



a one page schematic map of the McClellan Creek infiltration galleries for the City of East Helena.

**Exhibit A-6** consists of a 7 page memorandum from Karl Uhlig to John Bloomquist dated January 2, 2014 discussing the Application under consideration in this matter.

Applicant's **Exhibits A-5** and **A-7** were offered but not admitted as they are duplicates of Objector's **Exhibits O-7** and **O-2, O-3, O-6, O-8** and **O-9** (see below).

Objector offered the following exhibits which were admitted at the hearing without objection:

**Exhibit O-1** consists of a two page list entitled "Water Users of Prickly Pear Creek." No date for the list is given.

**Exhibit O-2** consists of a two page list entitled "Water Users of Prickly Pear Creek." It is described as the "Spreadsheet Version." No date for the list is given.

**Exhibit O-3** consists of a two page table entitled "Poepping-Garber Historic Water Use." The table shows water use from 1963 to 2010.

**Exhibit O-5** consists of a 6 page document entitled "Prickly Pear Water Users Constitution and By-Laws, 1976."

**Exhibit O-6** consists of a 3 page document described as Prickly Pear Creek Water Users Association By-Laws and Spring 1976 Vote.

**Exhibit O-7** consists of a 5 page document described as a Diversion Reduction Agreement dated June 4, 2013 between Farm Stream Solutions LLC and the Prickly Pear Water User Association.

**Exhibit O-8** consists of a one page summary of USGS data from 1960 to 2013 listing the number of days with stream flow in excess of 127 cfs.

**Exhibit O-9** consists of 41 pages of mean daily streamflow values for USGS gage 06061500 Prickly Pear Creek near Clancy MT.

Objector's **Exhibit O-4** was offered but not admitted as it is an invalid objection and is already included in the Department's official file in this matter.

## **BACKGROUND**

This change application was submitted to mitigate net depletion to Prickly Pear Creek by a ground water well permitted by the Department on July 21, 2009. *In the Matter of Application for Beneficial Water Use Permit No. 411 30026328 by Eastgate Water and Sewer Association,*

*Final Order.* Per that Final Order, the Permit was granted under the following condition:

APPLICANT OBTAINS AUTHORIZATION FOR AND PROVIDES MITIGATION WATER IN THE AMOUNT OF 185 AF UNDER WATER RIGHT CLAIM NOS. 41I 89277-00, 89278-00, AND 89279-00 GENERALLY IN THE LOCATION OF SEC. 36 OF TWP 10N, RGE 3W AND SEC. 30, TWP 10N, RGE 2W ON THE PRICKLY PEAR CREEK FROM APRIL 15 THROUGH OCTOBER 15. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION AS SPECIFICALLY DESCRIBED IN THIS DECISION IS IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES. NOTHING IN THIS PERMIT CONSTITUTES AUTHORIZATION FOR A CHANGE IN APPROPRIATION RIGHT.

The preceding permit condition was binding in the instant matter; however, upon analysis of the three water rights listed for change it was discovered that the historic use of those water rights was not sufficient to fully mitigate net depletions from the well. Thus, the Applicant requested and was granted a modification to the Preliminary Determination for Application for Beneficial Water Use Permit No. 41I 30026328 to include additional mitigation water purchased from the Bureau of Reclamation to be introduced to Prickly Pear Creek. The permit was re-issued on April 5, 2013. The modified condition states as follows:

**IMPORTANT INFORMATION**

APPLICANT SHALL OBTAIN AUTHORIZATION FOR AND PROVIDE MITIGATION WATER IN THE AMOUNT OF 185 ACRE-FEET (AF). STATEMENT OF CLAIM NOS. 41I 89277-00, 41I 89278-00 and 41I 89279-00 SHALL PROVIDE 134.5 AF OF THE MITIGATION WATER, BEGINNING AT THE HISTORIC POINT OF DIVERSION (POD) ON PRICKLY PEAR CREEK IN SEC 36 OF TWP 10N RGE 3W BETWEEN APRIL 1 AND AUGUST 31. THE REMAINING 50.5 AF OF MITIGATION WATER SHALL BE SUPPLIED BY THE HELENA VALLEY CANAL WATER USERS ASSOCIATION (ASSOCIATION) THROUGH A WATER USE CONTRACT WITH THE U.S. BUREAU OF RECLAMATION. THE ASSOCIATION SHALL DELIVER CONTRACT WATER TO PRICKLY PEAR CREEK AT A POINT IN SECTION 23, TWP 10N, RGE 3W. CONTRACT WATER SHALL BE DELIVERED TO THE STREAM REACH BETWEEN SEPTEMBER 1 AND OCTOBER 15. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED IN THIS DECISION IS IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN SOURCE, AMOUNT OR LOCATION CEASES. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES. NOTHING IN THIS PERMIT CONSTITUTES AUTHORIZATION FOR A CHANGE IN APPROPRIATION RIGHT.

This condition remains binding in the instant matter, however, it should be noted that the

proposed change of the three water rights is the only matter at issue in this proceeding. The additional 50.5 AF of water to be purchased from the Bureau of Reclamation is a separate matter and is properly tied to Beneficial Water Use Permit No. 411-30026328, not this change application.

The Department found that the proposed changes in appropriation rights for three water rights would not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued (PD ¶¶ 43, 50 at 22, 26). Silver Maple Ranch filed the lone valid objection in this matter. Silver Maple Ranch's objection was deemed valid because it contends that the PD is defective in that it fails to consider the water rights decreed in Flowerree; there is inadequate flow in Prickly Pear Creek; drought conditions will worsen; and that the analysis in the PD of historic use is generally inadequate. Silver Maple Ranch further alleges in their objection that the granting of the change in appropriation rights for these three water rights will adversely affect its water rights because:

- The depletion of Prickly Pear Creek by the ground water well (Permit No. 411-30026328 issued July 21, 2009) will not be adequately mitigated by the proposal to leave instream the water that could otherwise be diverted through exercise of Water Right Nos. 411-89277, 411-89278 and 411-89279.
- Applicant will lose the oversight of by the Water Commissioner for Prickly Pear Creek appointed by the district court to control and adjust flow rates and cut off users in order of their priority dates.
- By having Applicant surrender the water rights, Objector as a member of the Prickly Pear Water Users Association will lose the ability of the Association to assess water users for the annual dues and a share of the costs of maintaining the infrastructure shared in common with the owner of the water rights being dedicated to mitigation.

### **PRELIMINARY MATTERS**

It is axiomatic that, under Montana water law the applicant for a beneficial water use permit or a change in appropriation right bears the burden of proof to show that all of the criteria under § 85-2-311 (permit) or § 85-2-402 (change), MCA, are met at all stages before the Department and courts. 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.

An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA which provide:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), 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.

(b) 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](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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 change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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 or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

Under the Montana Water Use Act, the Department must make a preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right (§ 85-2-307(2)(ii), MCA). If the preliminary determination proposes to grant the application, the Department must prepare a public notice of the application, including a summary of the preliminary determination. The notice must state that by a date set by the Department, persons may file with the Department written objections to the application. (§§ 85-2-307(b) and 85-2-307(3)).

The Department followed this procedure and received one objection, from Silver Maple Ranch. Objections to Application to Change a Water Right must state facts indicating that one or more of the criteria in [§ 85-2-402, MCA] are not met. (§ 85-2-308(2), MCA) Silver Maple Ranch's objection specifically identifies adverse affect as the basis for their objection – "Objector believes its rights will be adversely affected if the Change is Granted." (Department

File SMP Objection) Thus, as I stated during the First Pre-Hearing Conference, the only issue under consideration for the contested case hearing is the criteria of adverse effect due to the proposed change in water rights. All other criteria evaluated in the PD are deemed met. (FPC audio @ 2:00)

As stated previously, the applicant in a proceeding to Change a Water Right has the burden of proof, at all stages of the proceeding, to show that the applicable criteria have been met. That being said, at the onset of a contested case proceeding in which a Preliminary Determination to Grant has already been issued by the Department, the Department has determined that the applicant has satisfied the applicable criteria for issuance of a permit or change in appropriation right (§ 85-2-307(2)(ii), MCA). If valid objections are not received on an application and the Department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the application as proposed in the preliminary determination (emphasis provided). (§ 85-2-310(3), MCA).

In the instant matter, because an objection has been received, but the Department has preliminarily determined that the application satisfies the applicable criteria, the burden of production shifts to the Objector to show how the Department's preliminary determination to grant the application will cause Objector adverse affect. Applicant retains the burden of proof as to the criteria and may present evidence at the contested case hearing to rebut any evidence that the Objector proffers at the hearing.<sup>1</sup>

Consistent with the foregoing, and with the procedures outlined in the Notice of First Pre-hearing Conference dated July 25, 2013, my statement during the pre-hearing conference on October 11, 2013 (Objector goes first), and my opening statement at the start of the hearing, the

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<sup>1</sup> See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT96, 112 P.3d 964 (2005) (MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim."

§ 26-1-401 states "[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

§ 26-1-402 states "[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

contested case proceeded under the premise that the Objector would have the burden of production to overcome the Department's Preliminary Determination that the Applicant's change as granted would not adversely affect existing water rights which include the Objector's water right. The Applicant then had the opportunity to rebut Objector's evidence concerning adverse affect. (Notice of First Pre-hearing Conference, Hearing Procedure: (Objectors goes first), PHC 10/11/13 audio @ 7:50, Eastgate Hearing audio, Tk. 2)

**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

1. The water rights Applicant seeks to change are shared with an adjoining landowner, Hamlin Family Revocable Living Trust. According to the Applicant, its proportionate share of each water right is 41.9% of the 352.7 acre claimed place of use, or 147.8 acres (all three water rights are claimed to irrigate the same 352.7 acres). The claimed water rights proposed to be changed have historically appropriated water for irrigation purposes from Prickly Pear Creek near East Helena, Montana. The elements of the water rights (under the combined ownership) as decreed in the Basin 41I Temporary Preliminary Decree are as follows:

<b>WR Claim #</b>	<b>Source</b>	<b>Priority Date</b>	<b>Flow Rate (CFS)</b>	<b>Purpose (Total Acres)</b>	<b>Max. Acres Irrigated</b>	<b>Diversion Structure</b>	<b>Period of Diversion</b>
41I 89277 00	Prickly Pear Creek	11/24/1866	1.25	Irrigation	352.7	Company Ditch	2/15 – 11/30
41I 89278 00	Prickly Pear Creek	2/10/1869	1.69	Irrigation	352.7	Company Ditch	3/15 – 11/19
41I 89279 00	Prickly Pear Creek	10/15/1866	0.94	Irrigation	352.7	Company Ditch	3/15 – 11/19

A general abstract of each claimed water right is located in the file. File.

**CHANGE PROPOSAL**

**FINDINGS OF FACT**

2. Applicant seeks to change the place of use and purpose of use of its proportionate share of Statement of Claim Nos. 41I 89277 00, 41I 89278 00, and 41I 89279 00 (the PD inadvertently included a statement that the point of diversion is also to be changed). Applicant proposes to

retire 147.8 acres of irrigation in this change proceeding. The initial application materials proposed changing a consumptive volume of 185.2 acre-feet (AF), to offset depletions to Prickly Pear Creek from Beneficial Water Use Permit 41I-30026328 (the groundwater appropriation), but the consumptive use associated with the historic irrigation system was later calculated to be only 134.5 AF. Per the Final Order in the 2009 permit proceeding, Applicant was required to obtain authorization from the Department for mitigation purposes in the amount of 185 AF. As mentioned above under Preliminary Matters, the Department re-issued Provisional Permit No. 41I 30026328 to incorporate an additional source of water for required mitigation.

3. Water is proposed to be left instream rather than diverted at the headgate and ditch system (known as Company Ditch) associated with former irrigation practices. The reach of stream required for effective mitigation is generally described as beginning at the Company Ditch diversion in Section 36 T10N R3W and continuing downstream to the North Helena Valley. The modified permit condition for Provisional Permit No. 41I-30026328 requires 50.5 AF of the total 185 AF of mitigation water be delivered approximately 2.9 miles downstream of the former point of diversion on Prickly Pear Creek. (File; Provisional Permit No. 41I 30026328)

#### GENERAL CONCLUSIONS OF LAW

4. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under the Preliminary Determination, the relevant change criteria for this matter are found in §85-2-402(2), MCA,:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), 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.

(b) 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](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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 change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant

to [85-2-320](#), 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 or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute 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, and the applicant has the burden of proof at all stages before the Department and courts.<sup>2</sup> (PD, Department File)

## **HISTORIC USE**

### **FINDINGS OF FACT**

5. The basis of for the water rights proposed to be changed is found in Statements of Claim filed by Robert and Colleen Garber that are based on the water rights described in the Prickly Pear Decree, Case #668 dated October 5, 1911, Circuit Court of the United States, Ninth Circuit, District of Montana. The Montana Water Court subsequently included the Garbers' claim in the Temporary Preliminary Decree of the Missouri River Above Holter Dam Basin (41I). Garbers were the successors in interest to the 1911 decree and have subsequently transferred their interest in the water rights to Eastgate and Hamlin Family Trust. (Department File)

6. Water Rights 41I-089277, 41I-089278 and 41I-089279 were at one time in the possession of one Poepping. For purposes of this proceeding they will be known as the Poepping-Garber rights. These rights have been historically diverted through what is known as the "Company Ditch." (Department File, PD, Exhibit O-3)

7. The Department, in its analysis of historic use, found that the three water rights proposed to be changed consisted of the following elements (PD ¶¶33 at 18):

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<sup>2</sup> For a general discussion of the law of water appropriation changes see ¶¶ 6 – 8 of the PD.

WR #	Priority Date	Diverted Volume (AF)	Flow Rate (CFS)	Total Acres	Consumptive Volume (AF)
41I 89277-00	11/24/1866	225	1.25	210.8	61.4
41I 89278-00	2/10/1869	204	1.69	210.8	84.4
41I 89279-00	10/15/1866	114	0.94	210.8	46.0
<b>Total</b>		<b>543</b>	<b>3.88</b>	<b>210.8</b>	<b>191.8</b>

The Department found that the 147.8 acres proposed to be retired lie entirely within the 210.8 acres historically irrigated by the three water rights. The Department found that the Applicant has proven by a preponderance of the evidence the combined historic use of Water Right Claim Nos. 41I 89277-00, 41I 89278-00 and 41I 89279-00 to be 3.88 CFS for flow rate, 543.0 AF for diverted volume, and a consumptive volume of 191.8 AF. The Applicant's portion of the historically used amounts of water is 3.88 CFS up to 380.7 AF for diverted volume, and 134.5 AF for consumed volume. (PD ¶38 at 21)

8. The Department's finding was based upon the evidence in the record, the Statements of Claim, the 1956 Water Resources survey, aerial photography, the affidavit of the previous landowner, water commissioner records, stream gaging data, and the Department's empirical methodology (IWR) outlined in ARM 36.12.1902. (PD ¶32 at 18)

9. At hearing Objector introduced evidence that between 1963 to 1973 (the time period for determining historic use from statements of claim is pre-1973 per ARM 36.12.1902(1)), the Poepping-Garber claims were delivered water in the amount of anywhere from 0.0 AF to 348.8 AF. Between 1974 and 1980 Water Commissioner records indicate deliveries of between 54.5 AF and 460.4 AF. After 1980 deliveries drop significantly with most years showing zero deliveries with the significant exception of 326.7 AF delivered in 1999. (Exhibit O-3, Exhibit A-4)

10. Objector's assertion that oversight by the Water Commissioner will be lost if the change is granted is without merit. The Water Commissioner testified that he will still be able to administer the water rights even though they are left undiverted. (Testimony of Bill Wegner, Audio Tk.#03)

11. Objector's own evidence and testimony establishes only that water was historically diverted for the Poepping-Garber rights. I find that Objector has not met the burden of production to show why the Department's Preliminary Decision was in error as to the historic use of Water Right Nos. 41I-89277, 41I-89278 and 41I-89279. (PD ¶38)

## CONCLUSIONS OF LAW

12. Applicant seeks to change Statement of Claim Nos. 411 89277, 411 89278, and 411 89279. The “existing water right” in this case is that as it existed prior to July 1, 1973, because no changes could have been made to the right after that date without the Department’s approval. §85-2-402(1), MCA; Royston, supra; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; 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 p. 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); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

13. 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).

14 While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., supra. 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. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing* Application for Water Rights in Rio Grande County, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

15. “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *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.*, DNRC 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.*

16. I conclude that the Objector has failed to produce sufficient evidence to overcome the findings and conclusion regarding historic use made in the Preliminary Determination to Grant. (PD ¶38) Accordingly, the findings and conclusions regarding historic use are confirmed and adopted as part of this Final Order. Applicant’s portion of historic use (amounts of water) is 3.88 CFS up to 380.7 AF for diverted volume, and 134.5 AF for consumed volume.

### **Adverse Effect**

#### **FINDINGS OF FACT**

17. Applicant seeks to change the place of use, and purpose of use of its proportionate share of Statement of Claim Nos. 41I 89277-00, 41I 89278-00, and 41I 89279-00 (the PD inadvertently included a statement that the point of diversion is also to be changed). The

Applicant proposes to retire 147.8 acres of the historically irrigated 210.8 acres to mitigate groundwater depletions from an existing well. The source for the water rights to be changed is Prickly Pear Creek. The proposed amounts of water to be changed are the Applicant's proportionate share of the three water rights. (Department File, PD)

18. In the Historic Use section the Department found the historic use of the water rights proposed for change to be the following:

WR #	Priority Date	Diverted Volume (AF)	Flow Rate (CFS)	Total Irrigated Acres	Consumptive Volume (AF)
41I 89277-00	11/24/1866	225	1.25	210.8	61.4
41I 89278-00	2/10/1869	204	1.69	210.8	84.4
41I 89279-00	10/15/1866	114	0.94	210.8	46.0
Total		543	3.88	210.8	191.8

The Department found the Applicant's proportionate share for the amount of water to be 3.88 CFS up to 380.7 AF for diverted volume, and 134.5 AF for consumed volume. The Department's findings on historic use confirm the Applicant's claims or assertions contained in the record regarding acres irrigated, location of point of diversion and place of use, flow rate, diverted volume, and consumed volume. There will be no expansion of the water rights involved in this change proceeding as a result of the proposed change.

19. Applicant shares the water rights and conveyance facilities with Hamlin Family Trust. Applicant has made the case in this matter that the water rights for each owner are apportioned based on acres irrigated. In the Historic Use section above the Department found that a total of 210.8 acres are irrigated, with Applicant owning 147.8 acres, and Hamlin Family Trust owning 63.0 acres. Finding of Fact Nos. 1 and 7 summarize the various historic elements of each water right that are owned by the two parties. Applicant has the right to change its proportionate share of the water rights provided it will not adversely affect Hamlin's interests. Evidence in the record does not show that Hamlin will be adversely affected. Therefore, the Department finds no adverse effects will occur to Hamlin Family Trust based on evidence in the record (Department File, PD)

20. Applicant's share of the three water rights will be left instream at the historic point of diversion to mitigate 134.5 AF of the net depletion to Prickly Pear Creek caused by a ground

water well permitted by the Department on July 21, 2009. *In the Matter of Application for Beneficial Water Use Permit No. 411 30026328 by Eastgate Water and Sewer Association, Final Order.* The new use of water will be largely non-consumptive and the Applicant's historic point of diversion for this change is located upstream of the reach of stream where depletions will occur from the groundwater appropriation. Additionally, because water will be left instream at the historic point of diversion, the location of any return flows from the historic irrigation system will not change. The remaining 50.5 AF of contract water will be delivered 2.9 miles downstream of the historic irrigation diversion and will ensure mitigation of the entire consumptive amount of pre-stream capture of tributary groundwater that would eventually deplete surface waters in Prickly Pear Creek and the North Helena Valley (185 AF). (PD)

21. At hearing, Objector provided no evidence regarding how ceasing diversion of historically utilized diversion rights (as recognized by the Department's analysis, and supported by Water Commissioner records) and leaving that historically diverted water in Prickly Pear Creek for mitigation (i.e. the previously diverted water will now be available for users downstream of the historic point of diversion) combined with the addition of 50.5 AF of Bureau Reclamation water (also available to be diverted by other water users, including Objector) to be added to Prickly Pear Creek 2.9 miles below the historic Company Ditch headgate could cause adverse effect to other Prickly Pear water users. (Exhibits O-1 through O-9)

22. Objector introduced exhibits relating to the Prickly Pear Water Users Assoc., a "Diversion Reduction Agreement" (to which the Applicant is not a party), and stream flow records from the upstream USGS gage on Prickly Pear Creek with highlighting showing the days where flow is in excess of 127 CFS. The 127 CFS is the level of flow that will satisfy all of the rights identified by Objector as "priority" claims. Objector did not establish what the criteria was for identifying "priority" claims. This Hearing Examiner cannot determine how membership in the Prickly Pear Water Users Association or being a party to the "Diversion Reduction Agreement" is relevant to the issue of adverse affect.. Objector's witness Tim Vincent testified that he was under the impression that all water users on Prickly Pear Creek must be members of the Association in order to use water. Such is clearly not the case since Water Commissioner records from 1976 show deliveries to individuals who are not listed on Exhibit O-6 which is dated Spring, 1976. Similarly, the significance of the 127 CFS "priority" claim threshold from the USGS stream gage data do not assist in showing that the mitigation as proposed will result in adverse effect.

23. I find that Objector has failed to produce evidence that the dedication of Water Right Nos. 41I 89277-00, 41I 89278-00, and 41I 89279-00 to mitigation in combination with the 50.5 AF of Bureau of Reclamation water to be introduced to Prickly Pear Creek will result in adverse effect to the use of the existing water rights of other persons or other perfected planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

#### CONCLUSIONS OF LAW

24. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (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).

25. Consumptive use of water may not increase when an existing water right is changed. E.g., In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, (DNRC Final Order 2005); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (DNRC Final Order 2003). Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. 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.*, (DNRC Proposal for Decision 2003), application subsequently withdrawn); *In The Matter of Application To Change A Water Right No. 43B 30002710 By USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 To Change Water Right Nos. 76H-108772 And 76H-1-8773 by North Corporation* (DNRC Final Order 2008)

26. The Applicant has proven, and Objector has failed to provide sufficient evidence to controvert, 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)(b), MCA.

### **Conclusion**

27. Objector has failed to provide sufficient evidence to overcome the findings and conclusions regarding historic use and adverse effect made in the Preliminary Decision to Grant Application to Change a Water Right No. 411-30050020. (¶¶ 16, 26)

### **FINAL ORDER**

Application to Change a Water Right No. 411-30050020 is therefore **GRANTED** subject to the following condition:

THIS AUTHORIZATION IS CONDITIONAL UPON THE ANNUAL DELIVERY OF 50.5 ACRE-FEET OF CONTRACT WATER TO PRICKLY PEAR CREEK FROM A TEMPORARY WATER SERVICE CONTRACT WITH THE BUREAU OF RECLAMATION. CONVEYANCE OF THE CONTRACT WATER SHALL BE VIA THE HELENA VALLEY CANAL AND THE POINT OF DELIVERY OR DISCHARGE TO PRICKLY PEAR CREEK SHALL BE AT A POINT IN SECTION 23, T10N R3W. THE WATER RIGHT OWNER OF RECORD IS RESPONSIBLE FOR MAINTAINING DOCUMENTATION SHOWING PROOF OF MITIGATION PLAN IMPLEMENTATION, INCLUDING A COPY OF THE CONTRACT, AND THE TIMING AND AMOUNT OF CONTRACT WATER DELIVERED FOR MITIGATION PURPOSES. RECORDS SHALL BE MADE AVAILABLE TO THE DEPARTMENT UPON REQUEST.

### **NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in

accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 18<sup>th</sup> day of April 2014.

/Original signed by David A Vogler/

David A Vogler, Hearing Examiner  
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and Conservation  
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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 18<sup>th</sup> day of April 2014 by first class United States mail.

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