

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

* * * * *

IN THE MATTER OF CHANGE APPLICATION)
NO. 41QJ-30051168 BY CHEVALLIER)
RANCH CO. AND STATE OF MONTANA)
BOARD OF LAND COMMISSIONERS,)
TRUST LAND MANAGEMENT DIVISION)

**FINAL ORDER
PRELIMINARY DETERMINATION
DECISION ADOPTION**

* * * * *

Having received no valid objections to the application, and subject to the terms, conditions, restrictions, and limitations described in the Preliminary Determination Decision document dated June 28, 2013, the above described water right application is GRANTED. § 85-2-310(3), MCA

DATED this 4th day of October 2013.

/Original signed by David A Vogler/
David A Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601

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

IN THE MATTER OF CHANGE APPLICATION) NO. 41QJ-30051168 BY CHEVALLIER) RANCH CO. AND STATE OF MONTANA) BOARD OF LAND COMMISSIONERS,) TRUST LAND MANAGEMENT DIVISION)	CLARIFICATION TO PRELIMINARY DETERMINATION TO GRANT FOLLOWING HEARING ON PRELIMINARY DETERMINATION TO DENY
---	---

It has come to the Hearing Examiner’s attention that some minor changes in the “Preliminary Determination to Grant Following Hearing on Preliminary Determination to Deny are needed to clarify some of the acres being retired from production.

1. On page 5, Finding of Fact 4, the second sentence should read: “As originally proposed, the change converts 248 acres of existing flood irrigation to a center pivot sprinkler system, adds 62 acres of new center pivot sprinkler irrigation and completely retires 147 acres of historic flood irrigation *from this claim*. See Findings of Fact 37 – 38, and Tables R3 and 5 for changes reflected in the Applicants’ January 29, 2013 submission.”

2. On page 31, Condition 3, add “60 ACRES IN” before “AREA 1” and add “80 ACRES IN” before “AREA 2”.

Dated this 10th day of July 2013.

/Original signed by David A Vogler/
David A Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the CLARIFICATION TO PRELIMINARY DETERMINATION TO GRANT FOLLOWING HEARING ON PRELIMINARY DETERMINATION TO DENY was served upon all parties listed below on this 10th day of July 2013 by first-class United States mail.

PAUL NEAL
NEAL LAW, P.C.
PO BOX 890
CONRAD, MT 59425

ANDRES N. HALADY
ASSISTANT ATTORNEY GENERAL
PO BOX 201440
HELENA, MT 59620-1440

Cc:
DNRC, HELENA REGIONAL OFFICE
PO BOX 201601
HELENA, MT 59620-1601

STATE OF MONTANA, BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620-1604

/Original signed by Jamie Price/

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

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

**IN THE MATTER OF CHANGE APPLICATION)
NO. 41QJ-30051168 BY CHEVALLIER) PRELIMINARY DETERMINATION TO GRANT
RANCH CO. AND STATE OF MONTANA) FOLLOWING HEARING ON
BOARD OF LAND COMMISSIONERS,) PRELIMINARY DETERMINATION TO DENY
TRUST LAND MANAGEMENT DIVISION)**

Pursuant to its authority under §§2-4-601 et seq., 85-2-310, 85-2-402, MCA and Mont. Admin. R. 36.12.201 et. seq, and 36.12.501 et seq., the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on April 25, 2013, to allow Chevallier Ranch Co. and State of Montana Board of Land Commissioners (Applicants) to show cause why the Application No. 41QJ-30051168 should not be denied under the terms of the Preliminary Determination to Deny dated February 22, 2013 (PD to Deny).

APPEARANCES

Chevallier Ranch Co. appeared at the hearing through counsel Paul Neal. Luke Osborne, HydroSolutions Inc. and Philip Chevallier testified on behalf of the ranch.

State of Montana Board of Land Commissioners informed the Hearing Examiner prior to the hearing that they would not be participating in the hearing.

EXHIBITS

Two Exhibits were accepted at the hearing as evidence:

Exhibit A – consists of 79 pages of text, graphs, charts and maps divided into 11 attachments:

- 1) Historic Water Balance Calculations
- 2) Proposed Water Balance Calculation
- 3) Justisson Ditch Capacity and Seepage Evaluation Tech Memo
- 4) Verified Motion to Amend Historic Place of Use
- 5) Return Flow Tech Memo
- 6) Center Pivot Pump Curve, Photo Documentation and Head Loss
- 7) Historic Water Use Map
- 8) Changed Water Use Summary Map

- 9) Trinity Creek Watershed Map
- 10) Field Notes from Justisson Ditch Field Investigation
- 11) Chevallier Ranch Flow Measurement Map

Exhibit B – is a one page map showing the location of State of Montana lands within the project area.

The Hearing Examiner has taken notice of the entire application file in this matter, including the PD to Deny. The findings of fact in this ORDER which the Hearing Examiner accepts from the PD to Deny are identified in the parenthetical following the finding such as “PD”, “File”, or from the materials used in the PD to Deny.

PRELIMINARY MATTERS

Chevallier Ranch and the Montana Board of Land Commissioners filed an “Application to Change a Water Right” on June 2, 2011 with the Helena Regional Office of DNRC (HRO). The Application is to change Water Right Claim No. 41QJ 21054. The HRO determined that the Application was correct and complete on July 3, 2012 after deficiencies were identified and addressed. On October 3, 2012, the HRO sent a letter to the Applicants informing them that they were issuing a “Draft Preliminary Determination” to deny the Application. In response, both Applicants filed a “Waiver of 120 Days Statutory Timeline for Preliminary Determination Decision.” On or about January 29, 2013, Chevallier Ranch filed an “Amendment Information in Response to [DNRC] Draft Preliminary Determination dated October 3, 2012.” On February 22, 2013, the HRO sent a letter to the Applicants informing them their Application “should be denied based upon findings specified in the enclosed Preliminary Determination Decision.” That same letter states “[o]n January 29, 2013, HydroSolutions submitted a substantial amount of additional information for the Department to consider. The Department has determined that the changes in acres irrigated, retired acres and the water balance charts will require an extensive new analysis which warrants a new application.” The Application and file was then forwarded to the Hearings Unit.

The file forwarded to the Hearings Unit contains the “Preliminary Determination to Deny Change” but does not contain the “Draft Preliminary Determination.” The PD to Deny makes no reference to the Applicants’ January 29, 2013, information and in fact the latest reference to information supplied by the Applicants is stated to be February 12, 2012, and May 2, 2012. There is no reference at all in the file regarding any review of the Applicants’ January 29, 2013,

submission other than the cursory reference in the HRO's February 22, 2013 letter to the Applicants that stated the submitted information "warrants a new application."

The objective of allowing an applicant to meet with the Department after issuance of a "Draft Preliminary Determination" is to give the applicant an opportunity to provide further information or clarification of the proposal. The Applicants' January 29, 2013, "Amendment Information in Response to [DNRC] Draft Preliminary Determination dated October 3, 2012" includes additional information and analysis regarding the Application. That additional information is what is described herein as the Exhibits that were offered at the show cause hearing.

After review of the entire file along with the PD to Deny, the Hearing Examiner finds that the information provided by the Applicants on January 29, 2013, appears to be in response to the "Draft Preliminary Determination." The Hearing Examiner further determines that the information submitted in January 29, 2013, does not substantially change Applicants' overall plan for the proposed change in Water Right No. 41QJ 21054.

In light of the foregoing, the Hearing Examiner has conducted a complete review of the entire file incorporating the Applicants' January 29, 2013, submission and being fully informed in the premises makes the following:

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicants¹ seek to change Water Right Claim No. 41QJ 21054 for 6.45 CFS flow and 2737.83 acre-feet (AF) diverted volume of Canyon Creek water with the purpose of flood irrigation and a priority date of July 18, 1904. The point of diversion is a diversion dam in the SWNE of Section 8, Township (T) 12 North (N), Range (R) 5 West (W), used to provide water to the Justisson Ditch which conveys water to the place of use. The claimed period of use and period of diversion is April 1 to November 1. The Applicants originally claimed a place of use of 978 acres in Sections 11, 14, 15, 16 and 23, T12N, R5W, Lewis and Clark County. Although total irrigation listed on Water Right Claim No. 41QJ 21054 is 978 acres, this Application claims that historically 925 acres were actually irrigated. The acre discrepancy is due to an error in the

1. Chevallier Ranch and the Board of Land Commissioners are co-owners of Water Right Claim 41QJ 21504. Throughout this ORDER the Hearing Examiner uses the term "Applicants" although only the attorney for Chevallier Ranch appeared at the hearing.

Verified Motion to Amend submitted to the Montana Water Court for Water Right Claim No. 41QJ 21054 in 2010. The Applicant’s attorney is working on correcting this error. This error in additional acreage creates an overlap in place of use with Water Right Claim Nos. 41QJ 143223, 41QJ 143224 and 41QJ 143246. Although Chevallier Ranch Company owns these claims currently, they were not purchased until 1989. Since the additional acreage in error causes the overlap, the previous listed three claims are not considered supplemental for this Application. (File, Deficiency Responses date February 10 and May 2, 2012)

Table 1: WATER RIGHT NO. 41QJ 21054 (as shown on current abstract)

Purpose	Flow Rate	Period of Use	Acres Irrigated	Point of Diversion	Source	Priority Date
Irrigation	6.45 CFS	Apr 1- Nov 1	978	SWNENE Sec.8	Canyon Creek	July 18, 1904

2. State of Montana Board of Land Commissioners, Trust Lands Division, owns 32 acres proposed to be converted to center pivot sprinkler irrigation and 62 acres proposed to be added to center pivot sprinkler irrigation. Chevallier Ranch Company owns the remainder of the place of use. As per ARM 36.12.1802, State Lands and Chevallier Ranch Company have a possessory interest in the place of use for Water Right Claim 41QJ 21054. (File, Ownership Update received August 5, 2011)

3. Water Right Claim Nos. 41QJ 21053 and 41QJ 21052 have overlapping places of use with Water Right Claim 41QJ 21054. The Applicants (Ranch) intend on submitting a separate Change Application for the supplemental claims at a later date because they use a different source of water and are downstream of the proposed pivot. DNRC instructed the Applicants to submit separate change applications for the two supplemental water rights. Applicants claim the application to be submitted at a later time will propose to retire a portion of the same acreage in Sections 14 and 11 that this Application is proposing to take out of production, also known as the acres north of the county road or Areas 1 and 2 in Exhibit A-8 attached hereto. (File)

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Application proposes to change a portion of the historic place of use of Water Right Claim 41QJ 21054, located near the town of Canyon Creek in Lewis and Clark County. The proposed change converts 248 acres of existing flood irrigation to a center pivot sprinkler system, adds 62 acres of new center pivot sprinkler irrigation and completely retires 147 acres of historic flood irrigation *from this claim*. The location of the retired acres is described as 80 acres in Section 11, 27 acres in the W2NE of Section 14, 36 acres in the N2NW of Section 14, and 4 acres in the NWNE of Section 23, all in T12N, R5W. The 248 acres proposed to be changed from historic flood irrigation to center pivot sprinkler irrigation are described as 78 acres in the E2 of Section 16 and 170 acres in the W2 of Section 15, all in T12N, R5W. The 62 acres proposed to be added to the place of use are located adjacent to the converted acres in Sections 15 and 16 (see attached Exhibit A-8, Areas 1-5). The proposed center pivot system will divert 1750 gallons per minute (GPM) from a pump house located on the Justisson Ditch in the S2NESE of Section 16, T12N, R5W. The pump house is equipped with a Cornell Pump model 6H-100-4 and a General Electric Motor model 5K 404JL252 with 100 horsepower. The proposed diverted volume is 2737.83 AF with a consumptive volume of 627.48 AF. The historic Justisson Ditch used for flood irrigation purposes will remain in operation, as the Applicants will continue to flood irrigate the remaining 530 acres. The Applicants do not propose to change any other elements of Water Right Claim 41QJ 21054 at this time. (File, Deficiency Responses date February 10 and May 2, 2012, Exhibit A-1)

5. The Water Court decreed that Water Right Claim 41QJ 21054's source is Canyon Creek, but the point of diversion is located on Little Prickly Pear Creek, it is assumed that the channel of Little Prickly Pear Creek is being used as a natural carrier of the Canyon Creek water. Since the point of diversion for this claim is after Canyon Creek flows into Little Prickly Pear Creek, the Applicants would be required to install and maintain measuring devices at the point of diversion and on Canyon Creek before it flows in to Little Prickly Pear Creek to ensure they are not appropriating Little Prickly Pear Creek water. Applicants would also be required to maintain monthly measurement records and submit them to the Department at the end of every irrigation season. (File)

85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

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

(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.

7. In a change proceeding and in accordance with well-settled western water law, 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;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E.

Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 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); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo.,2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) ... 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

(italics added).

8. Montana’s change statute simply codifies western water law.² One commentator describes the general requirements in change proceedings as follows:

² Although Montana has not codified the law in the detail, Wyoming has, and the two states’ requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

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 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 at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, 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.

9. See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (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 (2007), at § 5:78 (“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.”); § 37-92-301(5),

Colorado follows a similar analysis under its requirement that a “change of water right, ... shall be approved if such change, ...will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

10. Accordingly, 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)028708-41I by Hedrich/Straugh/Ringer, Final Order (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order (1992); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated).

11. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 - 57 (Colo., 1999). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only 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. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA.

12. 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 findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

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.

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.).

13. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

14. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

Historic Use:

FINDINGS OF FACT

15. The Chevallier family homesteaded the place of use in 1871. As decreed in District Court Cases 242 and 6263, the ranch has been flood irrigated since "a date long prior to July 18,

1904.” The priority date for Water Right Claim 41QJ 21054 was more recently decreed by the Montana Water Court in the basin 41QJ Temporary Preliminary Decree as July 18, 1904. (File)

Point of Diversion and Conveyance Facility

16. Historically five water rights (Table 2) used the same point of diversion and conveyance ditch, Justisson Ditch, to divert up to 15.7 CFS cumulatively. Water Right Claim Nos. 41QJ 143223 and 143246 also divert a portion of their claimed flow into the Vincent Ditch. (File)

Table 2: WATER RIGHTS ON THE JUSTISSON DITCH

W.R. NO.	FLOW (CFS)	OWNER	ACRES	PRIORITY DATE
41QJ 21054 00	6.45	Chevallier Ranch Co. MT State, Trust Lands	978 ³	July 18, 1904
41QJ 143223 00	3.14	Chevallier Ranch Co.	160	Nov. 11, 1882
41QJ 143224 00	1.48	Chevallier Ranch Co.	70	May 1, 1871
41QJ 143246 00	1.5	Chevallier Ranch Co.	160	Nov. 11, 1882
41QJ 97486 00	3.14	Sieben Ranch Co.	90	May 31, 1865

17. The historic point of diversion for the Justisson Ditch is a diversion dam located on Little Prickly Pear Creek, just after the confluence with Canyon Creek, in the SWNENE of Section 8, T12N, R5W. The deficiency response dated February 10, 2012, describes the first four tenths of a mile of the Justisson Ditch is considered a by-pass channel (Figure B.2.F). The diversion dam directs an uncontrolled amount of water down the by-pass channel and then into the main Justisson Ditch, water that does not go into the Justisson Ditch flows back into Little Prickly Pear Creek. Review of the Lewis and Clark County Water Resource Survey (1965) confirms that the Justisson Ditch is approximately six and a half miles long, horseshoe shaped and follows the contour lines around the place of use. Water Right Claim 41QJ 21054 is the most junior right on the ditch and diverts water from the ditch after the senior rights have been satisfied. The Applicants have never measured the amount of water diverted into the Justisson Ditch; the more

³ The 978 acres irrigated shown reflects an amended area. The POU was amended in 2010 from an original claim of 840 acres to 978 acres. However this increase erroneously included 67 acres in the N2NW4, T12N, R5W which is watered by the three other water rights listed. Chevallier Ranch has filed for a correction in the Water Court to correct this error. 41QJ 21054 would then show an acreage of 911 acres.

senior rights received water first and then Water Right Claim 41QJ 21054 got what was left in the ditch. Four and a half miles down, Willow Creek intersects the Justisson Ditch and Supplemental Water Right Claim 41QJ 21053 in the amount of 5 cfs contributes irrigation and carriage water the last two miles of the ditch. Since approximately 2738 AF of water from Water Right No. 41QJ 21054 is diverted during the irrigation season into the Justisson Ditch, and seepage losses average 0.24 cfs per mile (see below) for the five miles of ditch above Willow Creek, the total annual seepage loss above Willow Creek averages approximately 510 AF annually. $[0.24 \text{ cfs/mile} * 5 \text{ miles} = 1.20 \text{ cfs. } 1.20 \text{ cfs} * 1.984 \text{ AF/day/cfs} = 2.38 \text{ AF/day. } 2.38 \text{ AF/day} * 214 \text{ days} = 509.49 \text{ AF loss per season.}]$ 2738 AF of total seasonal diversion minus 510 AF of seasonal seepage loss equals 2228 AF available to divert out of the ditch. Since 819 AF is the volume irrigated out of the ditch for Area 5 see Table R-3 (*infra*), above Willow Creek, 1409 AF of water from Water Right Claim No. 41QJ 21054 remains available in the ditch prior to the intersection with Willow Creek. (File, Exhibit A-3, A-5)

18. Applicants measured flow in the Justisson Ditch and noted the capacity of the ditch at various locations. Below the by-pass channel in the Justisson Ditch proper, the capacity is estimated to be 15.8 cfs declining to approximately 12.0 cfs at the center pivot take out. Beyond the pivot take out, the capacity continues to decrease and is reduced to approximately 2.9 cfs by the time it reaches Duffy Lane (the south boundary of the acreage proposed to be retired. The Justisson Ditch is appropriately sized for the water rights that it historically and currently conveys. (Exhibit A-3)

19. In the PD to Deny, DNRC used National Engineering Handbook figures based on the soil types found in the area. Those figures show a loss rate of 1.55 to 1.95 cfs per mile which results in a total seepage loss of 8.33 to 10.73 cfs (not the 16.55 shown in the Department's Table 3 in the PDD). Seepage loss based on only soil type does not take into consideration factors such as natural ditch sealing due to fine sediments being deposited in the ditch over time. Applicants January 29, 2013, submission uses actual seepage rates for the Justisson Ditch by measuring losses in measured flow in the ditch. Justisson Ditch has not been significantly altered (lined, compacted, etc.) other than routine maintenance from its historical condition. The seepage loss rate varies from 5.0 cfs per mile (in the by-pass channel, which loss returns almost immediately to Little Prickly Pear Creek) and ranges from 0.31 to 0.17 cfs per mile in Justisson Ditch proper. The average seepage loss was 0.24 cfs per mile. Applicants seepage loss calculations are more reliable than the seepage loss calculated by DNRC. Applicants apportioned the ditch

seepage loss among the water rights that can be diverted into the ditch. For Water Right 21054 the loss was calculated to be 2.03 cfs over the entire 7 mile length of the ditch. (Exhibit A-3, A-5) 20. While the seepage values the Applicants use are contradictory of the soil types identified in the area, this Hearing Examiner finds that the Applicants' seepage values are more reliable and that sufficient water exists to irrigate fields across the historic place of use. (Exhibit A-3)

Place of Use

21. As described in the Application, the historic place of use consisted of 925 irrigated acres, generally located in Sections 11, 14, 15, 16 and 23, all in T12N, R5W, Lewis and Clark County. Affidavit from Phillip Chevallier states that primarily alfalfa hay and wild hay was historically grown on the place of use, areas with alfalfa hay typically produce 2 to 3 tons per acre and wild hay areas produce 1.5 to 2 tons per acre. (File)

22. Analysis of aerial photo AZM-7P-121 dated July 15, 1955, shows water being applied to the 925 acres. Aerial photos 278-074 and 278-093, dated September 2, 1978, and AZU-5EE-175 and AZU-5EE-177, dated October 13, 1964, show slightly patchier water application on approximately 775 acres. The acres "north of the county road" proposed to be retired under this Application don't appear to be irrigated with Canyon Creek water in the 1978 and 1964 aerial photos, a portion does not appear to be irrigated and the remaining appears to be irrigated from Willow Creek. The Lewis and Clark County Water Resources Survey (WRS), published in 1965, and the field notes indicate irrigation on a approximately 820 acres of the historic claimed place of use for Water Right Claim 41QJ 21054. (File)

23. Based on analysis of all the above mentioned aerial photos and WRS field notes , the Department finds historically 885 acres of the claimed place of use were irrigated at one time with Canyon Creek water from the Justisson Ditch. The 40 acres claimed on 41QJ 21052 appear to be irrigated with Willow Creek water, not Canyon Creek water via the Justisson Ditch based on Findings of Fact (FOF) 26 below. Chevallier Ranch agrees that 885 acres have been historically irrigated with water right 41QJ 21054. The Applicants' January 29, 2013, submission uses the period of diversion, solar evaporation, seepage rate, acres irrigated, irrigation efficiency, soil-water capacity, crop evapotranspiration, the DNRC irrigation water requirements and calculation to determine the historic water balance. The historic use water balance calculations in Exhibit A-1 and the map in Exhibit A-7, and A-11 describe how this water is applied, consumed and return; and are broken out for five separate areas within the entire

historic irrigated area identified as Areas 1 – 5 in Exhibit A-8 (attached). Since water right 41QJ 21052 is technically part of the historic place of use as listed on the abstract, it is included in the historic water use evaluation. The historic water balance calculations show that the 40 acres of its place of use were irrigated only by water right 41QJ 21052 and by sub-irrigation, and show that water right 41QJ 21054 applied water to the remaining 20 acres of Area 1. One reason for slightly patchier water application north of the county road is that the historic place of use of water right 41QJ 21053 actually irrigated ground in Area 3 and Area 4 as well as Area 2, shown on Exhibit A-7. In a practical sense, Willow Creek water diverted into the Justisson Ditch at the 41QJ 21053 point of diversion mixed with Canyon Creek water and assisted in irrigating all ground downstream from this point of diversion. It is not possible for Willow Creek water to be separated in the ditch to irrigate ground only in Area 2 as described on the water right abstract, however it appears that sufficient Canyon Creek water remains in Justisson Ditch below the Willow Creek junction to support the volumes apportioned to Water Right Claim No. 41QJ 21054 in Areas 1 – 4 on Exhibit A-8. Table R-3 below, summarizes estimated historic water use from Exhibit A-1 for Areas 1 through Area 5 including supplemental water rights and sub-irrigated areas. The Areas in the Table correspond to locations on the Exhibit A-7.

Table R-3. Summary of Historic Water Balance Calculations Including Supplemental Water Rights in Exhibit A-1.

Area-Water Right No.	Acres Irrigated	Volume Irrigated (ac-ft)	Consumptive Use (ac-ft)	Return Flow (ac-ft)
1-21052	40	153.4	20.1	133.4
1-Sub-Irrigated	40	NA	NA	NA
1-21054	20	30.02	15.44	14.58
1 Total	60	183.4	35.5	147.9
2-21054	80	12.01	6.17	5.83
2-21053	80	258.8	55.6	203.3
2 Total	80	270.9	61.7	209.1
3-21054	114	171,1	88,0	83,1
4-21054	125	187.6	96.5	91.1
5-21054	546	819.5	421.4	398.1
21054 Total	885	1220.2	627.5	592.8
Total w/ Supplemental	925	1632.5	703.1	929.4

Due to the topography of the project area, all return flows ultimately return to Little Prickly Pear Creek either through underground percolation directly to Little Prickly Pear Creek or by underground percolation to Willow Creek then as surface water to Little Prickly Pear Creek. The modeled yearly return flows show that for the first approximately five years return flows rise rapidly and then start to level off (but keep rising) through the next 25 modeled years (see also Adverse Effect section).

Supplemental Relationships

24. Water Right Claim 41QJ 21054 proposed to be changed currently has two different supplemental relationships. First, a Verified Motion to Amend was submitted in 2010 to clarify the place of use for Water Right Claim 41QJ 21054. The Motion to Amend included 67 acres irrigated in the N2NW1/4 of Section 15 to the claim. The 67 acres create an overlap with Water Right Claim Nos. 41QJ 143223, 41QJ 143224 and 41QJ 143246. The Applicants believe the overlap to be in error and intend to have those acres Amended off of Water Right Claim 41QJ 21054. The PD to Deny states that until the Applicants take formal action to have the error corrected, the Department finds the supplemental relationship analysis insufficient. Applicants January 29, 2013, submission demonstrates that they have taken formal action to correct the error through filing a verified motion to amend with the Water Court. (File, Deficiency Response dated February 10, 2012, Exhibit A-4) The information contained in the verified motion to amend Water Right No. 41QJ 21054 is consistent with the Applicants' supplemental water right relationship analysis. Accordingly the Hearing Examiner finds that there is no supplemental relationship between Water Right No. 41QJ 21054 and Water Right Claim Nos. 41QJ 143223, 41QJ 143224, and 41QJ 143246.

25. The second supplemental relationship Water Right Claim 41QJ 21054 historically has is with Water Right Claim Nos. 41QJ 21052 and 41QJ 21053, which claim Willow Creek as the source of water. The overlap in acreage is approximately 120 acres north of the county road in Section 11 and 14 (Areas 1 and 2). Area 1 consists of 40 acres irrigated by Water Right Claim No. 21052 (contributing 65% of the consumptive use) and subirrigated (contributing 35% of the consumptive use). Area 1 also consists of an additional 20 acres irrigated by Water Right Claim No. 21054. Area 2 consists of 80 acres irrigated by Water Right Claim No. 21054 (contributing 10% of the consumptive use) and Water Right Claim No. 21053 (contributing 90% of the consumptive use). Areas 1 and 2 are also a portion of the acreage the Applicants proposed to

take out of production under this Application (totaling 140 acres taken out of production. As instructed by the Helena Regional Office, Applicants intend on submitting an application to change the place of use and point of diversion for these two supplemental rights at a later date. (File, Exhibit A-7)

Table 4: SUPPLEMENTAL WATER RIGHTS

W.R. NO.	FLOW (CFS)	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	SOURCE	PRIORITY DATE
41QJ 21052 00	1.52	Irrigation	Apr 25-Oct 01	40 acres	NESWNW Sec. 14	Willow Creek	Apr 01, 1886
41QJ 21053 00	5	Irrigation	Apr 25-Oct 01	80 acres	SENESEW Sec. 23	Willow Creek	May 11, 1896

Period of Diversion/Use

26. The period of diversion and period of use as listed on Water Right Claim 41QJ 21054 abstract, is from April 1 to November 1 of each year. Affidavit by Applicant Phillip Chevallier states the irrigation system was sufficient to meet the irrigation requirements throughout the historic period of diversion. The Department finds the claimed period of diversion and use to be reasonable since sufficient flows are available from the source and this period of use conforms to practices typical of the area. (File, Finding of Fact 17)

Flow Rate

27. The flow rate decreed to Water Right Claim 41QJ 21054 is 6.45 CFS. The 6.45 CFS is part of the total 15.7 CFS flow that may be diverted into the Justisson Ditch. The Applicants explain there has never been a measurement device used to measure the diverted flow into the ditch and that there has been sufficient flow to meet the irrigation needs. The PD to deny issued by the Helena Regional Office estimates a flow rate for the Justisson Ditch of 63 CFS. This estimate is based on modeling using Mannings equation. The Applicants January 29, 2013 submission includes actual measurements of flow in the Justisson Ditch. Those measurements show that at normal bankful levels the ditch carries approximately 15 CFS at the head of the ditch diminishing to approximately 12 CFS at the pivot take out point and further diminishing to approximately 4 to 6 CFS after turning north above Areas 3 and 4. This Hearing Examiner finds

that the primary length of the Justisson Ditch is sized appropriately to convey the flow rates of combined water rights that use the ditch. (File, Exhibits A-3, A-11)

Diverted Volume

28. Since there has never been a measuring device on the diversion structure, the historically diverted volume figure (2737.83 AF) is based on the historic period of diversion and flow rate. Shortly after Canyon Creek flows into Little Prickly Pear Creek, the Applicants diverted an unmeasured amount of water with a diversion dam on Little Prickly Pear Creek into a bypass channel. Since the total flow rate allowed to be diverted into the Justisson Ditch is 15.7 CFS, and the Applicants measurements of ditch size and flow are appropriate for 15.7 CFS, this Hearing Examiner finds that the Applicants operated Water Right Claim 41QJ 21054 within the allowable flow rate, and the diverted volume of 2737.83 AF is reasonable. (File, Deficiency Response dated February 10, 2012, Exhibit A-3, Affidavit of Philip Chevallier)

Consumptive Volume

29. Applicants January 29, 2013, submission shows the historic water balance in Exhibit A-1 and A-7 describe how water was applied over the historic place of use. The revised historic water balance calculations use DNRC historic consumptive use methodology (ARM 36.12.1902(16)), based on the Austin weather station and Lewis and Clark County management factor. This equates to a total consumptive rate of 0.77 AF per acre. The water balance calculations included in the Applicants' January 29, 2013, submission also provide an accounting for monthly return flow volumes by accounting for water storage in the soil profile and do not include ditch seepage loss. The water use on Area 1 through Area 5 of the historic place of use is summarized in Table R-3, above. The revised water balance estimates a total consumptive volume of 683 AF over the 885 acre historic place of use including some supplemental water from water right 41QJ 21053 which is intermingled with water right 41QJ 21054 and is applied to the same ground in Area 2 (627.5 ac-ft + 55.6 ac-ft). Historic consumptive volume of 41QJ 21052 is estimated to be 20.1 ac-ft. (Exhibit A-1, A-7)

CONCLUSIONS OF LAW

30. Applicants seek to change existing water right represented by its Water Right Claim 41QJ 21054. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights 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).

31. 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).

32. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16)

33. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be

less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, (DNRC PFD, Final Order 2005); 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”).

34. 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)).

35. “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.

36. This Hearing Examiner finds that the Applicants have proven by a preponderance of the evidence the historic use of Water Right Claim No. 41QJ 21054 to be a flow rate of 6.45 CFS

with a consumptive volume of 627.5 AF and a diverted volume of 2737.83 AF to support 885 of historic flood irrigation. (Findings of Fact No. 15-29)

Adverse Effect:

FINDINGS OF FACT

37. Applicants initial approach was to change water rights 41QJ 21054, 41QJ 21053, and 41QJ 21052 simultaneously to offset additional consumptive use from the center pivot. However, DNRC directed the Applicants to submit separate applications for each of the water rights beginning with 41QJ 21054. The adverse effect evaluation of this change application and the proposed action requires that sufficient water from the supplemental water rights 41QJ 21052 and 41QJ 21053 are not utilized in the historic place of use identified as Areas 1 and 2 in Exhibit A-8 (as they have already been in practice). This Hearing Examiner finds that the Applicants’ overall plan is sound and that the only way to properly evaluate the individual needed changes is in the way that the Applicants have provided. If granted, the change authorization will be conditioned such that water from Water Right Nos. 41QJ 21054, 41QJ 21053, and 41QJ 21052 will not be used in the areas identified as being retired from irrigation in Areas 1 and 2. (File, Exhibit A-2)

38. Table 5 is a summary of the water balance analysis provided in Exhibit A-2.

Table 5. Summary of Changed Water Use

Area-Water Right No.	Acres Irrigated	Volume Irrigated (ac-ft)	Consumptive Use (ac-ft)	Return Flow (ac-ft)
1-21054	0	0	0	0
2-21054	0	0	0	0
3-21054	48	40.2	17.0	23.2
3-21052	48	153.4	20.1	133.4
3-Total	48	193.6	37.0	156.6
4-21054	125	96.6	40.9	56.0
4-21053	125	258.8	55.6	203.3
4 Total	125	355.7	96.5	259.9
5Flood-21054	294	537.4	226.9	310.5
5Pivot	310	528.8	342.4	186.4

5 Total	604	1066.2	569.3	496.9
21054 Total	777	1203.3	627.2	576.1
Total w/ Supplemental	777	1615.5	702.8	912.7
21054 Flood	467	674.4	284.8	389.7
Total Flood	467	1086.7	360.4	726.3
Total Pivot	310	528.8	342.4	186.4

Applicants January 29, 2013 submission includes an additional 66 acres to be retired in Area 3. Comparing Table 3 and Table 5 reveals that a total of 60 acres to be retired in Area 1, 80 acres to be retired in Area 2, and 66 acres to be retired in Area 3, and 4 acres in Area 5 for a total of 210 acres to be retired from irrigation within the project area. Again, comparing Table 3 and Table 5 shows that for Water Right Claim No. 21054 alone the acreage to which it is to be applied to drops from 885 acres to 777 acres and the consumptive volume 627.5 AF to 627.2 AF.

The flooded (which includes wheel line) acres in Areas 3 and 4 would be irrigated at 79% of full service or 100% of full service when the supplemental water rights are included. As shown in the table, supplemental water right 41QJ 21052 is moved to Area 3 and water right 41QJ 21053 is moved to Area 4 to reflect the water right changes proposed for those rights. This Hearing Examiner notes that the General Abstracts show some portion of Area 3 is currently authorized as being irrigated by 41QJ 21052, and some portion of Area 4 is currently authorized as being irrigated by 41QJ 21053. As can be seen from a comparison of Tables 3 and 5, there is virtually no change in the consumptive use of either water right 41QJ 21054 standing alone or in the total of all rights involved.

In summary, Water Right Claim No. 21054 will be used in combination with Water Right Claim No. 21052 to irrigate 48 acres in Area 3; in combination with Water Right Claim No. 21053 to irrigate 125 acres in Area 4; by itself to irrigate 310 acres under a pivot; and by itself to flood irrigate 294 acres. (Exhibits A-1, A-2)

39. Applicants' January 29, 2013, submission includes a return flow analysis for both historic return flow and return flows after the proposed change. Applicants used the Alluvial Water Accounting System (AWAS) software developed by the Integrated Decision Support Group of the Water Center at Colorado State University. AWAS is recognized as a valid modeling program by DNRC geohydrologists. Using the Water Balance tables, it can be seen that the total *available* return flow from historic practices is 929.4 ac-ft per year and the total *available*

return flow from the proposed change is 912.7 ac-ft per year. *Available* return flow does not equate with the actual flow returning to the stream as some of the *available* return flow will be lost through storage in the soil profile or deep percolation. *Available* return flow is an input parameter in the AWAS model. Running the AWAS model shows that under the proposed change return flows are slightly higher than historic for the first approximately 10 years of the model run and then virtually identical for the next 20 years of the model run. As noted earlier, the return flow under historic conditions and under the proposed change ultimately appear on Little Prickly Pear Creek at the mouth of the canyon either through percolation directly into Little Prickly Pear Creek or from percolation into Willow Creek and subsequently as surface flow into Little Prickly Pear Creek. What this means is that with the additional acres being irrigated under the pivot and the retirement of acres in Areas 1, 2 and 3, creates a zero balance in change to return flow. The volume diverted remains the same and consumptive use remains the same thus return flows will not be affected. (Exhibits A-1, A-2, A-5, A-8)

CONCLUSIONS OF LAW

40. The Applicant bears the affirmative burden of proving that 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. §85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC*, Proposal for Decision, adopted by DNRC Final Order (2005).

41. 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).

42. The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988). The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” Citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

...we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion

might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted). Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

43. 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).

44. 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 is 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.

45. 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.

46. The Applicants have 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)(b), MCA. (Findings of Fact No. 38, 39)

Beneficial Use

FINDINGS OF FACT

47. The Applicants proposed change converts 248 acres of flood irrigation to a center pivot sprinkler system, adds 62 acres of center pivot sprinkler irrigation and completely retires 147 acres of historic flood irrigation. No other elements of Water Right Claim 41QJ 21054 are proposed to be changed under this Application. The Department recognizes irrigation is a beneficial use, and this Hearing Examiner finds that the Applicants have shown that a flow rate

of 6.45 CFS, a diverted volume of 2737.83 AF will support 777 acres of flood and pivot irrigation and that the proposed change will result in a beneficial use of the water. (File, Exhibit A-2)

CONCLUSIONS OF LAW

48. 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.

49. The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. 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 (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), *aff'd 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* (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.

50. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision, adopted by DNRC Final Order (2005).

51. Applicants propose to use water from water right 41QJ 21054 for irrigation on 777 acres, which is a recognized beneficial use. §85-2-102(4), MCA. Applicants have proven by a preponderance of the evidence that the 2737.8 AF of diverted volume and 6.45 CFS flow rate of water requested is the amount needed to sustain the beneficial use. (F.O.F. No. 47)

Adequacy of Diversion

FINDINGS OF FACT

52. Applicants proposed change does not alter the means of diversion. The Justisson Ditch has been in use for over 100 years and has adequately conveyed water for irrigation on the Chevallier Ranch property. Applicants have shown that the Justisson Ditch is properly sized to convey all the water rights authorized to be diverted into it. However, the Justisson Ditch does not have any measuring device at the head of the ditch to ensure that the proper amounts of water are diverted into it. This Hearing Examiner finds that a proper headgate and measuring device needs to be installed at the head of the Justisson Ditch in order for this change to be approved. (File)

53. The proposed center pivot system will divert 1750 gallons per minute (GPM). A pump house is located on the Justisson Ditch in the S2NESE of Section 16, T12N, R5W. The pump house is equipped with a Cornell Pump model 6H-100-4 and a General Electric Motor model 5K 404JL252 with 100 horsepower. Applicants have provided documentation that the pump- is adequate to support the flow rate. (Exhibit A-6)

CONCLUSIONS OF LAW

54. 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* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

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).

55. Applicants have proven by a preponderance of the evidence that the means of diversion, construction, and operation of the appropriation works are adequate for the proposed change based on the decreed flow rate. (F.O.F. No. 51, 52)

Possessory Interest

FINDINGS OF FACT

56. The Applicants signed and had the affidavit on the Application form notarized affirming the Applicants have 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 for irrigation. (File)

CONCLUSIONS OF LAW

57. Pursuant to §85-2-402(2)(d), 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 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 it 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.

58. Pursuant to Admin. R. Mont. 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes

the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

59. The Applicants have proven by a preponderance of the evidence that they 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. §85-2-402(2)(d), MCA. (FOF No.65)

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41QJ 3005118 should be **Granted** to add 62 acres of new irrigation under a pivot in the SESE, NESE, NWSE and SWSE and SWNE all in Sec. 16, T12N, R5W, Lewis and Clark County, subject to the following conditions:

1. **WATER MEASUREMENT REQUIRED – CANYON CREEK**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASURING DEVICE ON CANYON CREEK BEFORE IT FLOWS INTO LITTLE PRICKLY PEAR CREEK, TO ENSURE THAT LITTLE PRICKLY PEAR CREEK IS NOT BEING APPROPRIATED. THE LOCATION OF THE MEASUREMENT DEVICE SHALL BE INSTALLED BY THE APPROPRIATOR JUST ABOVE THE CONFLUENCE OF CANYON CREEK WITH LITTLE PRICKLY PEAR CREEK. MEASUREMENT RECORDS SHALL BE TAKEN ONCE A WEEK THROUGH OUT THE PERIOD OF DIVERSION, APRIL 1 TO NOVEMBER 1 OF EACH IRRIGATION SEASON. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CASUE FOR REVOCATION OF THIS AUTHORIZATION. THE RECORDS MUST BE SENT TO THE DNRC HELENA REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE ACCURATELY.

2. **WATER MEASUREMENT RECORDS REQUIRED AT DIVERSION**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASUREMENT DEVICE ON THE POINT OF DIVERSION. THE APPROPRIATOR SHALL NOT DIVERT MORE THAN THEY HAVE A RIGHT TO AND NOT EXCEED THE AVAILABILITY FROM CANYON CREEK. THE APPROPRIATOR SHALL KEEP A WRITTEN WEEKLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME DIVERSION TAKES PLACE. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON

REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS AUTHORIZATION. THE RECORDS MUST BE SENT TO THE DNRC HELENA REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO: HELENA WATER RESOURCES REGIONAL OFFICE, 1424 9TH AVENUE, PO BOX 201601, HELENA, MT 59620-1601

3. APPROPRIATOR TO CEASE IRRIGATION OF IDENTIFIED ACRES

APPROPRIATOR SHALL CEASE USING WATER RIGHT NOS. 41QJ 21054, 41QJ 21053, AND 41QJ 21052 ON THE ACRES IDENTIFIED TO BE RETIRED FROM IRRIGATION AS DEPICTED ON EXHIBIT A-8 "CHANGED WATER USE SUMMARY MAP" IDENTIFIED AS "AREA 1" IN THE NESW, SESW, NWSE, SEC. 11, NENW, SEC. 14; "AREA 2" IN THE NWSE, SWSE, SEC 11, NWNE, NENW, SEC. 14; AND 66 ACRES IN "AREA 3" IN THE NESW, NWSW, SESW, SWSW, SEC. 14; AND 4 ACRES IN "AREA 5" IN THE SWNE, SENW, SEC 15; ALL IN T12N, R5W, LEWIS AND CLARK COUNTY. USE OF WATER FROM WATER RIGHT NOS. 41QJ 21054, 41QJ 21053, OR 41QJ 21052 ON THE ABOVE DESCRIBED LANDS MAY BE CAUSE FOR REVOCATION OF THIS AUTHORIZATION.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria.

Dated this 28th day of June 2013.

/Original signed by David A Vogler/

David A Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT FOLLOWING HEARING ON PRELIMINARY DETERMINATION TO DENY was served upon all parties listed below on this 28th day of June 2013 by first-class United States mail.

PAUL NEAL
NEAL LAW, P.C.
PO BOX 890
CONRAD, MT 59425

ANDRES N. HALADY
ASSISTANT ATTORNEY GENERAL
PO BOX 201440
HELENA, MT 59620-1440

Cc:
DNRC, HELENA REGIONAL OFFICE
PO BOX 201601
HELENA, MT 59620-1601

STATE OF MONTANA, BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620-1604

/Original signed by Jamie Price/

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

