4, OS-5, OS-6, OS-7, Testimony of Dennis Sain, Anna Sain, and Desmond McDonald)

25. A Brencail fish screen device was installed at the Cobban Ditch headgate in 2002 and includes a 4-6" diameter return flow pipe that returns a maximum of .25 cfs from the ditch to Rattlesnake Creek. (Memo from Ladd Knotek, Fisheries Biologist, MT DFWP dated October 20, 2008 appended to Objector Sains' Exhibit OS-6). This device is used to clean the fish screen and return entrained fish back to Rattlesnake Creek.

26. The Lincolnwood Subdivision has also been built along the upper main channel of the Cobban Ditch. If the ditch is run too full, water begins to back up from certain screened road culverts, which are subject to blockages by ditch debris, and flood these properties and seep into basements, resulting in complaints and considerable expense to those homeowners. (Dennis Sain testimony, Part 9, at 26:40)

27. Objector Sains assert that after a trench was cut through the Cobban Ditch to service underground utilities near Rattlesnake Drive, the Ditch was not properly reconstructed which also increased ditch losses. (Dennis Sain testimony, Part 9, at 24:26)

28. Objector Sains also assert that the East Branch of the Cobban Ditch, where it passes through the Messiah Lutheran Church property, is not properly maintained and when it was relocated on the property, several small ornamental ponds were placed on the ditch that all contribute to large increases in ditch loss above their property. (Dennis Sain testimony, Part 9, at 20:00)

29. Dennis Sain also testified that the portion of the Ditch below his property, above and on the Klapwyk property, has grown in since Albert Klapwyk (Objector David Klapwyk's father) could no longer maintain it since 4-5 years before he died. (Part 9, at 15:07)

30. Mr. Sain testified that there is a general need for all the ditch users to work on the Ditch, and this would improve the flow of water for everyone. (Part 9, at 30:40)

Water Rights Conveyance to Applicant

31. Applicant obtained an undivided ½ interest in both Water Rights No. 76M-45464 and 76M-99081 by a quit claim deed filed and recorded in Missoula County on May 15, 2006 (Exhibit A-6). The Department was unaware of the exact nature of this conveyance until a copy of the quit claim deed was provided as pre-filed evidence in this case, after processing of the

application in the Regional Office and after public notice and objections were filed. I did not discover this issue until the review of the entire closed record.

32. The conveyance of an undivided interest in both water right claims means that the grantor retains some measure of control over the exercise of the water rights as a whole, yet it is the intent of the grantee to split these two water rights in half, then move and recombine the halves owned to be used on Applicant's property. The Church is not included as a co-Applicant in this matter, and as such the Department has no authority and may not include conditions on a Change Authorization as to control the operations of these water rights by the Church. As the interest in these water rights is **undivided**, the water rights legally may not be split, so the intent of the Applicant cannot be achieved. In order to accomplish the Applicant's intent with an undivided interest in these water rights, the Church must sign as a co-applicant and the Application must describe how the undivided water rights will be jointly managed on the Church, parsonage and Applicant properties so as not to constitute an expansion of the historic use. Another alternative would be to file another written instrument with Missoula County that defines the division of the interests such that Applicant adequately controls some portion of the water rights independently of irrigation by the Church.

33. I find that the Objectors' concern over the expansion of these water rights is justified by the testimony of Robert Boller, who manages the irrigation for the Church. When asked how the Church intended to irrigate differently if this change were authorized, Mr. Boller responded that he did not intend to irrigate any differently. (Boller Testimony at Part 5)

Adverse Effect

34. I find that in order to prevent adverse effects to other water users on the Cobban Ditch, the water rights proposed to be changed must be further defined and a management plan must be agreed to among the co-owners that prevents an expansion of the volume of water that will be used. No such management plan was included as part of this Application or can be found in the hearing record.

35. There is no information in the record to indicate that there is a significant difference in the water-holding capacities of the soils that are proposed to be irrigated under this Change Application from those that were historically irrigated. I find that because of the proximity of the new area proposed to be irrigated on the Christian property to the historically irrigated areas owned by the Church, there will be no increase in the amount of water diverted or consumed because of the differences in the soils on those properties.

36. The information in the record is that the crops irrigated on the new place of use on the Christian property (alfalfa, turf grass, or garden) will not differ significantly from the crops that have historically been produced on the Church or parsonage parcels. I find that any difference in crops irrigated, in combination with the small acreage being irrigated (1 acre), will not cause an increase the amount of water diverted or consumed.

37. There is no information in the record that the irrigation method or period of irrigation use will be changed. I find that the irrigation method and period of use will not cause an increase in the amount of water diverted or consumed.

38. I find that the amount, timing, and location of return flows by this proposed change will not change because of Findings of Fact 35, 36 and 37, so long as the changed use does not result in an expansion of the historically irrigated acreage.

39. The Applicant identified 0.22 acres on the Church parcel on which irrigation is proposed to be discontinued under Water Right 76M-45464 (Exhibit A-10). However, due to the undivided nature of the interest of the water right, I have no authority to limit the Church's irrigation out of the Cobban Ditch on the Church parcel to 0.22 acres (9,583.2 sq. ft.) in the area immediately south of the Church building.

40. The Applicant identified 0.875 acres on the parsonage parcel on which irrigation is proposed to be discontinued under Water Right No. 76M-99081 (Exhibit A-10). This is one-half of the entire 1.75 acre parcel. The Application indicates that the Church proposes to discontinue irrigation of the north quarter of the parsonage parcel where the building sites are located, and roughly the eastern half of the south half of the parsonage parcel. However, I have no authority to limit the irrigation of the parsonage property to an amount necessary to avoid adverse effect. If I had such authority, I would limit the irrigated area of the parsonage property to an area equal to one-half of the historically irrigated 1.3125 acres which equates to 0.656 acre (28,586 sq. ft). (FOF 17)

41. I also find that if this change were to be authorized, irrigation of the parsonage parcel from the Cobban Ditch under Water Right No. 76M-99081 water must be limited to 0.656 acre in an area generally described as the south half of the north half of the parsonage parcel and the west half of the south half of the same parcel, to not constitute an expansion of the remaining half of this water right owned by the Church.

42. I find that the total amount of irrigated acreage that Applicant would be able to irrigate by combining its halves of Water Right Nos. 76M-45464 and 76M-99081, without causing adverse

effect to other water users on the Cobban Ditch, is 0.876 acre (.22 acres + .656 acres), or 38,169 sq. ft. (FOF 11 and 17)

43. I find that the maximum flow of water that Applicant would be able to divert from the Cobban Ditch at its new secondary point of diversion by combining its halves of Water Rights Nos. 76M-45464 and 76M-99081, without causing adverse effect to other water users on the Cobban Ditch, is 20 gpm (10 gpm + 10 gpm). (FOF 12 and 13)

44. Having established the limits of the water rights that would remain and may be changed to avoid an increase in the amount of water consumed, I find that the other primary issue regarding potential adverse effect in this case is whether the proposed new use will reduce the instantaneous flow rate of water available for physical diversion from the Cobban Ditch by the Objectors.

45. Applicant's consultant was unclear about the exact location of the east/west split in the Cobban Ditch, and questioned in written documents in the record that this split still even exists (Application Review Form Response by Karl Uhlig, May 22, 2008, Department File). I find that the west branch does exist and continues to be used for the McDonalds' irrigation based on the testimony of Mr. and Mrs. Sain, Mr. McDonald and Mr. Boller. I cannot determine with certainty that the Applicant's proposed pumpsite is above or below the east/west split in the ditch.

46. The total combined flow rate of the water rights proposed to be changed on the Cobban Ditch is roughly 120 gpm. This amount includes sufficient carriage water to account for ditch losses as measured at the Cobban Ditch headgate. The only information in the record that quantifies ditch losses is from Case 76M-7, in which ditch losses between the headgate and the secondary diversion from the Cobban Ditch for the Church parcel constitutes 2/3 of the diverted flow at the headgate. Combined, the historic secondary diversion for irrigation on the Church and parsonage properties totaled at most 40 gpm. By acquiring half the two water rights, the Applicant would not obtain the right to divert 50 gpm at the proposed secondary pumpsite, but only 20 gpm after the historic carriage water obligations under these two water rights are met. Applicant did not provide a specific calculation for ditch loss from the headgate to the proposed pumpsite or between the proposed pumpsite and the existing diversion at the church. I find that by diverting 50 gpm from the Cobban Ditch at the proposed pumpsite, the Applicant would be expanding the use of these two water rights even if none of the Church and parsonage properties continue to be irrigated from the ditch at all. Testimony on behalf of the Church indicated that it intends to continue to irrigate both parcels as it does currently.

47. I find that Applicant has not proven that the proposed change would not adversely affect other water right holders on the Cobban Ditch. The change as proposed would constitute an expansion of the water rights, and because of the undivided interest in the water rights by a co-owner who is not the Applicant, I cannot impose conditions that would restrict the water use so as to avoid adverse effects. (FOF 32 through 34 and 39 through 46)

Adequacy of Appropriation Works

48. Applicant intends to use a 2 hp Turf Boss pump that will be capable of pumping 50 gpm through seven, 7 gpm sprinkler heads. Performance data for the pump and cost estimates for the associated diversion and irrigation system were submitted as Exhibit A-11.

49. Applicant's consultant used a computer software program (Bentley Flow Master) to estimate the flow of water in the Cobban Ditch near Christian's proposed new pumpsite. Based on ditch measurements, the calculated discharge of the ditch at this location when the water is .33 ft (4") deep is .91 cfs (408.4 gpm), and if the water is .66 ft (8") deep, the discharge is 2.46 cfs (1104 gpm). (Appendix F of Application)

50. The Cobban Ditch headgate and the Ditch to the proposed pumpsite on the Christian property are adequate to deliver 50 gpm for the Applicant's proposed use. (Appendix F, Application, Department File)

51. I find that the appropriation works are adequate to accomplish the proposed change. (FOF 48-50). As a water user from the Cobban Ditch, Applicant assumes some responsibility to assist and cooperate in the operation and maintenance of the Ditch with other water users, both above and below Applicant's pumpsite from the Ditch.

Beneficial Use

52. Irrigation of lawn, garden, and a hay crop is a beneficial use. The proposed flow rate at the headgate (60 gpm), if pumped continuously over the 189 day period of use, would produce a volume of 50.1 acre-feet. This volume would be further limited by the annual volume limit of 1.67 acre-feet placed on Water Right No. 76M-45464. No similar volume limit has been placed on Water Right No. 76M-99081. (FOF 11 and 15)

53. Assuming that the water rights were split in half, the total volume available for the proposed new use at the secondary point of diversion is 0.835 acre-feet per year under Water Right No. 76M-45464 (one-half of 1.67 af). The lack of a similar stated volume limit on Water Right No. 76M-99081 means that the constraint upon the volume allowed is historical use. Half

of the flow rate for that use at the secondary point of diversion is 10 gpm, which if pumped continuously over the 189 period of use would produce 8.35 acre-feet. The total volume available as half of both water rights at the proposed secondary point of diversion is a maximum of 9.185 acre-feet per year. (FOF 11 and 17)

54. An Irrigation Requirements Worksheet using the NRCS Montana Irrigation Guide was included in the Application as Appendix D. This worksheet indicates that the volume of water required at the field boundary for full service irrigation of 1 acre of turf grasses in an average year in this climatic region is 2.2 acre-feet per year. (FOF 3). This amount included crop consumption of 23.5 inches of water, less effective precipitation of 4.83 inches, and included a field application efficiency of 70%. The total volume of irrigation water consumed by the crop is 18.67 inches, or 1.56 acre-feet per year. One-half of both water rights would be sufficient to provide an adequate volume of water for the proposed changed beneficial use.

55. A flow rate of 20 gpm and a volume of 9.185 acre-feet at the secondary point of diversion from the Cobban Ditch would allow fewer sprinkler heads operating at one time and require more zones to irrigate one acre.

56. Even with the additional constraints imposed by reducing the flow rate, acreage, and volume based on historical use, the proposed changed use is a beneficial use and could be accomplished without waste. However, the irrigation system would have to be designed and operated differently than the one proposed by the Applicant. (FOF 54 and 55)

Possessory Interest

57. Montana cadastral mapping information for the proposed new place of use show and Applicants have affirmed that they have the possessory interest in the property where the water is to be put to beneficial use. (Appendix E, Application, Department File)

58. I find that the Applicants have demonstrated their possessory interest in the proposed new place of use.

Salvaged Water/Water Quality Issues

59. The change application is not for salvaged water. (Department file; § 85-2-402(2)(e), MCA)

60. No objections were raised as to water quality or as to the ability of a discharge permit holder to satisfy effluent limitations. (Department file; § 85-2-402(2)(f) and (g), MCA)

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

CONCLUSIONS OF LAW

General

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in § 85-2-402, MCA. For the instant Application, the requirements of § 85-2-402(2)(e)(f) and (g), MCA, are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (FOF 59, 60)

2. Section 85-2-402(2), MCA, states, inter alia, and as applicable to this Application:

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

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

(b) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

The requirements of Montana's change statutes have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (applicant has the burden of proof at all stages before the Department and courts). Generally an applicant can change up to the historic diverted flow rate and volume as limited by the historic consumptive use of the water right as long as the applicable criteria are met. Id.

3. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of

Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

4. The public notice requirement of § 85-2-307, MCA, has been met. (FOF 3)
5. Official notice was taken of all documents in the record and any exhibits already contained within the DNRC's files. The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. In addition to the materials granted judicial notice as submitted by Applicant under pre-trial motion, I have also taken notice of the DNRC Water Rights Records Database. (See FOFs 10 and 12). Parties may contest the materials first noticed in this proposal for decision by filing exceptions to the proposal for decision. (ARM 36.12.221(4), ARM 36.12.229)

Historic Use

6. An applicant can change only that to which it has a right. E.g., McDonald v. State, (1986) 220 Mont. 519, 722 P.2d 598; see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo.,2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible "change" of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application," (citations omitted). The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, even if the water right was decreed in Montana's adjudication. See McDonald (beneficial use is the basis, the measure and the limit, irrespective of greater quantity attempted to be appropriated). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221, MCA, 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 § 85-2-402, MCA. (See In the Matter of Application

No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation, Final Order, (2008)) 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. E.g., *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).

7. Historic beneficial use is used to evaluate potential adverse effect to other appropriators, senior and junior. Other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; Robert E. Beck, 2 Waters and Water Rights, § 14.04(c)(1) (1991 ed.); W. Hutchins, Selected Problems in the Law of Water Rights in the West, p. 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); McDonald, supra (existing right is the pattern of historic use); see also §85-2-401, MCA. Montana's change statute at § 85-2-402(2)(a), MCA, reads in part:

... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

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

....

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

(Emphasis added).

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.

(Emphasis added).

See also, Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, p. 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, § 5:78 (2007) (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); Colo. Rev. Stat. § 37-92-301(5) (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

8. A key element of historic use and an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (*In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order*, (2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal for Decision*, (2005) (Final Order adopted Proposal for Decision); *In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, Proposal for Decision*, (2003) (Final Order adopted Proposal for Decision).

9. Montana’s change statute simply codifies western water law.^[3] One commentator describes the general requirements in change proceedings as follows:

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

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

[3] 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.

have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation. Historic consumptive use varies greatly with the circumstances of use.

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

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

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates. With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

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

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

Id. § 14.04(c)(1).

11. Montana has no legal standard in a water right change proceeding for assigning a volume for historic consumptive use. The actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water) Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”); *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order. As a result, there may be evidence that property was irrigated but the amount diverted and consumed is not necessarily equivalent to the duty of water. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. It is the applicant’s burden to produce evidence of historical use, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H*

1223599 BY MGRR #1, LLC, “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” (*In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), affirmed Royston (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057 Without evidence of the amount of actual historical use, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a); *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002), supra; *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, supra.

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

13. The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (change denied in part for failure to prove lack of adverse effect due to lack of analysis of return flow). Section 85-2-

402(2), MCA, 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.” The phrase “by a preponderance of the evidence” means such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it. Ekwoztzel v. Parker (1971), 156 Mont. 477, 484-485, 482 P.2d 559, 563 (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added).

Adverse Effect

14. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077. Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of a water right and an appropriator is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or lost to the system. The Department defines “return flow” in part as:

"Return flow" means that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, and to which other water users are entitled to a continuation of, as part of their water right...

Admin. R. Mont. 36.12.101(56); see also, Doney, p. 21.

The Montana Supreme Court also recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶22, 31, 43, 346 Mont. 508, ¶¶22, 31,43, 198 P.3d 219, ¶¶22, 31,43, *citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185.

15. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, *supra*.

16. In the instant case, I conclude that the 1960 Missoula County Water Resources Survey provides some evidence that the water rights proposed to be changed were historically used, at least in August of 1955. (FOF 7). The historic use question in this case is whether these two water rights may be changed in the amounts they were decreed, or whether authorizing a change in those amounts would constitute an adverse effect on other water users if those other users have come to depend on a smaller-than-decreed amount of water having been used in more recent "history."

17. Based on testimony received in 1994, the Water Court reduced the irrigated acreage and flow rate of Water Right No. 76M-45464 in Case 76M-7 in February, 1995. I conclude that the historic use of this water right as decreed by the Water Court is sufficiently accurate, such that a change of Water Right No. 76M-45464 will not result in an expansion of water use that would constitute an adverse effect on other water users. (FOF 12)

18. No objections were made to Water Right No. 76M-99081 at the Preliminary Decree stage. However, evidence in the record of this contested case indicates that the use of Water Right No. 76M-99081 has been less than what was claimed almost 30 years ago. The 1960 Missoula County Water Resources Survey does not unequivocally support the claim that 100% of the decreed place of use for this water right was irrigated. The supporting documents and aerial photograph for the WRS indicate that the entire place of use was irrigated, but for some

reason the published WRS did not include a portion of that place of use as irrigated in the final published map. Furthermore, testimony at the hearing by the person responsible for managing the irrigation supports only three-quarters of the parsonage parcel as being irrigated since 1998. (FOF 15) Authorizing the change of this water right based on the acreage claimed could result in an expansion of the water right that could adversely effect other water users. Therefore, I conclude that the total amount of acreage that may be changed under this water right without causing adverse effect to other water users is limited to 1.3125 acres (FOF 17), rather than the 1.75 acres that were claimed.

19. Based on the quit claim deed to these water rights, half is owned by the Church and half is owned by Applicant, but each party's interest in these water rights is undivided. Because of the undivided interest the Church and Applicant appear to be tenants in common of the water rights. See Rodda v. Best (1923), 217 P. 669 (Tenants in common are equally entitled to the use, benefit, and possession of the common property and may exercise acts of ownership in regard thereto, the limitation being that they are bound to so exercise their rights in the property as not to interfere with the rights of their cotenants); Osnes Livestock Co. v. Warren (1936) 62 P.2d 206. The Church therefore retains an interest in how these water rights are used on Applicant's property, and Applicant retains an interest in how these water rights are used on the Church's two properties. Therefore, unless the water rights are split, the Church must be included as a co-applicant for this change application and the Application must explain how the water rights will be jointly operated and administered to avoid an expansion of the use. (FOF 31-33) As this Application has been filed, the Department has no ability to assert authority over the use of these water rights by the Church, and cannot impose conditions on a change authorization that would avoid adverse effect. Applicant has not proven by a preponderance of the evidence that it can control the operation of these water rights such that there would be no adverse effect on other water users.

20. By limiting a change in place of use without changing the irrigation purpose to the same total historically irrigated acreage, with other factors such as soils, crops, period of use, means of conveyance and method of irrigation being equal, I conclude that there will be no increase in the consumptive use in a water right on an acre-for-acre basis. (FOF 35, 36 and 37). Applicant has proven by a preponderance of the evidence that if the amount of newly irrigated acreage on its property does not exceed the amount of historically irrigated acreage retired by the Church, there would be no increase in the amount of water consumed (1.56 acre-feet per acre, FOF 54). Applicant has not proven by a preponderance of the evidence that the amount of new acreage proposed to be irrigated (1 acre, FOF 4) does not exceed the sum of both halves of the

historically irrigated areas (.22 acre and .656 acre, FOF 12 and 17). Applicant has not proven by a preponderance of the evidence that the flow rate proposed to be pumped at the new secondary point of diversion (50 gpm, FOF 5) does not exceed the sum of the two halves of the flow rates diverted down ditch on the parcels owned by the church (10 gpm and 10 gpm, FOF 11 and 13).

21. Given that the water rights on the East Branch of the Cobban Ditch all have the same priority date, all carriage water or ditch loss must be shared proportionally, regardless of the amount of water claimed. Applicant has not proven that the proposed change adequately accounts for ditch loss in quantifying the amount of water intended to be diverted at the Applicant's proposed secondary point of diversion from the Cobban Ditch. (FOF 11, 13, 17, 19 and 20)

22. Applicant has not proven by a preponderance of the evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§85-2-402(2)(a), MCA; FOF 47; and COL 19, 20 and 21).

Adequacy of Appropriation Works

23. Pursuant to §85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1)(a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the*

Matter for Application to Change a Water Right No. 101960-41S by Royston (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston* (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (specific ditch segments would be adequate after completion of maintenance and rehabilitation work). (DNRC Final Order 2005). Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

24. Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (§ 85-2-402(2)(b), MCA; FOF 48, 49, and 50)

Beneficial Use

25. Under the change statute, §85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§85-2-301 and 311(1)(d), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., *McDonald*, supra; *Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396.

26. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., *Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-*

108497 by Alex Matheson, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, DNRC Final Order (2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter Of Application For Beneficial Water Use Permit 76LJ 30008762 By Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), affirmed on other grounds, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (November 2008)(permit denied in part because of failure to support quantity of water needed for pond). See also §85-2-312(1)(a), MCA. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., *Stellick*, supra.

27. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that one acre could be fully serviced with diversion of 50 gpm and 2.2 acre-feet at the Applicant’s pumpsite. A lesser flow rate of 20 gpm at the secondary point of diversion could also sustain this beneficial use, albeit less conveniently. (FOF No. 52-55)

28. Applicants have proven by a preponderance of evidence that the proposed use is a beneficial use. (§ 85-2-402(2)(c); FOF 56)

Possessory Interest

29. Applicants have proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (§ 85-2-402(2)(d), MCA; FOF 58).

Salvaged Water/Water Quality Issues

30. The Application does not involve salvaged water (§ 85-2-402(2)(e), MCA; FOF 59) and no valid water quality objection was filed (§ 85-2-402(2)(f) and (g), MCA; FOF 60).

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

PROPOSED ORDER

Application No. 76M-30028036 to change Water Right Numbers 76M-45464-00 and 76M-99081-00 by Clayton T. and Dawn S. Christian is hereby **DENIED**.

NOTICE

Any party adversely affected by this Proposal for Decision may file written exceptions and a supporting brief with the Hearing Examiner. Oral argument on the exceptions may be held, if requested. See § 2-4-621, MCA, and Admin. R. M. 36.12.229. Exceptions and briefs, and requests for oral argument must be filed with the Department postmarked by **July 13, 2009** and copies mailed by that same date to all parties. No new evidence will be considered in the final decision-making process.

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed. No final decision shall be made until after the expiration of the above time period, and due consideration of timely oral argument requests, exceptions, and briefs.

DATED this 11th day of June, 2009.

/Original signed by R Curtis Martin/

R. Curtis Martin, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6625

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 11th day of June 2009 by first-class United States mail.

SUZANNE TAYLOR, ESQ.
PO BOX 7384
MISSOULA, MT 59807

JOHN J. FERGUSON
ATTORNEY AT LAW
FERGUSON LAW OFFICE, PLLC
111 N. HIGGINS AVE., SUITE 400
MISSOULA, MT 59802

DENNIS L & ANNA D SAIN
3610 RATTLESNAKE DR
MISSOULA, MT 59802

Cc:
DNRC MISSOULA REGIONAL OFFICE
PO BOX 5004
MISSOULA MT 59806-5004

/Original signed by Jamie Price/

Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615