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(Last updated April 2016)

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SUMMARIES OF ORDERS

Final Order Date:	05/04/74 (G)	**Applicant:**	Westmoreland Resources
Case #/Type:	10-g42KJ (P)	**Regional Office:**	Billings
Application Date:	07/11/73	**Examiner:**	Chronister
Hearing Date:	01/14/74	**Use:**	Industrial

A-4.9395
I-14.900

Interim permit showed no well interference or adverse effect to surface users by groundwater well.

Final Order Date:	05/10/74 (G W/C)	**Applicant:**	Bird
Case #/Type:	32-s41E (P)	**Regional Office:**	Helena
Application Date:	07/24/73	**Examiner:**	Chronister
Hearing Date:	12/17/73	**Use:**	Mining

A-4.9394
S-15.920
O-2.490
B-21.780

Objections pertained to water quality since source is also source for the Town of Basin. Neither objector produced sufficient evidence to warrant denial of permit. Granted.
(Caveat: it is now responsibility of applicant to prove no adverse effect.)

Final Order Date:	07/08/74 (G W/C)	**Applicant:**	Nussbaum/Johnson
Case #/Type:	201-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	?	**Examiner:**	Chronister
Hearing Date:	04/29/74	**Use:**	Irrigation

A-4.9395
T-5.800

Pumping at requested rate may adversely affect objector's wells.

[Permit granted with condition that amount could later be reduced.]

Final Order Date:	08/14/74 (G W/C)	**Applicant:**	Diehl Development Corporation
Case #/Type:	107-s41I (P)	**Regional Office:**	Helena
Application Date:	08/15/73	**Examiner:**	Doney
Hearing Date:	06/11/74	**Use:**	Irrigation

A-4.9392
T-5.800

The rights of prior appropriators should not be adversely affected if applicant is required to allow a flow of water to pass the proposed point of diversion for the protection of existing rights.

E-14.9376

Since sufficient quantities of water will be maintained in the stream for the protection of aquatic life, it is unnecessary to determine whether the public has an existing water right in Prickley Pear Creek for recreational use, nor is it necessary to determine whether under the Montana Environmental Protection Act, a permit may be conditioned for the sole purpose of preserving environmental quality.

Final Order Date:	09/06/74 (G W/C)	**Applicant:**	Skyliner Corp.
Case #/Type:	912-s41K (P)	**Regional Office:**	Helena
Application Date:	11/05/73	**Examiner:**	MacIntyre
Hearing Date:	08/07/74	**Use:**	Recreation

S-15.920
U-14.1259.25

Water from developed springs contributes to source. Held, Held, unappropriated water available.

Final Order Date:	09/10/74 (D)	**Applicant:**	Coutts
Case #/Type:	67-s43D (P)	**Regional Office:**	Billings
Application Date:	08/07/73	**Examiner:**	Chronister
Hearing Date:	08/12/74	**Use:**	Irrigation

U-14.1259
W-1.870

Objector has prior claim to waste and seepage waters sought; the proposed appropriation would adversely and totally interfere with objector's claims.

Final Order Date:	10/03/74 (G W/C)	**Applicant:**	City of Ronan
Case #/Type:	73-g76L (P)	**Regional Office:**	Kalispell
Application Date:	08/08/73	**Examiner:**	Chronister
Hearing Date:	04/30/74	**Use:**	Commercial

E-24.4848
J-21.800

Indians have paramount rights in waters of Flathead Reservation to the extent of their reserved right, and the State of Montana has no jurisdiction to regulate, apportion, or otherwise affect or diminish those rights; however, the State does have jurisdiction to regulate surplus water.

Final Order Date:	10/20/74 (DIS)	**Applicant:**	Swart
Case #/Type:	1437-s42KJ (P)	**Regional Office:**	Miles City
Application Date:	01/30/74	**Examiner:**	Lewis
Hearing Date:	09/25/74	**Use:**	Stock

A-16.7567

Because applicant has an existing reservoir in the same coulee as the proposed point of diversion, the above matter should be considered an application to change the point of diversion, and applicant allowed to withdraw this application and apply for a change.

Final Order Date:	11/08/74 (G)	**Applicant:**	Burlington Northern, Inc.
Case #/Type:	1676-c41I (C)	**Regional Office:**	Helena
Application Date:	03/06/74	**Examiner:**	?
Hearing Date:	09/09/74	**Use:**	Irrigation

A-4.9395
E-24.480

Although flow rate used in past for locomotive water (very little volume actually diverted), change in use allowed to irrigate golf course. No adverse effect.

Final Order Date:	11/11/74 (G W/C)	**Applicant:**	Bureau of Land Management
Case #/Type:	1681-s43Q (P)	**Regional Office:**	Billings
Application Date:	03/05/74	**Examiner:**	Lewis
Hearing Date:	09/26/74	**Use:**	Irrigation

L-1.940

"Different types of surface water" doctrine nullified by Water Use Act.

Final Order Date:	11/26/74 (G W/C)	**Applicant:**	Kane
Case #/Type:	77-c43D (C)	**Regional Office:**	Billings
Application Date:	12/07/73	**Examiner:**	Nugent
Hearing Date:	07/01/74	**Use:**	Irrigation

B-21.780

Burden of proof in a change proceeding is upon those who allege injury.

Final Order Date:	12/05/74 (G W/C)	**Applicant:**	Crumpled Horn
Case #/Type:	546-s41O (P)	**Regional Office:**	Havre
Application Date:	10/01/73	**Examiner:**	Spaeth
Hearing Date:	08/05/74	**Use:**	Irrigation

A-16.7516
L-1.940

Application for water right for use on state lands does not comply with R.C.M. which governs the acquisition of a water right by lessee of state lands. Therefore, that portion of the application must be denied.

Final Order Date:	12/11/74 (D)	**Applicant:**	Bureau of Land Management
Case #/Type:	1623-s41I (P)	**Regional Office:**	Helena
Application Date:	02/22/74	**Examiner:**	MacIntyre
Hearing Date:	09/09/74	**Use:**	Drilling Geothermal Research Well

I-14.900
L-1.940

Department issued interim permit for drilling of research well which permit terminated on October 1, 1974. A provisional permit may not be issued, and no use right has been created in applicant.

Final Order Date:	12/18/74 (G W/C)	**Applicant:**	Czerwinski
Case #/Type:	425-s76N (P)	**Regional Office:**	Kalispell
Application Date:	09/14/73	**Examiner:**	Spaeth
Hearing Date:	07/15/74	**Use:**	Irrigation/Stock/ Fish Pond

M-5.110

Canal inadequate.

[Permit issued with condition that canal be improved in two years.]

Final Order Date:	12/19/74 (G W/C)	**Applicant:**	Scott
Case #/Type:	1283-g41O (C)	**Regional Office:**	Havre
Application Date:	01/07/74	**Examiner:**	Lewis
Hearing Date:	10/07/74	**Use:**	Irrigation

A-4.9395
E-24.480

Applicant's existing right only to depth of 17 feet. Thus if water table should drop below 17 feet, applicant is prohibited from further pumping.

A-16.7567

Well to be drilled six feet from existing water right pit. Department determined this a change in point of diversion.

Final Order Date:	01/03/75 (G W/C)	**Applicant:**	Shipman
Case #/Type:	1598-s41S (P) 1599-s41S & 1600-s41S (P)	**Regional Office:**	Lewistown
Application Date:	02/15/74	**Examiner:**	Lewis
Hearing Date:	10/17/74	**Use:**	Irrigation

A-4.930
B-21.780

Testimony did not conclusively establish that the proposed diversions would interfere with existing rights.

Final Order Date:	01/28/75 (G/WC)	**Applicant:**	Thompson
Case #/Type:	101-s41I (P)	**Regional Office:**	Helena
Application Date:	08/13/73	**Examiner:**	Chronister
Hearing Date:	05/13/74	**Use:**	Irrigation

A-4.930
I-14.900

Interim permit granted. Well pumped to determine adverse effect on objector's springs and subirrigation. Department engineers found no adverse effect. Granted.

Final Order Date:	01/28/75 (G W/C)	**Applicant:**	Montana Department of State Lands
Case #/Type:	217-s42J (P) 218-s42J & 1112-s42J	**Regional Office:**	Miles City
Application Date:	08/31/73	**Examiner:**	Nugent
Hearing Date:	08/20/74	**Use:**	Irrigation

M-5.110 Means of diversion (dam) must be changed to allow all water through until objector's rights are satisfied.

U-14.120 Seldom is unappropriated water in source.

Final Order Date:	03/05/75 (G W/C)	**Applicant:**	Faber
Case #/Type:	1136-s40I (P)	**Regional Office:**	Havre
Application Date:	12/10/73	**Examiner:**	Spaeth
Hearing Date:	08/28/74	**Use:**	Irrigation

A-4.930 Water available only when water flows past objectors' existing dams.
U-14.120
O-2.490

Final Order Date:	03/05/75 (G)	**Applicant:**	Armstrong
Case #/Type:	1825-s40A (P)	**Regional Office:**	Lewistown
Application Date:	03/20/74	**Examiner:**	Lewis
Hearing Date:	11/12/74	**Use:**	Irrigation/Stock

A-4.930 Because stream goes underground below applicant but above objector,
U-14.1259 it was not conclusively established that any amount of withdrawal at applicant's pond would adversely affect objector's water right. Held, no adverse effect.

[Permit granted.]

Final Order Date:	03/05/75 (G)	**Applicant:**	Klasna
Case #/Type:	1879-s40P (P)	**Regional Office:**	Glasgow
Application Date:	03/26/74	**Examiner:**	Lewis
Hearing Date:	11/21/74	**Use:**	Stock

E-24.4831 Evidence did not conclusively establish a water right in objector which would be protected under the Montana Water Use Act.

P-18.720 Department does not have authority to deny permit on basis of land
W-1.870 damage from saline seep.

Final Order Date:	03/05/75 (G W/C)	**Applicant:**	Dover
Case #/Type:	2012-s41S (P)	**Regional Office:**	Lewistown
Application Date:	04/11/74	**Examiner:**	Lewis
Hearing Date:	12/10/74	**Use:**	Irrigation

A-4.930 Evidence did not conclusively establish that granting of permits would adversely affect objector's prior existing water rights.

[Permit granted.]

Final Order Date:	03/24/75 (G W/C)	**Applicant:**	Blair
Case #/Type:	1602-g41N (P)	**Regional Office:**	Havre
Application Date:	02/20/74	**Examiner:**	MacIntyre
Hearing Date:	01/21/75	**Use:**	Irrigation

A-4.930 Evidence did not conclusively establish that objector's rights would

B-21.780 be adversely affected.

Final Order Date:	03/24/75 (G W/C)	**Applicant:**	Little Beavercreek Ranches, Inc.
Case #/Type:	1821-s76M (P)	**Regional Office:**	Missoula
Application Date:	03/18/74	**Examiner:**	Spaeth
Hearing Date:	10/16/74	**Use:**	Irrigation

A-4.9383
E-24.4879
M-5.1188
Applicant may not interfere with existing subirrigation rights by lowering level of stream. [Later decisions contrary.]

B-5.690 The use of water which causes significant soil erosion is not a beneficial use of water. [?]

E-24.4834 Testimony as to recreational and wildlife uses of stream irrelevant as such uses not recognized.

Final Order Date:	03/24/75 (G W/C)	**Applicant:**	Treasure State Acres, Inc.
Case #/Type:	1940-s41I (C)	**Regional Office:**	Helena
Application Date:	04/04/74	**Examiner:**	Spaeth
Hearing Date:	10/10/74	**Use:**	Domestic

A-4.9348.20 Only that portion of right diverted at confluence of Seven Mile and Ten Mile Creeks allowed to be transferred and moved, as move of rights above confluence would result in Ten Mile Creek going dry to the confluence. [?]

[Transfer granted in part.]

Final Order Date:	03/24/75 (G W/C)	**Applicant:**	Colver
Case #/Type:	2176-s41S (P)	**Regional Office:**	Lewistown
Application Date:	05/02/74	**Examiner:**	Lewis
Hearing Date:	12/11/74	**Use:**	Stock

A-4.930 The evidence tended to indicate that grant would not adversely affect objector's rights.

[Permit granted.]

Final Order Date:	03/24/75 (G W/C)	**Applicant:**	Anderson
Case #/Type:	2272-g41O (P)	**Regional Office:**	Havre
Application Date:	05/13/74	**Examiner:**	Lewis
Hearing Date:	01/06/75	**Use:**	Irrigation

T-5.800 [Permit granted with proviso that if it were determined that existing rights are adversely affected, the permit will be modified.]

Final Order Date:	04/14/75 (G W/C)	**Applicant:**	Montana Department of State Lands/ Hurlburt
Case #/Type:	1316-s40O (P)	**Regional Office:**	Glasgow
Application Date:	01/15/74	**Examiner:**	Spaeth
Hearing Date:	08/27/74	**Use:**	Stock

A-16.7567 Application for permit changed at hearing to application for change in existing right.

M-5.110 Existing dam to be rebuilt 300 feet upstream.

Final Order Date:	04/14/75 (G W/C)	**Applicant:**	McLean
Case #/Type:	1387-s40R (P)	**Regional Office:**	Glasgow
Application Date:	01/24/74	**Examiner:**	Lewis
Hearing Date:	11/20/74	**Use:**	Stock

E-24.4831 Objector's claim of water right is greatly exaggerated. Department only recognizes it as 57 acre-feet.

Final Order Date:	04/14/75 (G W/C)	**Applicant:**	Howell
Case #/Type:	1655-s43D (P)	**Regional Office:**	Billings
Application Date:	04/03/74	**Examiner:**	Lewis
Hearing Date:	01/15/75	**Use:**	Irrigation

U-14.120 Unappropriated water available only during high spring runoff.

Final Order Date:	04/14/75 (G W/C)	**Applicant:**	McKinlay
Case #/Type:	2029-s41S (P)	**Regional Office:**	Lewistown
Application Date:	04/15/74	**Examiner:**	Lewis
Hearing Date:	12/10/74	**Use:**	Irrigation

O-2.490 All objections filed late. Objections dismissed. [Permit granted.]

Final Order Date:	04/14/75 (G W/C)	**Applicant:**	Ferguson
Case #/Type:	2417-s41QJ (P)	**Regional Office:**	Lewistown
Application Date:	05/21/74	**Examiner:**	Lewis
Hearing Date:	12/09/74	**Use:**	Irrigation

T-5.800 [Objection settled upon stipulation that permit include condition that waters not be diverted when river flow below certain benchmark on Castener Creek.]

Final Order Date:	04/28/75 (G W/C)	**Applicant:**	Beldens
Case #/Type:	2591-s41S (P)	**Regional Office:**	Lewistown
Application Date:	06/17/74	**Examiner:**	Lewis
Hearing Date:	12/10/74	**Use:**	Fish/Stock

A-4.930 Evidence tended to show that approval of this application would not adversely affect existing rights of objector. [Permit granted.]

Final Order Date:	04/75 (G W/C)	**Applicant:**	Hinebauch
Case #/Type:	2567-g40J (P)	**Regional Office:**	Havre
Application Date:	06/11/74	**Examiner:**	Lewis
Hearing Date:	11/14/74	**Use:**	Irrigation

A-4.930
B-21.780 Evidence did not conclusively establish that granting the a permit would adversely affect prior rights.

E-24.4831 A filed appropriation is a valid water right only to the extent and limit of the quantity of water put to beneficial use. [Permit granted.]

Final Order Date:	05/08/75 (G W/C)	**Applicant:**	McKinlay
Case #/Type:	2028-s41S (P)	**Regional Office:**	Lewistown
Application Date:	04/15/74	**Examiner:**	Lewis
Hearing Date:	12/10/74	**Use:**	Irrigation/Stock

A-4.930 Evidence showed that to allow applicant to fill his reservoirs in

U-14.1259 summer months would adversely affect objectors. [Permit granted modified to preclude summer impoundment.]

Final Order Date:	05/19/75 (G W/C)	**Applicant:**	Windels
Case #/Type:	1826-g40J (P) 1827-g40J & 1828-g40J (P)	**Regional Office:**	Havre
Application Date:	03/20/74	**Examiner:**	Lewis
Hearing Date:	11/14/74	**Use:**	Irrigation

A-4.930 Evidence did not conclusively establish that granting permits would adversely affect prior existing groundwater rights. [Permit granted.]

Final Order Date:	05/19/75 (G W/C)	**Applicant:**	Van Voast
Case #/Type:	2302-g40J (P)	**Regional Office:**	Havre
Application Date:	05/15/74	**Examiner:**	Lewis
Hearing Date:	11/14/74	**Use:**	Irrigation

A-4.930
B-21.780 Evidence did not conclusively establish that granting permit would adversely affect prior rights.

B-5.690
E-24.4831 A filed appropriation is a valid water right only to the extent and limit of the quantity of water put to beneficial use. [Permit granted.]

Final Order Date:	05/19/75 (G W/C)	**Applicant:**	Matter
Case #/Type:	2079-g40A (P)	**Regional Office:**	Havre
Application Date:	04/22/74	**Examiner:**	Lewis
Hearing Date:	11/13/74	**Use:**	Irrigation

A-4.93348.00
A-4.9395
E-22.480
O-2.490
B-21.780 Objectors feared a new well would result in an annual withdrawal rate that would exceed the annual recharge of the aquifer. However, evidence presented did not conclusively establish that granting permit would adversely affect prior rights.

E-24.4831 A water right is valid only to the extent and limit of quantity of water actually beneficially use. Granted.

Final Order Date:	05/20/75 (G W/C)	**Applicant:**	Morgan
Case #/Type:	1-s41H (P) 98-c41H (C)	**Regional Office:**	Bozeman
Application Date:	07/03/73	**Examiner:**	Chronister
Hearing Date:	06/03/74	**Use:**	Irrigation

J-21.800 No conclusion as to ownership of the ditch; such question properly decided in court.

M-5.110 Ditch is adequate as the parties with an interest therein have in the past been able to accommodate their rights.

U-14.120 There are excess unappropriated waters in West Gallatin River in May and June.

Final Order Date:	05/23/75 (G W/C)	**Applicant:**	Papez
Case #/Type:	2457-s43B (P)	**Regional Office:**	Billings
Application Date:	05/31/74	**Examiner:**	Spaeth
Hearing Date:	10/01/74	**Use:**	Stock

A-4.9348.10 Change in existing right allowed even though for increased acreage, as this increase is offset by addition of other water into the drainage. [?]

A-16.7567 Change in existing water right considered applied for although application is for new permit only.
[Permit granted; change authorized.]

Final Order Date:	05/27/75 (G W/C)	**Applicant:**	Swart
Case #/Type:	1438-s42KJ (P)	**Regional Office:**	Miles City
Application Date:	01/30/74	**Examiner:**	Lewis
Hearing Date:	09/25/74	**Use:**	Stock

E-24.4810 Three-fourths of objector's right has been abandoned; therefore no adverse effect to his right hereby.

Final Order Date:	06/06/75 (G W/C)	**Applicant:**	Garrison
Case #/Type:	1523-s76D (P)	**Regional Office:**	Kalispell
Application Date:	02/08/74	**Examiner:**	Spaeth
Hearing Date:	12/16/74	**Use:**	Irrigation

E-24.4834 Nondiversionary recreational and wildlife uses not recognized under Montana law. [Temporary permit issued.]

Final Order Date:	08/27/75 (D)	**Applicant:**	Kimpton Ranch Co.
Case #/Type:	2248-c41I (C)	**Regional Office:**	Helena
Application Date:	05/09/74	**Examiner:**	Lewis
Hearing Date:	02/27/75	**Use:**	Irrigation

E-24.480 [Change denied because applicant apparently does not own right.]

Final Order Date:	10/01/75 (G W/C)	**Applicant:**	Pedersen
Case #/Type:	2571-s40R (P)	**Regional Office:**	Glasgow
Application Date:	06/12/74	**Examiner:**	Lewis
Hearing Date:	05/08/75	**Use:**	Irrigation

A-4.930
E-24.4834
U-14.1259
Objector Medicine Lake Refuge will not be adversely affected because application only for times of extreme high flow when there is unappropriated water in the source. [Permit granted.]

Final Order Date:	10/10/75 (D)	**Applicant:**	Schell
Case #/Type:	1769-s42L (P)	**Regional Office:**	Miles City
Application Date:	03/08/74	**Examiner:**	Lewis
Hearing Date:	02/06/75	**Use:**	Irrigation

U-14.120 No unappropriated water in coulee. [Permit denied.]

Final Order Date:	10/15/75 (G W/C)	**Applicant:**	Christensen
Case #/Type:	702-s41K (P)	**Regional Office:**	Lewistown
Application Date:	10/15/73	**Examiner:**	Lewis
Hearing Date:	04/03/75	**Use:**	Irrigation

A-4.930 Upstream objector cannot be adversely affected by issuance of permit.

Final Order Date:	10/15/75 (G W/C)	**Applicant:**	Smerker
Case #/Type:	2733-s41Q (P)	**Regional Office:**	Lewistown
Application Date:	06/27/74	**Examiner:**	Lewis
Hearing Date:	04/17/75	**Use:**	Irrigation

B-5.6979 Notice of appropriation (1891) for a quantity of water more than the

E-24.4831 quantity of the applicant's beneficial use of that right does not diminish the quantity applicant can receive under new permit. [Permit granted.]

Final Order Date:	10/15/75 (G W/C)	**Applicant:**	Clute
Case #/Type:	2888-s76L (P)	**Regional Office:**	Kalispell
Application Date:	07/09/74	**Examiner:**	Spaeth
Hearing Date:	06/05/75	**Use:**	Irrigation/Stock

E-24.4848 Salish and Kootenai conditions.

U-14.1259 Applicant can only divert from Fred's Swamp after water derived therefrom ceases to flow onto objector's property, as objector has a right to the flow out of Fred's Swamp when it flows.

Final Order Date:	10/17/75 (G)	**Applicant:**	Owen
Case #/Type:	2911-s76H (P) 2912-s76H (P)	**Regional Office:**	Missoula
Application Date:	07/11/74	**Examiner:**	Lewis
Hearing Date:	05/13/75	**Use:**	Irrigation

A-4.930 Because all objectors are upstream of applicant, prior existing appropriations cannot be adversely affected by issuance of permit.

Final Order Date:	11/03/75 (G)	**Applicant:**	Howser
Case #/Type:	3094-g76L (P)	**Regional Office:**	Kalispell
Application Date:	?	**Examiner:**	Lewis
Hearing Date:	06/16/75	**Use:**	Irrigation

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A-16.750
J-21.800 Portion of water here applied for, which had already been first put to use before 1973 will have the priority date of that first appropriation. [???]

Final Order Date:	11/14/75 (G W/C)	**Applicant:**	Strangford
Case #/Type:	2193-s39E (P)	**Regional Office:**	Miles City
Application Date:	05/03/74	**Examiner:**	Lewis
Hearing Date:	07/23/75	**Use:**	Stock

E-24.4831
T-5.800 Objector did not successfully show a prior right to be protected; however, permit conditioned to protect prior rights. [?]

Final Order Date:	12/1975 (G W/C)	**Applicant:**	U.S. Bureau of Land Management
Case #/Type:	2948-s40E (P) 2953-s40E (P)	**Regional Office:**	Glasgow
Application Date:	07/15/74	**Examiner:**	Lewis
Hearing Date:	06/11/75	**Use:**	Stock/Wildlife

A-4.930
B-21.780 Evidence did not conclusively establish that objector's right would be adversely affected. [Permit granted.]

Final Order Date:	12/12/75 (W)	**Applicant:**	Hofer Brothers
Case #/Type:	1957-s41N (P)	**Regional Office:**	Havre
Application Date:	N/A	**Examiner:**	Lewis
Hearing Date:	05/15/75	**Use:**	?

A-16.750
J-21.800 There is no authority in Water Use Act to terminate with prejudice an application which has been withdrawn. Applicant can always reapply regardless of inconvenience to objectors. [Applicant withdrew application.]

Final Order Date:	12/12/75 (G W/C)	**Applicant:**	Johnson, Maynard
Case #/Type:	2364-s40G (P)	**Regional Office:**	Havre
Application Date:	07/05/74	**Examiner:**	Lewis
Hearing Date:	04/15/75	**Use:**	Stock

[The following holdings are implied in the order; never actually expressed.]

E-22.480 Equivocal testimony does not establish the fact that water would not reach the objectors in any event.

I-14.900
J-21.800
S-21.660 Department cannot summarily deny permit because applicant failed to obey interim permit.

U-14.1259 Bare assertion that objectors are unable to exercise water rights in the past two to three drought years held insufficient to conclude there are no unappropriated waters in the source.

Final Order Date:	12/12/75 (G W/C)	**Applicant:**	U.S. Bureau of Land Management
Case #/Type:	2949-s40E (P)	**Regional Office:**	Glasgow
Application Date:	?	**Examiner:**	Lewis
Hearing Date:	06/11/75	**Use:**	Wildlife

O-2.490 Objection dismissed because objector's point of diversion not downstream from proposed point of diversion.

[Objections withdrawn as hearing determined no cause to object. Permit granted.]

Final Order Date:	12/12/75 (G W/C)	**Applicant:**	Hofer Brothers
Case #/Type:	3626-s41N (P)	**Regional Office:**	Havre
Application Date:	09/16/74	**Examiner:**	Lewis
Hearing Date:	05/15/75	**Use:**	Stock

A-4.930
U-14.1259 A lone allegation that a downstream appropriator has a prior right and that he has been in recent years unable to exercise the right because the source of water was dry in July and August does not constitute conclusive evidence that the proposed appropriation will adversely affect the prior right.

J-21.800
M-5.110 A landowner cannot be required to seal an existing pit rather than enlarge his facilities to obtain additional water. [?]

Final Order Date:	01/ /76 (G)	**Applicant:**	Bond, Robert
Case #/Type:	2815-s40G (P)	**Regional Office:**	Havre
Application Date:	07/05/74	**Examiner:**	Lewis
Hearing Date:	04/15/75	**Use:**	Stock

A-4.930
S-15.920 Source not tributary to objector's source. Held, there can be no adverse effect to objector's water rights. [Permit granted.]

Final Order Date:	01/03/77 (D)	**Applicant:**	N Triangle Ranch, Inc.
Case #/Type:	6940-s42M (P)	**Regional Office:**	Glasgow
Application Date:	?	**Examiner:**	Chronister
Hearing Date:	10/28/76	**Use:**	Irrigation

U-14.1259 Source fully appropriated. [Permit denied.]

Final Order Date:	01/05/76 (G W/C)	**Applicant:**	U.S. Bureau of Land Management
Case #/Type:	2950-s40E (P) 2951-s40E (P) 2952-s40E (P) 2957-s40E (P)	**Regional Office:**	Glasgow
Application Date:	07/15/74	**Examiner:**	Lewis
Hearing Date:	06/11/75	**Use:**	Wildlife/Oil & Gas Drilling

A-4.930 Evidence did not establish conclusively that the proposed appropriation would adversely affect objector's right; rather, evidence showed that in most years, right would not be adversely affected.

M-5.110 Means of diversion adequate except lacks drainage device for protection of downstream diverters.

[Permit granted with condition of device installation.]

Final Order Date:	01/22/76 (G)	**Applicant:**	Johnson, Paul
Case #/Type:	2517-s40G (P) 2518-s40G (P)	**Regional Office:**	Havre
Application Date:	06/06/74	**Examiner:**	Lewis
Hearing Date:	04/15/75	**Use:**	Stock

A-4.930
S-15.920 Source not tributary to source from which objector gets water. Held, can be no adverse effect to objector's right. [Permit granted.]

Final Order Date:	01/22/76 (G W/C)	**Applicant:**	Jensen
Case #/Type:	2679-s40G (P)	**Regional Office:**	Havre
Application Date:	07/05/74	**Examiner:**	Lewis
Hearing Date:	04/15/75	**Use:**	Stock

M-5.110 Means of construction not adequate for lack of drainage device. [Permit issued with condition to install drainage device.]

Final Order Date:	01/22/76 (G)	**Applicant:**	Crumpled Horn
Case #/Type:	004516-g41O (P)	**Regional Office:**	Havre
Application Date:	12/30/74	**Examiner:**	MacIntyre
Hearing Date:	10/15/75	**Use:**	Irrigation

B-21.780 It would be an unreasonable burden to require each applicant to demonstrate beyond a shadow of a doubt, particularly in case of groundwater appropriations, that his needs will be completely satisfied. This would, in effect, require applicant to have made the appropriation and have expended all of the money in connection therewith before learning whether he is entitled to an appropriation.

A-4.9395
E-24.4879 If all the necessary water were withdrawn from the aquifer located between the surface and 160 feet below the ground, no well would go dry, but the water level would fall. Held no adverse effect. **Permit granted.**

In subsequent court action, Cause 7076, the court held Applicant's exercise of permit affected certain wells so prior appropriators could not reasonably exercise their rights and ordered applicant to pay one of the prior appropriators $300.00 as the reasonable expense required to obtain water from his house well. Moreover, if applicant continued to pump, it would be required to pay $2,526.86 as reasonable expense of obtaining water from a well on state land. But the court held the area is

a source of much water. "Here is water, a great deal of water, and as is most usual in such situations, the early users tend to be profligate in their use. That use even though not the most economical must be closely examined and protected. But there are limits, prior is not prior in the absolute since the most inefficient means of diversion will receive absolute autonomy. The word 'reasonable' is the benchmark of all water controversies."

Final Order Date:	01/22/76 (G W/C)	**Applicant:**	Smith Farms, Inc.
Case #/Type:	3344-s40R (P)	**Regional Office:**	Glasgow
Application Date:	08/16/74	**Examiner:**	Spaeth
Hearing Date:	09/22/75	**Use:**	Irrigation

E-24.4831 Although there is some question as to the validity of the volume of the United States Department of Fish and Wildlife's rights, there is insufficient evidence in the record to reduce such right.

Final Order Date:	04/05/76 (G W/C)	**Applicant:**	Neidhardt
Case #/Type:	3068-s76G (P)	**Regional Office:**	Helena
Application Date:	07/22/74	**Examiner:**	Gordon
Hearing Date:	01/16/76	**Use:**	Stock

U-14.1259 There is unappropriated water in Fred Burr Creek when there is in excess of 250 M.I. flowing immediately below Lars Olsen's point of diversion.

Final Order Date:	04/13/76 (G W/C)	**Applicant:**	DeVries
Case #/Type:	4996-s43D (P)	**Regional Office:**	Billings
Application Date:	03/10/75	**Examiner:**	Spaeth
Hearing Date:	12/04/75	**Use:**	Irrigation

A-4.9379 Return flow is an important criterion in determining whether someone will be adversely affected by a change.

Final Order Date:	04/22/76 (G W/C)	**Applicant:**	Montana Agricultural Experiment Station
Case #/Type:	1905-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	03/29/74	**Examiner:**	Lewis
Hearing Date:	02/24/75	**Use:**	Irrigation

A-4.9395
E-24.4879 Upon receipt of complaint, investigation showed objector’s problems with his well not due to seepage from applicant's well, but to applicant's pumping of well. Held, objector could still reasonably exercise his rights with static level fluctuations.

M-5.110
W-1.870 Means of diversion for flowing artesian well inadequate because when capped, seepage occurs around well casing, and when uncapped, water wasted. Held, well must be fixed so all water diverted therefrom is put to beneficial use.

[Permit granted with condition that well be fixed so can be capped and regulated, and under terms that Department would inspect any complaints of adverse effect made by objectors within a three-year period and reserving unto the Department the right to modify or revoke permit upon consideration of the facts.] [Permit not modified.]

Final Order Date:	04/23/76 (D)	**Applicant:**	Stanberry
Case #/Type:	2841-s40G (P)	**Regional Office:**	Havre
Application Date:	07/08/74	**Examiner:**	Spaeth
Hearing Date:	10/22/75	**Use:**	Wildlife/Stock

U-14.120 No unappropriated water in source. [Permit denied.]

Final Order Date:	04/28/76 (G W/C)	**Applicant:**	Hammond
Case #/Type:	3997-g41O (P)	**Regional Office:**	Havre
Application Date:	10/24/74	**Examiner:**	Gordon
Hearing Date:	12/15/75	**Use:**	Irrigation

S-14.920
A-4.930
Although application is for groundwater, Department hydrogeologist determined source is water in gravel beds comprising floodplain of Teton River and is to some degree hydraulically connected to river. Withdrawal of such water would ultimately affect streamflow in Teton River. In order to prevent adverse effect, permit is conditioned to a two-period pumping scheme.

Final Order Date:	04/30/76 (G W/C)	**Applicant:**	Muster
Case #/Type:	5277-s76L (P)	**Regional Office:**	Kalispell
Application Date:	04/21/75	**Examiner:**	Gordon
Hearing Date:	12/19/75	**Use:**	Irrigation

A-4.9319 Applicant will not be held accountable for stream loss below his point of diversion not attributable to him.

Final Order Date:	05/24/76 (G W/C)	**Applicant:**	Bond, Robert
Case #/Type:	2816-s40G (P)	**Regional Office:**	Havre
Application Date:	07/05/74	**Examiner:**	Lewis
Hearing Date:	04/15/75	**Use:**	Stock

[The following holdings are implied in the Final Order although never actually expressed.]

E-22.480 Equivocal testimony that water would not reach objectors anyway not sufficient to support such a finding.

E-22.480
U-14.1259
Bare assertion that objectors unable to exercise water rights in past two to three drought years held insufficient to conclude there are no unappropriated waters in the source.

I-14.900
J-21.800
S-21.660
Department cannot deny permit because applicant failed to obey interim permit. (?)

[Permit issued with condition that adequate drainage device be installed.]

Final Order Date:	05/24/76 (G W/C)	**Applicant:**	Beatty
Case #/Type:	4379-s40J (P)	**Regional Office:**	Havre
Application Date:	12/12/75	**Examiner:**	Gordon
Hearing Date:	03/04/76	**Use:**	Irrigation

E-22.480 Objection to admission of exhibit rises only to challenge as to weight thereof.

Final Order Date:	05/24/76 (G W/C)	**Applicant:**	Taylor, Garth
Case #/Type:	4492-s41B (P)	**Regional Office:**	Helena
Application Date:	12/26/74	**Examiner:**	Gordon
Hearing Date:	03/01/76	**Use:**	Recreation/Fish/ Wildlife

U-14.120 Unappropriated water available only from October 16 through March 31. Permit limited to that period.

U-14.1259.70 Although use supposed to be nonconsumptive, may be consumptive.

Final Order Date:	05/24/76 (G W/C)	**Applicant:**	Standley, Sr.
Case #/Type:	5408-s41K (P)	**Regional Office:**	Havre
Application Date:	04/29/75	**Examiner:**	Gordon
Hearing Date:	12/16/75	**Use:**	Irrigation/Stock Fish/Wildlife

A-4.9379 The rule in **United States v. Ide** granting irrigation district preference in use of return flow is not necessarily applicable here because of differences in facts of the case.

M-5.110
T-5.800 Must install outlet structure in dam in order to bypass flows during irrigation season.

T-5.800
U-14.1259 There is no unappropriated water during irrigation season; therefore, applicant may not divert without the prior consent of prior appropriators.

Final Order Date:	06/08/76 (G W/C)	**Applicant:**	Meadows Ranch, Inc.
Case #/Type:	3792-s41O (P)	**Regional Office:**	Havre
Application Date:	10/01/74	**Examiner:**	Lewis
Hearing Date:	06/16/75	**Use:**	Irrigation

B-5.690 Bare assertion that applicant has other rights which he is not using in full does not constitute grounds for denial of permit for lack of beneficial use.

B-5.690 Bare assertion that applicant has not calculated the benefit to be gained by installing his irrigation system is not sufficient grounds to deny permit for lack of beneficial use.

B-5.690
M-5.110 Bare assertion that applicant has not calculated the exact quantity of water needed to maximize consumptive plant use does not constitute grounds for denial of permit for inadequate means of diversion.

E-22.480
E-24.480 Bare assertion that downstream appropriator has prior existing rights does not constitute evidence sufficient to deny permit.

E-22.480
E-24.480 Absent testimony to the contrary, a rancher's testimony is conclusive as to the application of water, including means of appropriation and beneficial use.

U-14.1274 Bare assertion that the stream has been dry at times in July and August does not constitute evidence sufficient to deny permit because no unappropriated waters in source.

Final Order Date:	06/10/76 (G/WC)	**Applicant:**	Semenza/Muri
Case #/Type:	2418-41K (P)	**Regional Office:**	Helena
Application Date:	05/28/74	**Examiner:**	Lewis
Hearing Date:	01/06/75	**Use:**	Irrigation/Stock

E-22.480
D-21.780
Exhibits cannot be accepted into the record after evidentiary hearing. To do so denies other parties right to cross-examine witnesses who are able to testify to validity of facts contained in exhibits.

U-14.120
T-5.800
Unappropriated waters available only until July 15. Permit granted for appropriation from May 1 to July 15 and from September 1 to October 15.

Final Order Date:	06/28/76 (D)	**Applicant:**	Kelly
Case #/Type:	913-s41I (P)	**Regional Office:**	Helena
Application Date:	03/15/74	**Examiner:**	Gordon
Hearing Date:	05/03/76	**Use:**	Irrigation

E-24.4894
U-14.1259
Pursuant to **United States v. Ide**, objector herein has a prior right to use of project return flows; consequently there are no unappropriated waters in the source, a drainage ditch.

Final Order Date:	06/30/76 (G W/C)	**Applicant:**	Zinne
Case #/Type:	5932-s40A (P)	**Regional Office:**	Lewistown
Application Date:	07/10/75	**Examiner:**	Gordon
Hearing Date:	04/13/76	**Use:**	Irrigation

T-5.800
Proper scheduling of appropriation in Custer Gulch will ensure that existing water rights of objectors will be protected.

Final Order Date:	07/21/76 (G W/C)	**Applicant:**	Brost
Case #/Type:	1978-s40H (P)	**Regional Office:**	Havre
Application Date:	08/04/74	**Examiner:**	Gordon
Hearing Date:	03/04/76	**Use:**	Irrigation/stock

J-21.800
M-5.1129
P-18.720
E-22.480
Real property rights and easements are not within the jurisdiction of the Department. The grant of a permit in no way grants a permittee a right to violate real property rights of any person, nor does it excuse a permittee from liability for same, even if such violation is an avoidable consequence of exercising a permit. Similarly, the allegation that granting a permit would result in the violation of real property rights is not sufficient basis to deny permit.

S-15.920
A-4.930
T-5.800
Permittee cannot be held accountable for stream flow conditions that are neither a direct or indirect result of permittee’s appropriation or other actions. Such unaccountability shall specifically include, but not be limited to, accountability for downstream loss of flow due to existing underground stream channels.

Final Order Date:	08/09/76 (G W/C)	**Applicant:**	Meisner
Case #/Type:	4647-s43Q (P)	**Regional Office:**	Billings
Application Date:	01/21/75	**Examiner:**	Spaeth
Hearing Date:	12/05/75	**Use:**	Stock

M-5.110
P-18.720
Means of diversion not adequate - high hazard dam unless carefully engineered. Permit conditioned to require same.

Final Order Date:	08/12/76 (G W/C)	**Applicant:**	Adams, Bert
Case #/Type:	1443-s40J (P)	**Regional Office:**	Havre
Application Date:	01/31/74	**Examiner:**	Lewis
Hearing Date:	01/07/75	**Use:**	Irrigation/Stock

E-22.480
O-2.490

Certain entities cannot be joined as parties hereto because they did not file timely objections hereto. Their testimony, however, was considered in reaching decision herein.

Final Order Date:	08/20/76 (G W/C)	**Applicant:**	Hoerner Waldorf
Case #/Type:	2789-g76M (P)	**Regional Office:**	Missoula
Application Date:	07/02/74	**Examiner:**	Spaeth
Hearing Date:	03/06/75	**Use:**	Industrial

T-5.800

[Permit granted with provision that it can be modified or revoked within three-year period if adverse effect to objectors, or if it fails to meet state or national standards.]

Final Order Date:	08/26/76 (G W/C)	**Applicant:**	Cooper
Case #/Type:	5742-s76H (C)	**Regional Office:**	Missoula
Application Date:	06/18/75	**Examiner:**	Spaeth
Hearing Date:	05/18/76	**Use:**	Irrigation/Stock

J-21.800

The question of right-of-way must be determined in another forum.

Final Order Date:	08/26/76 (G W/C)	**Applicant:**	Moss
Case #/Type:	6576-s76H (P)	**Regional Office:**	Missoula
Application Date:	10/01/75	**Examiner:**	MacIntyre
Hearing Date:	06/11/76	**Use:**	Domestic/Irrigation

T-5.800

Applicant may not divert water when there is insufficient water to fill existing rights.

Final Order Date:	08/26/76 (G W/C)	**Applicant:**	Philipps
Case #/Type:	4078-g41P (P)	**Regional Office:**	Havre
Application Date:	11/06/74	**Examiner:**	Chronister
Hearing Date:	10/01/75	**Use:**	Irrigation

U-14.1259.00
U-14.1274
A-4.930
S-20.720

Because applicant sought to appropriate from February 1 to April 15 to fill a reservoir for use during the irrigation season and applicant agreed to a condition that he would never reduce the stream flow less than 6 cfs, held no direct effect to irrigators. During high spring runoff, applicant's diversion for 3 or 4 days would have little real effect upon downstream users. G W/C [P4D]

T-5.800
M-5.110

Proposed Order modified to require among other things and in addition to conditions proposed, measuring devices in stream at all diversion points and on the pump. Permittee must keep written records of all waters diverted, both to fill the reservoir and that released and again diverted for use. [FO]

Final Order Date:	09/14/76 (G W/C)	**Applicant:**	McDonnell
Case #/Type:	2632-s41F (P)	**Regional Office:**	Bozeman
Application Date:	1974	**Examiner:**	Chronister
Hearing Date:	10/08/75	**Use:**	Irrigation

J-21.800
M-5.110

Department has no jurisdiction to determine ownership of Burrell Ditch.

M-5.110 Burrell Ditch has sufficient capacity to carry water applicant requests. (Therefore, means of diversion adequate.)

U-14.1259 There are unappropriated waters in the Dyke Ditch (a public ditch taking from the Madison River and maintained by the Army Corps. of Engineers), as there is more water flowing down it then is presently required by users thereon. [FO]

[Permit granted with condition that Department may modify if complaints received within two-year period. Complaint received later. Permit modified.]

Final Order Date:	09/21/76 (G W/C)	**Applicant:**	Loney Bair
Case #/Type:	6453-s41J (P)	**Regional Office:**	Lewistown
Application Date:	07/14/74	**Examiner:**	Spaeth
Hearing Date:	05/13/76	**Use:**	Irrigation

E-24.4834
T-5.800 Montana Department of Fish and Game has a valid prior water right to the waters of the Smith River for purposes of maintaining flows necessary for preservation of fish and wildlife habitat. However, same has not been quantified. However, the rights would be protected if permits conditioned to allow further amendments when rights quantified.

Final Order Date:	09/30/76 (G W/C)	**Applicant:**	Bair
Case #/Type:	6939-s41J (P)	**Regional Office:**	Lewistown
Application Date:	11/24/75	**Examiner:**	Spaeth
Hearing Date:	05/13/76	**Use:**	Irrigation

B-5.6934
E-24.480
T-5.800 Montana Department of Fish and Game has a valid prior water right to the waters of the Smith River for purposes of maintaining flows necessary for preservation of fish and wildlife habitat. However, same has not been quantified. However, the rights would be protected if permits conditioned to allow further amendments when rights quantified.

Final Order Date:	09/30/76 (G)	**Applicant:**	State Lands
Case #/Type:	4962-41A (P)	**Regional Office:**	Helena
Application Date:	03/05/75	**Examiner:**	Diemert
Hearing Date:	06/24/76	**Use:**	Irrigation

J-21.800
M-5.1129
E-22.480 Ditch rights and easements are not within the jurisdiction of the Department. The grant of a permit in no way grants permittee a right violate real property, nor does it excuse permittee from liability for same.

Final Order Date:	09/30/76 (G)	**Applicant:**	Wellborn/McBee
Case #/Type:	5189-41A (P)	**Regional Office:**	Helena
Application Date:	03/05/75	**Examiner:**	Diemert
Hearing Date:	06/24/76	**Use:**	Irrigation

J-21.800
M-5.1129
E -22.480 Ditch rights and easements are not within the jurisdiction of the Department. The grant of a permit in no way grants permittee a right violate real property, nor does it excuse permittee from liability for same.

Final Order Date:	10/12/76 (G/WC)	**Applicant:**	Waltermire
Case #/Type:	4636-76H (P)	**Regional Office:**	Kalispell
Application Date:	01/20/75	**Examiner:**	Spaeth
Hearing Date:	05/17/76	**Use:**	Irrigation/stock/ domestic

U.14.1259.00
U-14.1274
Water available year round some years and generally during first half of irrigation season.

E-24.4831
T-5.800
Applicant may have existing rights in source. When a determination of the nature and extent of those rights is made, the permit shall be accordingly amended to reflect such prior rights.

Final Order Date:	10/22/76 (G W/C)	**Applicant:**	Berg
Case #/Type:	1351-s41J (P)	**Regional Office:**	Lewistown
Application Date:	01/17/74	**Examiner:**	Spaeth
Hearing Date:	05/13/76	**Use:**	Irrigation

E-24.4834
Montana Department of Fish and Game has a valid prior right to the water of the Smith River for purposes of maintaining stream flows necessary for preservation of fish and wildlife habitat.

Final Order Date:	11/03/76 (G W/C)	**Applicant:**	Palmer Ranch, Inc.
Case #/Type:	3358-s40S (P)	**Regional Office:**	Glasgow
Application Date:	08/19/74	**Examiner:**	Diemert
Hearing Date:	04/21/76	**Use:**	Irrigation

A-16.7567
Motion to treat application as one for new appropriation, but if denied, to be treated as application for change of place of use, granted. [?]

L-1.940
The common law doctrine of riparian rights has never prevailed in Montana.

Final Order Date:	11/03/76 (G W/C)	**Applicant:**	Feist
Case #/Type:	3614-s43Q (P)	**Regional Office:**	Billings
Application Date:	?	**Examiner:**	Lewis
Hearing Date:	06/19/75	**Use:**	Irrigation

A-4.930
M-5.110
Testimony that objector's stock could not obtain water for a few days is not, without more conclusive evidence, proof that the means of diversion are unreasonable and therefore adverse.

D-21.310
Notice of hearing, although faulty, did not confuse objector. Motion to dismiss application denied, nor is there need to renotice.

U-14.1259
Volume claimed already appropriated less than approximate production of drainage. Unappropriated water available.

Final Order Date:	11/11/76 (G W/C)	**Applicant:**	Konie
Case #/Type:	4063-s76M (P)	**Regional Office:**	Missoula
Application Date:	10/30/74	**Examiner:**	Diemert
Hearing Date:	09/21/76	**Use:**	Domestic/Irrigation

M-5.1129
The acquisition of an easement to use the existing ditch to transport water herein applied for is not a prerequisite to this Department's issuance of a provisional permit.

Final Order Date:	12/21/76 (G W/C)	**Applicant:**	Obert
Case #/Type:	6322-s43D (P)	**Regional Office:**	Billings
Application Date:	08/27/75	**Examiner:**	Diemert
Hearing Date:	08/30/76	**Use:**	Irrigation

J-21.800
L-1.940
T-5.800

The Department can designate a person to notify a water right user of times when there are surplus waters in the source without delegating its statutory authority to administer waters. Applicant must check with objector before diverting.

Final Order Date:	01/11/77 (G W/C)	**Applicant:**	Vosen
Case #/Type:	3597-s40J (P) 3599-s40J (P)	**Regional Office:**	Havre
Application Date:	09/12/74	**Examiner:**	Gordon
Hearing Date:	04/22/76	**Use:**	Wildlife/Stock

A-16.750

Although objector has received his permit first, this permit will be senior as application was made for it first.

E-22.480
L-1.940

The mere riparian claim that water arises on or flows through property is not relevant to determination of whether to grant permit.

M-5.110

Bypass facility, or equivalent, needed around pit to protect downstream prior rights.

Final Order Date:	02/28/77 (G W/C)	**Applicant:**	Montana Dept. of State Lands
Case #/Type:	5270-s41D (P)	**Regional Office:**	Helena
Application Date:	04/17/75	**Examiner:**	Gordon
Hearing Date:	01/20/76	**Use:**	Irrigation

T-5.800
U-14.1259

No unappropriated water in source August 1 to September 20. Permit not issued for that period. Sometimes no unappropriated water from May 1 to July 31. Applicant cannot divert when insufficient water at objectors' points of diversions to meet their prior rights.

Final Order Date:	02/28/77 (G W/C)	**Applicant:**	Grosswiler Dairy
Case #/Type:	5638-g76LJ (P) 5639-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	06/09/75	**Examiner:**	Diemert
Hearing Date:	09/14/76	**Use:**	Irrigation

A-4.930
T-5.800

No adverse effect found; however, permit issued anyway with provision that Department could order cessation of diversion, or enter upon the property at any time.

Final Order Date:	02/28/77 (G W/C)	**Applicant:**	Dunbar
Case #/Type:	6498-s40K (P)	**Regional Office:**	Glasgow
Application Date:	09/22/75	**Examiner:**	Diemert
Hearing Date:	06/30/76	**Use:**	Irrigation

E-24.4834
U-14.1259

Water is impounded by Whitewater Dam for wildlife habitat under United States Fish and Game right. There is unappropriated water in the source when there is sufficient water in the source to maintain goose production.

Final Order Date:	03/09/77 (G)	**Applicant:**	Karr
Case #/Type:	5063-43D (C)	**Regional Office:**	Billings
Application Date:	10/17/75	**Examiner:**	Diemert
Hearing Date:	10/04/76	**Use:**	Irrigation/stock

E-24.4810
E-24.4831
Water not used for 27 years and ditches plowed under. Held, evidence of 1898 filing of appropriation water right is not conclusive as to validity of that right.

Final Order Date:	03/24/77 (G W/C)	**Applicant:**	Otten
Case #/Type:	6894-s76K (P)	**Regional Office:**	Kalispell
Application Date:	11/17/75	**Examiner:**	Spaeth
Hearing Date:	06/14/76	**Use:**	Irrigation

E-24.4834
Lake used for recreational purposes. Although proposal contains no findings as to actual water rights for recreation, lake level protected apparently to protect recreation. [Permit granted.]

Final Order Date:	03/29/77 (G W/C)	**Applicant:**	Farmers Co-Op Canal Company
Case #/Type:	5266-s41O (P)	**Regional Office:**	Havre
Application Date:	04/1/75	**Examiner:**	Gordon
Hearing Date:	03/24/76	**Use:**	Irrigation

A-4.9392
S-20.720
Where applicant will store water in a reservoir, enlarged for permit purposes, both pursuant to existing water rights and to this permit, to protect other users, permit must be conditioned so that applicant may only appropriate in excess of original capacity, and/or after October 31st of each year pursuant to new priority date.

A-16.7567
S-20.720
Application may not be modified at hearing to include alternate place of storage.

B-21.780
L-1.790
Applicant's plan may contemplate diversion at rates greater than 15 cfs; however, as proof standard for such is clear and convincing evidence, and as the hearing was conducted with the understanding that the request was not for greater than 15 cfs, no permit may issue herein for greater than 15 cfs.

E-22.480
Objections to admission of Exhibit 1 rise only to the level of challenges to its weight.

J-21.800
P-18.720
The issue of property rights other than water is not within jurisdiction of Department.

Final Order Date:	04/21/77 (G W/C)	**Applicant:**	Barrick
Case #/Type:	4342-s41S (P) 5122-s41S (P)	**Regional Office:**	Lewistown
Application Date:	12/10/74	**Examiner:**	Spaeth
Hearing Date:	09/08/75	**Use:**	Irrigation

E-24.4834
A nondiversionary fish and wildlife use is not recognized under Montana law and the Department will not recognize such a use as a prior beneficial use.

Final Order Date:	06/27/77 (G W/C)	**Applicant:**	Bras
Case #/Type:	1028-s76L (P)	**Regional Office:**	Kalispell
Application Date:	11/19/73	**Examiner:**	Lewis
Hearing Date:	11/25/74	**Use:**	Irrigation

E-24.4848
Salish and Kootenai reserved rights must be protected.

U-14.120 Unappropriated water exists in source, Little Bitterroot, only at certain times.

Final Order Date:	06/27/77 (G W/C)	**Applicant:**	Erlenbusch
Case #/Type:	4686-s40D (P)	**Regional Office:**	Glasgow
Application Date:	01/27/75	**Examiner:**	Gordon
Hearing Date:	04/20/76	**Use:**	Irrigation/Stock

E-24.4831 Objector having not shown compliance with the pre-1973 filed appropriation statute, the right he claims is not necessarily entitled to protection.

A-4.930
E-24.480 However, the Department will recognize this right up to the amount shown actually used by the objector prior to filing of this application.

Final Order Date:	07/07/77 (G W/C)	**Applicant:**	Kemp Ranch Partnership
Case #/Type:	1265-s76L (P)	**Regional Office:**	Kalispell
Application Date:	01/02/74	**Examiner:**	MacIntyre
Hearing Date:	09/23/74	**Use:**	Irrigation

J-21.800 Although no objections filed hereto, because the source, point of diversion, and point of use are so similar to application 1266 which did receive objection, the Department determined that one application cannot be acted on without study of the other. Accordingly, after hearing on 1266, the Department issues the following opinion re 1265.

Final Order Date:	07/07/77 (G W/C)	**Applicant:**	Kemp Ranch Partnership
Case #/Type:	1266-s76L (P)	**Regional Office:**	Kalispell
Application Date:	01/02/74	**Examiner:**	MacIntyre
Hearing Date:	09/23/74	**Use:**	Irrigation

E-24.480
M-5.110 Water appropriated under an existing right may be turned into the natural channel of a stream without becoming a part of the natural flow thereof.

U-14.120 Unappropriated water available only in certain parts of irrigation season.

[Permit issued with limited period of diversion.]

Final Order Date:	07/07/77 (G/WC)	**Applicant:**	Baker
Case #/Type:	8317-40D (P)	**Regional Office:**	Glasgow
Application Date:	05/17/76	**Examiner:**	MacIntyre
Hearing Date:	04/05/77	**Use:**	Irrigation

U-14.120
S-15.920 There is no unappropriated water in source of supply except there may be excess water in winter and spring runoff periods during wet years.

Final Order Date:	07/13/77 (G W/C)	**Applicant:**	Finley
Case #/Type:	5364-s76M (P)	**Regional Office:**	Missoula
Application Date:	?	**Examiner:**	Chronister
Hearing Date:	06/16/76	**Use:**	Irrigation

A-4.9325 Applicant must cease pumping when water level in West Twin Creek

T-5.800 drops below 78 M.I. at objector's point of diversion in order to prevent adverse effect to tree farm where timing of water application is crucial.

Final Order Date:	07/18/77 (G W/C)	**Applicant:**	Glasscock, III
Case #/Type:	4806-s40D (P)	**Regional Office:**	Glasgow
Application Date:	?	**Examiner:**	Chronister
Hearing Date:	11/05/76	**Use:**	Irrigate

A-4.930 The present application may not be denied simply because there may be more like it to follow.

A-4.930
U-14.1259 Allowing applicant to impound extremely high spring run-off will not interfere with prior rights.

J-21.800
R-5.930 Oral argument need not be held within the 180 day time period set set forth in the statute.

R-5.930 It has been the policy of the Department to accept exceptions if they are reasonably within the time limit stated in the proposal.

Final Order Date:	08/04/77 (G W/C)	**Applicant:**	Kirksey Brothers
Case #/Type:	8518-s41I (C)	**Regional Office:**	Helena
Application Date:	06/02/76	**Examiner:**	Spaeth
Hearing Date:	05/23/77	**Use:**	Irrigation

J-21.800
L-1.940 The law does not require the user of contract water to apply to the State for a change in his point of diversion off of the canal serving contract holders.

Final Order Date:	08/30/77 (G/WC)	**Applicant:**	Sivertsen/Doughten
Case #/Type:	3343-40J (P)	**Regional Office:**	Havre
Application Date:	08/16/74	**Examiner:**	Diemert
Hearing Date:	07/01/77	**Use:**	Irrigation/stock/ wildlife
Oral Argument Date:	05/12/77	**O/A Examiner**: Ferris	

L-1.940
S-20.720 Montana Water Law sanctions single filling of reservoir in any year to store and use in that year and succeeding years what he has a right to use. Cites **Federal Land Bank v. Morris.**

E-24.4848
R-5.850
T-5.800 A permit issued on a source upstream from Indian reservation is subject to tribal reserved rights in the source of supply.

U-14.1259.00
U-14.1274 Unappropriated waters available only when water is spilling at Fresno Dam.

Final Order Date:	09/01/77 (G/WC)	**Applicant:**	Stevens
Case #/Type:	8982-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	06/18/76	**Examiner:**	Gordon
Hearing Date:	03/30/77	**Use:**	Fish/flood control/ recreation

B-21.780 Applicant must show criteria for issuance of a permit has been met even when objectors fail to attend hearing.

Final Order Date:	09/08/77 (G/WC)	**Applicant:**	Stoddard
Case #/Type:	7853-41B (P)	**Regional Office:**	Helena
Application Date:	03/30/76	**Examiner:**	Throm
Hearing Date:	07/07/77	**Use:**	Irrigation

S-15.920
U-14.1259.00
U-15.1274

Although original well was completed at 20' below surface and new well was completed at 60' the source is one aquifer where unappropriated water is available.

Final Order Date:	10/06/77 (G W/C)	**Applicant:**	Newman
Case #/Type:	6268-s42KJ (P) 6269-s42KJ (P) 8247-s42KJ (P) 8248-s42KJ (P)	**Regional Office:**	Miles City
Application Date:	08/22/75	**Examiner:**	Throm
Hearing Date:	06/22/77	**Use:**	Irrigation

L-1.790

Cannot grant in excess of 15 cfs since clear and convincing evidence required.

Final Order Date:	10/13/77 (G W/C)	**Applicant:**	Kammerer
Case #/Type:	9548-s76H (P)	**Regional Office:**	Missoula
Application Date:	09/20/76	**Examiner:**	Throm
Hearing Date:	07/27/77	**Use:**	Fish/Wildlife

S-21.6621
U-14.1259.70

Although prior departmental decision held that there is no unappropriated water in the source for a consumptive use, this use is nonconsumptive and there are unappropriated waters for nonconsumptive purposes.

Final Order Date:	10/17/77 (G W/C)	**Applicant:**	Ford
Case #/Type:	5151-s76M (P)	**Regional Office:**	Missoula
Application Date:	04/02/75	**Examiner:**	MacIntyre
Hearing Date:	06/10/76	**Use:**	Irrigation

A-16.7567

Modification of application at hearing to request shorter irrigation period is proper.

U-14.120

Unappropriated water available in spring only. Irrigation may only be done with spring runoff waters.

Final Order Date:	11/08/77 (G W/C)	**Applicant:**	Nielsen
Case #/Type:	2220-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	06/05/74	**Examiner:**	Lewis
Hearing Date:	01/29/75	**Use:**	Irrigation

A-4.9394
T-5.800

As requested by Department of Fish and Game, permit conditioned to prevent lake turbidity. [But why if no recreation or wildlife right recognized?]

E-24.4831
M-5.1188

Only recognizable rights out of lake at present are for subirrigation and lawn watering.

E-24.4834

Nondiversionary recreational and wildlife uses not considered, as such uses not recognized prior to 1973.

E-24.4834
R-5.930

[Upon exception by Department of Fish and Game, Department offered objector choice of withdrawing application, proceeding to another hearing with Department of Fish and Game, stipulating to issuance of temporary permit with specific conditions (protecting recreational

and fish and wildlife concerns without recognizing any existing rights thereto). Objector chose option 3. FO]

[Temporary permit issued.]

Final Order Date:	12/06/77 (G W/C)	**Applicant:**	Frolin
Case #/Type:	9787-g76L (P)	**Regional Office:**	Kalispell
Application Date:	10/12/76	**Examiner:**	Throm
Hearing Date:	08/10/77	**Use:**	Irrigation

J-21.800
S-15.920

State maintains jurisdiction over underground water which may be geologically connected to water under Flathead Reservation.

Final Order Date:	01/03/78 (G W/C)	**Applicant:**	Johnson, Dewey
Case #/Type:	7484-s40N (P)	**Regional Office:**	Glasgow
Application Date:	?	**Examiner:**	Chronister
Hearing Date:	11/04/76	**Use:**	Irrigation

E-24.4831
S-20.720
U-14.1259

All water at Vandalia appropriated by United States except during very high runoff in early spring. However, the United States does not in most years need all the water it has appropriated at Vandalia and such water is appropriable. [Permit granted.]

Final Order Date:	01/03/78 (G W/C)	**Applicant:**	Linn/Robinson
Case #/Type:	9847-s40J (P) 9966-s40J (P)	**Regional Office:**	Glasgow
Application Date:	09/13/76 10/19/76	**Examiner:**	Throm
Hearing Date:	08/24/77	**Use:**	Irrigation

S-15.920

Undeveloped springs and surface runoff, inseparable, together form the source of supply of Little Pumpkin Creek from which objector has a water right.

[Temporary permit issued; the results of appropriation pursuant to be evaluated by the Department, and a regular permit then issued or denied. Evaluation done in 1980; regular permit granted.] [Permit conditioned per stipulation.]

Final Order Date:	01/18/78 (G W/C)	**Applicant:**	Lee, Donald
Case #/Type:	11180-s43D (P)	**Regional Office:**	Billings
Application Date:	12/22/76	**Examiner:**	Throm
Hearing Date:	09/21/77	**Use:**	Irrigation

S-15.920
U-14.1259
W-1.870

Seepage from canal renders part of applicant's property unusable. He may dispose of such seepage, but may only appropriate it for use if it does not constitute a source of supply to Rock Creek (which is overappropriated). [Permit granted.]

Final Order Date:	01/20/78 (G)	**Applicant:**	Reimer
Case #/Type:	8010-76L (P) 8246-76L (P)	**Regional Office:**	Kalispell
Application Date:	04/16/76 05/07/76	**Examiner:**	Throm
Hearing Date:	08/08/77	**Use:**	Irrigation

J-21.800
A-16.750
E-24.480

The final determination of validity and quantification of existing rights are not within jurisdiction of hearing examiner or Department. Application to "consolidate position in regard to water

T-5.800 rights" from the source must be treated as new appropriation but conditioned so that permit is "inclusive of" rather than "additional to" any existing rights in the same source.

I-14.870
B-5.6934
E-24.4834
O-2.490
Uses such as instream flow for fish, wildlife, recreation, and scenic values were not defined as beneficial uses prior to 1973. Hence no weight given to objections based on such uses.

J-21.800 Department has no jurisdiction concerning easements. Grant of permit does to grant permittee right to violate real property rights of any person.

Final Order Date:	01/30/78 (G W/C)	**Applicant:**	Gasvoda
Case #/Type:	10819-g76H (P) 10820-g76H (P)	**Regional Office:**	Missoula
Application Date:	12/28/76	**Examiner:**	Throm
Hearing Date:	07/27/77	**Use:**	Irrigation

A-4.9395 No adverse effect to objectors if permit is conditioned to prevent withdrawals from shallow aquifer.

Final Order Date:	02/03/78 (G W/C)	**Applicant:**	Monk
Case #/Type:	9849-s76C (P)	**Regional Office:**	Kalispell
Application Date:	10/08/76	**Examiner:**	Throm
Hearing Date:	08/09/77	**Use:**	Irrigation

A-4.930
T-5.800
Permittee is specifically "enjoined" from diverting hereunder when water rights of objectors would be adversely affected.

A-16.7567
S-20.720
Application does not request storage; therefore, cannot grant storage.

A-16.7576
D-21.310
Republication not required although application point of diversion corrected at hearing.

I-14.870
O-2.490
Objection of Montana Department of Fish and Game declared invalid because it has no known appropriation from Fisher River.

Final Order Date:	03/02/78 (D)	**Applicant:**	Johnston
Case #/Type:	5569-c41J (C)	**Regional Office:**	Lewistown
Application Date:	05/30/75	**Examiner:**	Gordon
Hearing Date:	11/17/76	**Use:**	Irrigation

A-16.7567
D-21.310
Amendment of application at hearing to include other changes disallowed; violative of due process.

E-24.4810 Examiner lacks sufficient authority to find abandonment.

E-24.4831 Since applicant's exhibit contains a sworn statement alleging actual prior use from 1877 to 1892, and same was uncontested, it must be concluded for purposes herein that the water right did, in fact, vest through actual prior use.

E-24.4831
R-5.930
Action pending during initial hearing finalized prior to final order. Decree found no right in applicant. Notice taken of decree at final order stage, proposed finding of water right in applicant reversed. Change denied as no right to change. [FO]

Final Order Date:	03/03/78 (G W/C)	**Applicant:**	Willson
Case #/Type:	9961-g42C (P)	**Regional Office:**	Miles City
Application Date:	10/14/76	**Examiner:**	Throm
Hearing Date:	09/20/77	**Use:**	Irrigation

S-15.920 Undeveloped springs and surface runoff, inseparable, together form the source of supply of Little Pumpkin Creek from which objector has a water right.

[Temporary permit issued; the results of appropriation pursuant to be evaluated by the Department, and a regular permit then issued or denied. Evaluation done in 1980; regular permit granted.

Final Order Date:	03/03/78 (D)	**Applicant:**	Bacon
Case #/Type:	10021-g41H (P)	**Regional Office:**	Bozeman
Application Date:	11/01/76	**Examiner:**	Throm
Hearing Date:	10/14/77	**Use:**	Irrigation

A-4.9383 No unappropriated waters in Dry Creek. Applicant's pit would withdraw groundwater which stabilizes creek in summer. Held, adverse effect to Dry Creek appropriators.

[Permit denied.]

Final Order Date:	03/03/78 (G W/C)	**Applicant:**	Billmayer
Case #/Type:	11345-c40J (C) 11346-c40J (C) 11347-c40J (C) 11348-c40J (C) 11368-c40J (C)	**Regional Office:**	Havre
Application Date:	02/11/77 02/16/77 (11368)	**Examiner:**	Throm
Hearing Date:	08/25/77	**Use:**	Irrigation

[Permitted well turned out to be dry holes or low producers. Application to change points of diversion only.]

A-4.9392 New wells draw from same source (Flaxville gravel) but from a thicker and more permeable part thereof. Held, no adverse effect from move to other appropriators in area if authorization conditioned.

E-22.480 Fact that permittee already drilled and produces from new wells irrelevant to determination of whether to authorize change.

J-21.800
P-5.8021 Allegation that no change could be authorized because the original wells as permitted had not been perfected, ignored.

[Change authorized with condition that records of well levels be kept, and if it be determined that new wells interfere with prior water rights, authorizations will be modified.]

Final Order Date:	03/15/78 (G W/C)	**Applicant:**	Shotliff/Haugh
Case #/Type:	9757-s76K (P)	**Regional Office:**	Kalispell
Application Date:	10/06/76	**Examiner:**	Throm
Hearing Date:	10/27/77	**Use:**	Irrigation

B-5.6979 Volume requested is excessive.

U-14.120 There are unappropriated waters in the source, but not throughout period. Permit conditioned.

Final Order Date:	04/14/78 (G W/C)	**Applicant:**	Jacobson
Case #/Type:	9969-g76L (P)	**Regional Office:**	Kalispell
Application Date:	10/21/76	**Examiner:**	Throm
Hearing Date:	11/02/77	**Use:**	Irrigation

J-21.800
E-24.4831

The quantification and final determination of the validity of beneficial use rights must be established in accordance with the procedures mandated by § 98-870 et seq of Montana Water Use Act.

O-2.490
E-22.480
B-21.780

Held, evidence submitted by objectors failed to show the prior existing water rights would be adversely affected. (Caveat: it is now applicant's burden to prove no adverse effect.)

Final Order Date:	06/07/78 (G W/C)	**Applicant:**	Blakely
Case #/Type:	7504-g41H (P)	**Regional Office:**	Bozeman
Application Date:	02/17/76	**Examiner:**	Gordon
Hearing Date:	12/20/76	**Use:**	Irrigation

U-14.1259.25

Although there is no unappropriated water presently in creek, applicant will attempt to increase flow by constructing settling pond. Held, there may be unappropriated water in source.

[Permit granted with condition that applicant may not appropriate unless he is successful in increasing flow of creek.]

Final Order Date:	06/12/78 (G W/C)	**Applicant:**	Bair
Case #/Type:	8022-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/14/76	**Examiner:**	Throm
Hearing Date:	10/26/77	**Use:**	Irrigation

A-4.9395
I-14.900

[Hearing held upon expiration of temporary permit.] Nine foot draw-down not adverse effect.

Final Order Date:	06/14/78 (G W/C)	**Applicant:**	Palo
Case #/Type:	8772-c41QJ (C)	**Regional Office:**	Lewistown
Application Date:	06/30/76	**Examiner:**	Spaeth
Hearing Date:	03/04/77	**Use:**	Irrigation

A-4.9394
B-5.690
E-14.930
T-5.800

Tests indicated times when Muddy Creek water was extremely high in salts and probably should not be used in a sprinkler irrigation system. Condition added to restrict use for leaching prior to June 1 and periods when salts are less than 1000 ppm. (Amended Proposal for Decision) Primary problem is not increased salinity of runoff, but harm to land on which water would be used. Condition added subjecting permit to future revision if it is found water quality of Muddy Creek is diminished substantially by this change, to the detriment of downstream appropriators.

Final Order Date:	06/15/78 (D)	**Applicant:**	Treasure State Acres
Case #/Type:	12,203-ss41I (SS)	**Regional Office:**	Helena
Application Date:	04/13/77	**Examiner:**	Throm
Hearing Date:	02/24/78	**Use:**	Irrigation

A-4.9348.20
A-4.9348.00
E-22.480
S-15.920
E-24.480

Application for sever and sell of water right. Applicant proposed to move a water right on Ten Mile Creek upstream on Seven Mile Creek a tributary to Ten Mile Creek. Approval of application would cause an adverse effect on other water rights. Exhibit clearly demonstrated such a change would place applicant in a position to demand water regardless of Seven Mile Creek flows even though Ten Mile Creek

would have had sufficient water to satisfy applicant's decreed rights from Ten Mile Creek.

Final Order Date:	06/16/78 (D)	**Applicant:**	Roberts Loan & Cattle Co.
Case #/Type:	13648-s40A (P)	**Regional Office:**	Lewistown
Application Date:	06/24/77	**Examiner:**	Throm
Hearing Date:	03/30/78	**Use:**	Irrigation/stock

U-14.1259.00
U-14.1274
A-4.930
M-5.110

There are unappropriated waters in the source during winter months, at times of heavy spring runoff, and at other times of high-intensity, short-duration summer storms. However, without means to bypass proposed reservoirs, applicant would preempt water supplies to the adverse effect of prior appropriators. Applicant failed to meet criterion of adequate means of diversion.

Final Order Date:	06/16/78 (G W/C)	**Applicant:**	Koss
Case #/Type:	4234-s40E (P)	**Regional Office:**	Glasgow
Application Date:	11/25/74	**Examiner:**	Diemert
Hearing Date:	06/30/76	**Use:**	Irrigation

A-4.9321

The use of a mechanically regulated diverting device would adversely affect appropriators in that it would require their constant vigilance to protect their water rights. The proposed culvert should be installed at a level in the dike which will allow only excess waters to flow through.

E-22.480

Claims of prior interference with existing water rights are irrelevant to and beyond the scope of this hearing.

Final Order Date:	07/24/78 (G/WC)	**Applicant:**	Johnson
Case #/Type:	8329-76H (C)	**Regional Office:**	Missoula
Application Date:	05/18/76	**Examiner:**	Throm
Hearing Date:	07/28/77	**Use:**	Irrigation/stock

A-16.7567
E-24.480
O-2.490

Application may be modified at hearing to reflect intent. Objectors present may be polled to determine if objections held for change. If no objectors withdraw. Hearing may be resumed to hear objections to amended application.

M-5.110
E-24.480
P-18.720

Concerns relating to safety and adequacy of existing structures should be brought before Dam Safety Section. ?

Final Order Date:	08/24/78 (G)	**Applicant:**	Oscar Quam Ranch
Case #/Type:	12276-s39FJ (P) 12277-s39FJ (P)	**Regional Office:**	Miles City
Application Date:	04/18/77	**Examiner:**	Throm
Hearing Date:	04/26/78	**Use:**	Stock

J-21.800

Held, application comes under exception to statute. No permit required.

Final Order Date:	12/01/78 (G/C)	**Applicant:**	Schonenberger
Case #/Type:	10046-s41D (P)	**Regional Office:**	Helena
Application Date:	11/03/76	**Examiner:**	Throm
Hearing Date:	07/06/76	**Use:**	Irrigation
Oral Argument Date:	07/25/78	**O/A Examiner:**	Ferris

U-14.1259.00
U-14.1274

Held although water is not available throughout the period requested water was available some years during June and up to July 15.

A-4.9348.00 Held, because stream is decreed with a water commissioner to admeasure and distribute the water, granting of permit would not adversely affect the rights of prior appropriators.

M-5.110 Held applicant's intention to have plans and specifications approved by SCS constitutes adequate means of diversion. Granted. **Exceptions received.**

P-5.800
A-4.930
O-2.490 Final Order modified proposed order by granting a temporary permit for a three-year period to enable parties to document any adverse effects after which the documented data would be evaluated and a permit would be either modified, granted, or denied. **Appealed to district court.**

U-14.120
U-14.1259.00
U-14.1274
E-22.480 Court held finding of unappropriated water was "clearly erroneous." No evidence was submitted by any party that suggested water in excess of the decreed rights ever flows in Swamp Creek.

M-5.110
J-21.800
D-21.310
O-2.490 Court held Department has no authority to approve an application without first requiring evidence of the adequacy of the means of diversion or its construction. When Department granted permit without first requiring evidence of the adequacy of the means of diversion or its construction, the objectors were denied their rights of cross-examination and rebuttal on those issues. Decision reversed.

Final Order Date:	12/01/78 (G W/C)	**Applicant:**	Montana Dept. of State Lands
Case #/Type:	4963-s41I (P)	**Regional Office:**	Helena
Application Date:	03/05/75	**Examiner:**	Gordon
Hearing Date:	05/03/76	**Use:**	Irrigation

D-21.310 Montana Power Company's subsequent motion to continue indefinitely, denied; denial of motion not denial of due process as Montana Power accorded all rights of other parties, and as it had sufficient notice to prepare for hearing.

E-24.4831 Bureau of Reclamation held to possess a valid use right to maintain 2,015,000 acre-feet of water in reservoir; this, over applicant's objection that bureau had not filed for right, and that not all stored water was used beneficially.

E-24.4831 Montana Power Company appears to be entitled to 900 (?) cfs over and above the flow passed by Canyon Ferry.

E-24.4831
S-21.6621 Findings of special master in **Montana Power Co. v. Broadwater-Missouri** not binding "precedent" as case was dismissed for lack of jurisdiction. The proper way to view findings herein is rather that of impartial expert testimony.

U-14.1259 There may be unappropriated water in source when both Montana Power Company and Bureau of Reclamation rights are satisfied, this period occurring in most years between April 4 and September 30 inclusive, especially April to July.

[Permit issued with conditions restricting applicant's right to divert to periods when Bureau of Reclamation and Montana Power have all their water.]

Final Order Date:	03/17/79 (G W/C)	**Applicant:**	Nyquist
Case #/Type:	12868-s76M (P)	**Regional Office:**	Missoula
Application Date:	05/17/77	**Examiner:**	Tevebaugh
Hearing Date:	05/09/78	**Use:**	Wildlife/Stock Fire/Domestic

U-14.1259 Permit granted for high water period (throughout which unappropriated water was shown available) rather than period requested.

Final Order Date:	07/11/79 (G W/C)	**Applicant:**	Peterson
Case #/Type:	11454-c41C (C)	**Regional Office:**	Bozeman
Application Date:	02/23/77	**Examiner:**	Tevebaugh
Hearing Date:	06/01/78	**Use:**	Irrigation

E-24.4831 Motion to dismiss because Department would first have to make determination regarding the existence and extent of water right denied.
J-21.800

J-21.800 Motion to dismiss for lack of jurisdiction due to expiration of 60 days denied.

Final Order Date:	01/07/80 (G W/C)	**Applicant:**	North Montana Feeders, Inc.
Case #/Type:	18962-g41O (P)	**Regional Office:**	Havre
Application Date:	05/06/78	**Examiner:**	Pengelly
Hearing Date:	06/28/79	**Use:**	Stock

U-14.120 There are unappropriated waters in the source except in periods of drought. [Permit granted.]

Final Order Date:	02/08/80 (G W/C)	**Applicant:**	Thisted
Case #/Type:	13017-g41L (P)	**Regional Office:**	Havre
Application Date:	05/24/77	**Examiner:**	Pengelly
Hearing Date:	10/05/78	**Use:**	Irrigation

A-4.930 It is not certain that the rights of prior appropriators will be adversely affected. Held, criterion met.
B-21.780 [Permit granted.]

Final Order Date:	02/26/80 (D)	**Applicant:**	Hensler
Case #/Type:	20886-s76H (P)	**Regional Office:**	Missoula
Application Date:	10/31/78	**Examiner:**	Pengelly
Hearing Date:	09/06/79	**Use:**	Wildlife

M-5.110 Means of diversion inadequate because no provision to let water run through dam when required by down streamers.

U-14.1259 Water in Dry Gulch, including Bitterroot Irrigation District canal seepage is fully appropriated except during high runoff.

Final Order Date:	02/26/80 (D)	**Applicant:**	McTaggart
Case #/Type:	15251-s41I (P)	**Regional Office:**	Helena
Application Date:	09/19/77	**Examiner:**	Pengelly
Hearing Date:	11/20/79	**Use:**	Irrigation

E-22.480 Decree of court (1967) states that "at no time has there been, nor
U-14.1259 is there now, more waters in Silver Creek and its tributaries than is sufficient to meet the requirements of plaintiff, except in times of high runoff water". Held, unappropriated water not available throughout proposed period of diversion. [Permit

denied.]

Final Order Date:	02/27/80 (G W/C)	**Applicant:**	McTaggart
Case #/Type:	16322-s41I (C)	**Regional Office:**	Helena
Application Date:	12/07/77	**Examiner:**	Pengelly
Hearing Date:	11/20/79	**Use:**	Irrigation/Stock

A-4.9348.10 Acre for acre change in place of use will not adversely affect other users on source. [Change authorized.]

Final Order Date:	03/06/80 (G W/C)	**Applicant:**	Woronik
Case #/Type:	18516-s40J (P)	**Regional Office:**	Havre
Application Date:	05/03/78	**Examiner:**	Pengelly
Hearing Date:	11/13/79	**Use:**	Irrigation

L-1.790 Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

Final Order Date:	03/06/80 (G W/C)	**Applicant:**	Woronik
Case #/Type:	18518-s40J (P)	**Regional Office:**	Havre
Application Date:	05/03/78	**Examiner:**	Pengelly
Hearing Date:	11/13/79	**Use:**	Irrigation

L-1.790 Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

Final Order Date:	03/06/80 (G W/C)	**Applicant:**	Woronik
Case #/Type:	18519-s40J (P)	**Regional Office:**	Havre
Application Date:	05/03/78	**Examiner:**	Pengelly
Hearing Date:	11/13/79	**Use:**	Irrigation

L-1.790 Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

Final Order Date:	03/31/80 (G W/C)	**Applicant:**	Drum Land & Livestock
Case #/Type:	16340-s76L (P)	**Regional Office:**	Kalispell
Application Date:	10/04/89	**Examiner:**	Pengelly
Hearing Date:	12/05/79	**Use:**	Irrigation

E-24.4848 Indian rights involved. [Stipulation reached; permit issued with conditions.]

Final Order Date:	04/02/80 (G W/C)	**Applicant:**	Allen, Lloyd
Case #/Type:	15719-g41K (P)	**Regional Office:**	Helena
Application Date:	10/17/77	**Examiner:**	Tevebaugh
Hearing Date:	11/02/78	**Use:**	Irrigation

E-24.4831 Until adjudication of water rights completed, Department must accept all claims of existing water rights at face value. [FO]

E-24.4831 The right to claim subirrigation was recognized prior to 1973.

M-5.1188 Department must recognize claims of water rights relative to laws which existed at the time the claims were filed. [FO]

O-2.490 Motion to strike objections to permit denied. Although they contain errors, objections still do have substance.

U-14.1274 The record contained evidence that aquifer might produce sufficient water to supply applicant.

[Interim (temporary) permit granted.]

Final Order Date:	04/15/80 (D)	**Applicant:**	Campbell
Case #/Type:	19535 -s76H (P)	**Regional Office:**	Missoula
Application Date:	07/18/78	**Examiner:**	Pengelly
Hearing Date:	12/18/79	**Use:**	Irrigation

A-16.7576
D-21.780 Although water could be used in greenhouse in January, application for summer months only. Cannot extend period without republishing. [FO]

B-5.690 Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

R-5.930 Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

U-14.1259 Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

Final Order Date:	04/15/80 (D)	**Applicant:**	Campbell
Case #/Type:	20682-s76H (P)	**Regional Office:**	Missoula
Application Date:	09/19/78	**Examiner:**	Pengelly
Hearing Date:	12/18/79	**Use:**	Irrigation

A-16.7576
D-21.780 Although water could be used in greenhouse in January, application for summer months only. Cannot extend period without republishing. [FO]

B-5.690 Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

R-5.930 Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

U-14.1259 Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

Final Order Date:	04/15/80 (D)	**Applicant:**	Campbell
Case #/Type:	20683-s76H (P)	**Regional Office:**	Missoula
Application Date:	09/19/78	**Examiner:**	Pengelly
Hearing Date:	12/18/79	**Use:**	Irrigation

A-16.7576 Although water could be used in greenhouse in January, application

D-21.780 for summer months only. Cannot extend period without republishing. [FO]

B-5.690 Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

R-5.930 Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

U-14.1259 Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

Final Order Date:	05/02/80 (D)	**Applicant:**	Leister
Case #/Type:	13503-s76H (P)	**Regional Office:**	Missoula
Application Date:	06/20/77	**Examiner:**	Pengelly
Hearing Date:	02/05/80	**Use:**	Irrigation

A-16.750
J-21.800
S-21.660
Department's failure to act on application within 180 days does not result in denial of application.

U-14.120 Applicant presented no evidence that there are unappropriated waters in the source or that prior appropriators would not be affected. Concluded there are no unappropriated waters in source and that prior appropriators would be adversely affected.

[Permit denied.]

Final Order Date:	05/02/80 (D)	**Applicant:**	O'Connor
Case #/Type:	18860-s76H (P)	**Regional Office:**	Missoula
Application Date:	05/18/78	**Examiner:**	Pengelly
Hearing Date:	02/05/80	**Use:**	Irrigation/Domestic

U-14.120 Applicant presented no evidence that there is unappropriated water in the source of supply. [Permit denied.]

Final Order Date:	06/23/80 (G W/C)	**Applicant:**	Runestad, Jr.
Case #/Type:	17881-g40A (P)	**Regional Office:**	Lewistown
Application Date:	03/07/78	**Examiner:**	Pengelly
Hearing Date:	03/11/80	**Use:**	Irrigation

S-15.920 A spring is ground water if its natural flow is increased by some development at its point of extrusion. An undeveloped spring is surface water. [FO]

Final Order Date:	06/23/80 (D)	**Applicant:**	Law
Case #/Type:	19244-c76H (C)	**Regional Office:**	Missoula
Application Date:	06/11/78	**Examiner:**	Pengelly
Hearing Date:	04/23/80	**Use:**	Irrigation

A-16.7576 [Application improperly noticed to change portion of filed appropriation rather than portion of decreed right. Application dismissed.]

Final Order Date:	09/30/80 (G W/C)	**Applicant:**	Papez
Case #/Type:	19569-s43B (P) 19570-s43B (P)	**Regional Office:**	Billings

Application Date:	07/20/78	**Examiner:**	Pengelly
Hearing Date:	06/18/80	**Use:**	Fish and wildlife

U-14.1259.70 Initial fill of fish reservoir consumptive. Rest of appropriation is flow through. Initial fill will be in high water period when there is plenty of water in source. Rest of year water is nonconsumptively used. Held, § 85-2-311(1)(a), MCA, fulfilled.

Final Order Date:	10/01/80 (G W/C)	**Applicant:**	Bair
Case #/Type:	8022-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/14/76	**Examiner:**	Throm
Hearing Date:	06/26/80	**Use:**	Irrigation

I-14.900 [Hearing held upon expiration of temporary permit.] Nine foot drawdown not adverse effect.

Final Order Date:	10/14/80 (G W/C)	**Applicant:**	Bradshaw
Case #/Type:	13180-g76L (P)	**Regional Office:**	Kalispell
Application Date:	06/02/77	**Examiner:**	Pengelly
Hearing Date:	06/27/80	**Use:**	Irrigation

A-4.9395
T-5.800 Objectors draw from shallow aquifer; applicants will be from deeper aquifer. Although the degree of hydrologic connection between the aquifers is uncertain, concluded there will be no adverse effect if applicant's well is grouted to preclude drawing from shallow aquifer.

Final Order Date:	10/27/80 (D)	**Applicant:**	Carpenter
Case #/Type:	15964-s76L (P)	**Regional Office:**	Kalispell
Application Date:	10/11/77	**Examiner:**	Pengelly
Hearing Date:	07/17/80	**Use:**	Irrigation

U-14.120 May be unappropriated water in source, but not in amount requested and not throughout requested period. [Permit denied.]

Final Order Date:	11/21/80 (G W/C)	**Applicant:**	Ashley Irrigation Dist.
Case #/Type:	14607-ss76LJ (S)	**Regional Office:**	Kalispell
Application Date:	08/31/77	**Examiner:**	Sandquist
Hearing Date:	02/20/80	**Use:**	Irrigation

A-4.930
B-5.6934
P-18.720 Objection that cessation of use of ditch will result in death of riparian vegetation and deletion of water supply to wildlife is not sufficient to deny sever/sell.

A-4.930
I-14.870 Applicant's sale of water right to Fish, Wildlife and Parks right to be stored and released into Ashley Creek to provide instream flows, and to dilute sewage discharge will not adversely affect the rights of others.

E-24.4831 Objector does not have right to use ditch water merely because he is riparian to ditch.

E-24.4831
J-21.800 Examiner does not have jurisdiction to adjudicate water rights; therefore, for purposes herein only, it is determined that applicant has valid water claims as discussed above.

P-18.720 There may be adverse effects from sale to user for "irrigation and rejuvenation" as overflows and discharges from the impoundment cannot be adequately regulated given the present design, and discharges into the old channel, in its present unimproved condition

may adversely affect the rights of others adjacent to old channel (by flooding their properties).

[Sever/sell approved for all grantees with conditions to prevent flooding.]

Final Order Date:	12/04/80 (G W/C)	**Applicant:**	Chase
Case #/Type:	24404-s76G (P)	**Regional Office:**	Missoula
Application Date:	08/31/79	**Examiner:**	Pengelly
Hearing Date:	09/15/80	**Use:**	Irrigation

A-4.930
S-15.920
U-14.1259
Except during spring runoff, West Fork of Cramer Creek water disappears into alluvium one mile above confluence with Cramer Creek. Held, water taken from West Fork would not be available to Cramer Creek users during that irrigation season. [Held, Cramer Creek users cannot be adversely affected by applicant's diversion of West Fork water.]

U-14.1259
There is at least a trickle of water passing the last point of diversion used by objectors throughout the summer. [Held, there is unappropriated water available?]

Final Order Date:	12/12/80 (D)	**Applicant:**	Russell & Rumph Ranch
Case #/Type:	25477-s42J (P)	**Regional Office:**	Miles City
Application Date:	11/05/79	**Examiner:**	Pengelly
Hearing Date:	10/08/80	**Use:**	Irrigation

U-14.1259
Objector's prior right has not been filled since 1971. Held, no unappropriated water available. [Permit denied.]

Final Order Date:	12/15/80 (D)	**Applicant:**	Town of Joliet
Case #/Type:	18506-c43D (C)	**Regional Office:**	Billings
Application Date:	04/26/78	**Examiner:**	Pengelly
Hearing Date:	05/19/80	**Use:**	Irrigation

A-4.9348.00
Town of Joliet and Joliet Cemetery District both claim the same 35 inch right, which cemetery has used (exclusively) since 1956. Held, cannot grant proposed change (because use of right by both would increase source depletion?). [Change denied.]

Final Order Date:	12/30/80 (G W/C)	**Applicant:**	Kyler
Case #/Type:	22047-g41E (P) 22048-g41E (P)	**Regional Office:**	Helena
Application Date:	03/07/79	**Examiner:**	Pengelly
Hearing Date:	07/15/80	**Use:**	Irrigation

(See also 22047-g41E transferred to Shervin.)

A-4.9383
Because of clay lenses and high aquifer transmissivity, it is concluded that there will be no substantial effect on stream flow caused by applicant's well. [FO]

A-4.9383
S-15.920
In order for ground water not to be "part of the surface water," there must exist a nonsaturated intervening layer between the surface water source and the point of withdrawal of the subsurface waters.

P-5.800
S-21.660
Appropriation of water without a water right does not preclude subsequent issuance of permit for such appropriation.

S-15.920 Subsurface water source must be closely interconnected with surface to be considered part of surface water. [FO]

A-16.7516
S-20.110 No provision in Montana law that a person must own land to apply for a water right.

Final Order Date:	02/20/81 (D)	**Applicant:**	Wallace
Case #/Type:	7264-s43D (P)	**Regional Office:**	Billings
Application Date:	?	**Examiner:**	Williams
Hearing Date:	10/30/80	**Use:**	Irrigation

J-21.800
R-5.930 Once a final order has been issued, the Department is without jurisdiction to "rehear" case (unless final order reserves jurisdiction). [Discussion in document entitled "reasons of hearings examiner".] [Dismissed.]

Final Order Date:	05/21/81 (D)	**Applicant:**	Thomas H. Boone, Trustee
Case #/Type:	14965-g41E (P) 19230-c41E (C)	**Regional Office:**	Helena
Application Date:	08/26/77	**Examiner:**	Sandquist
Hearing Date:	08/08/79	**Use:**	Irrigation

A-4.930
R-5.930 Examiners not concluding no adverse effect sustained. [FO]

A-4.930
T-5.800 Subjecting permit to prior rights would not be an effective condition to protect same because the boundaries and interrelationships of the Boone water supply are unknown, and because of the time delay between diversion and effect on the source.

A-4.9325
U-14.120 This appropriation would result in depletion and diminution of Boulder River; however, the depletion may not be evident for 15 to 60 days after the actual diversion.

A-4.9348.10
A-4.9379 Change proposed to increase irrigation of 97-340 acres to 838 acres will decrease the amount of return flow and recharge water to the Boulder River, thereby adversely affecting the rights of other appropriators in the Boulder River system.

A-4.9348.48 An appropriator is entitled to a change of use if the new use will not consume a greater amount of water than was previously consumed by the old use.

A-4.9379
E-22.480 Finding that return flows would be diminished sustained although predicated on opinion. [FO]

A-16.7567
D-21.310 Motion to amend application at hearing denied.

B-21.780 Applicant has burden of proof by a preponderance of the evidence as to the criteria.

B-21.780
U-14.1259.25 Claimant of developed water has historically had the burden of proving such water is in fact developed.

E-24.480
J-21.800 To limit Montana Power Company's right to store water in Canyon Ferry to only times when water was released from Hebgen Lake would constitute an adjudication; held, Department has no jurisdiction. [FO]

E-24.4831 **S-21.676**	Findings in **Montana Power Co. v. Broadwater-Missouri** are not binding (**res judicata**) as the case was dismissed on appeal for lack of jurisdiction. [FO]
E-24.4831	[Montana Power Company and Bureau of Reclamation rights discussed.]
E-24.4831 **S-20.720**	Montana Power Company's storage rights recognized and protected in Conclusion of Law #10. [FO]
I-14.900	Interim permit denied because there was not substantial evidence that the criteria for issuing a regular permit could be met.
J-21.800 **L-1.940**	An agency's adoption of rules cannot operate to amend statutory provisions. Therefore, to extent ARM definition of surface water does this, it would be invalid. [FO]
J-21.800 **S-21.660**	Prehearing motion to district court for writ of prohibition (to prevent Department from acting on applications) denied by district court. The 60-day statutory limit is directory, not jurisdictional.
L-1.940	Policy of state to encourage wise use of water must be balanced against the rights of prior appropriators.
M-5.110	Means of diversion not adequate to divert requested flow.
R-5.930 **S-15.920**	Examiner correct in characterizing a portion of the pit waters as connected with surface waters. [FO]
S-15.920	Montana has adopted the subflow doctrine for appropriations of water which comprises the subsurface flow or source for a stream, lake, or river, **i.e.**, that these form a natural part of the source and that appropriation thereof must fall on the ladder of priorities thereon.
S-15.920	The phrase "not part of the surface water" excludes from groundwater waters which contribute directly to the source, or indirectly by providing storage, pressure head, or gradient so that surface flow can be sustained at the historic levels.
S-15.920	For groundwater to not be a part of the surface, there must exist a nonsaturated intervening layer between the surface water source and the point of withdrawal of the subsurface waters.
S-15.920	Subsurface waters which contribute directly or indirectly to surface flows are part of the surface source.
S-15.920	Waters proposed to be diverted here by pit are interrelated to the flows to the north channel of the Boulder River; therefore, the waters to be diverted include an unknown quantity of surface water.
S-15.920	When the evidence is weighed, it is found that there is substantial evidence to support a finding that the north channel of the Boulder River is a natural channel of the Boulder. [FO]
S-15.920	The north channel has a defined bed and banks and therefore the definition of the water course in **Doney v. Beatty** is not applicable. [FO]
S-21.920	Application of subflow doctrine sustained. [FO]
U-14.1259	Water only available for appropriation when Canyon Ferry spills.

Final Order Date:	06/09/81 (G W/C)	**Applicant:**	Schuler Ranch
Case #/Type:	29495-s41O (P)	**Regional Office:**	Havre
Application Date:	07/03/80	**Examiner:**	Williams
Hearing Date:	02/09/81	**Use:**	Irrigation

B-21.7835 Burden on applicant is to demonstrate criteria by a preponderance of the evidence.

L-1.940 Corporation is a person within meaning of the act.

U-14.1259 Applicant failed to prove that unappropriated water exists throughout the requested period of appropriation. However, if permit is conditioned to require 50 cfs bypass flow, there will be no adverse effect to objectors.

Final Order Date:	06/10/81 (G W/C)	**Applicant:**	Ray Habel, Inc.
Case #/Type:	25445-s41O (P)	**Regional Office:**	Havre
Application Date:	11/28/79	**Examiner:**	Williams
Hearing Date:	02/09/81	**Use:**	Irrigation

T-5.800
U-14.120 Unappropriated water will not be available throughout the proposed period of diversion. However, it is always available when the flow at Kerr Bridge Gaging Station exceeds 50 cfs. Period of diversion restricted to when flow at Kerr Bridge exceeds 50 cfs. [Permit granted.]

Final Order Date:	06/19/81 (G W/C)	**Applicant:**	Marstaeller
Case #/Type:	17907-s40A (P)	**Regional Office:**	Billings
Application Date:	03/10/78	**Examiner:**	Pengelly
Hearing Date:	11/13/80	**Use:**	Irrigation

U-14.1259 The entire 215 acre-feet of water physically available is not necessarily unappropriated water. There are existing irrigation and stock rights downstream.

Final Order Date:	06/19/81 (D)	**Applicant:**	Marstaeller
Case #/Type:	20365-s40A (P)	**Regional Office:**	Billings
Application Date:	06/05/78	**Examiner:**	Pengelly
Hearing Date:	11/13/80	**Use:**	Irrigation

U-14.1259.0
S-15.920
A-4.930 Applicant submitted several applications. In this case the water requested had already been spoken for by another application submitted by applicant for the same source. If both applications were granted there would be an adverse effect to downstream users.

Final Order Date:	06/19/81 (G w/C)	**Applicant:**	Marstaeller
Case #/Type:	20366-s40A (P)	**Regional Office:**	Billings
Application Date:	06/05/78	**Examiner:**	Pengelly
Hearing Date:	11/13/80	**Use:**	Irrigation

U-14.1259.00
U-14.1274
E-22.480 Applicant unable to show unappropriated waters in the source of supply throughout the proposed period of use. Permit granted with truncated period of use.

Final Order Date:	06/24/81 (G W/C)	**Applicant:**	Vasilchek
Case #/Type:	23106-s76M (P)	**Regional Office:**	Missoula
Application Date:	06/11/79	**Examiner:**	Williams
Hearing Date:	03/20/81	**Use:**	Domestic

A-4.930 The fact that this application may be the first of many such requests is immaterial.

A-4.930
A-16.750 There is no requirement that an applicant seeks water from a source of supply that is more convenient to objector than the one sought.

B-5.6979 Amount requested excessive for use described.

E-24.4879
W-1.870 Loss of even great amounts of water out of unlined ditch does not necessarily render objector's means of diversion wasteful as a matter of law.

U-14.1259 Applicant failed to prove water available during summer, as objector's irrigation uses require the entire flow of Seven Mile Creek.

[Permit issued in part; denied in part.]

Final Order Date:	Est. 06/81	**Applicant:**	Parker
Case #/Type:	12893-g76GJ (R)	**Regional Office:**	Missoula
Application Date:	N/A	**Examiner:**	Williams
Hearing Date:	03/27/81	**Use:**	Irrigation

B-21.780 In revocation, Department has the burden to produce evidence such that reasonable minds may differ as to whether sufficient grounds exist for revocation. Permittee bears the burden of persuasion by a preponderance of the evidence.

D-21.310 Neither Department nor applicant had received notice of improprieties issue; applicant would be prejudiced by its inclusion.

E-22.480 Evidence propounded by **amicus** re alleged Department improprieties in issuing a "corrected provisional permit" stricken as outside the scope of the proceeding, which scope is properly defined by the Department

J-21.800 Proper forum for resolution of improprieties in issuing permit initially in district court.

O-2.490 Intervenor allowed in revocation proceeding as **amicus curiae** as countenanced by § 2-4-602(7), MCA.

P-5.8031 Unnecessary to decide here whether mere failure to file notice of completion would in itself work a forfeiture of permit.

P-5.8031 Permittee must show reasonable diligence in order to preserve relation back of priority date to date of application.

P-5.8031 The basic criterion of reasonable diligence requires a **bona fide** intent to complete the appropriation with all the expedition and constant effort to accomplish the undertaking which is common to reasonable men who desire prompt accomplishments of their appropriative plans. It is a question of fact.

P-5.8031 There was a flurry of well drilling activity in 1977. However, nothing was done to complete the appropriation over the next three years. Nothing in the record indicates that permittee did not divert because he did not need the water or because diversion would adversely affect other appropriators.

P-5.8031 Claims of lack of financial means to complete an appropriation have been subjected to strict scrutiny by the courts.

P-5.8031 Cost of pump mechanism was anticipated by appropriator at time of filing application. While matters incidental to the enterprise itself that cannot be reasonably avoided may excuse utmost diligence in some circumstances, matters such as this purely personal to the appropriator, cannot work an exception to the rule requiring due diligence.

[permit revoked]

Final Order Date:	07/01/81 (G W/C)	**Applicant:**	Kenyon-Noble Ready Mix Co.
Case #/Type:	24591-g41H (P)	**Regional Office:**	Helena
Application Date:	09/25/79	**Examiner:**	Williams
Hearing Date:	04/07/81	**Use:**	Commercial

A-4.9395 Reduction in ground water supply by matter of inches is not adverse effect.

A-16.7567
A-16.7576
D-21.310 Parties who did not object to modification of application made at hearing are not denied due process by acceptance of such modifications. However, as application is substantially different, notice must be republished to provide opportunity to object to those who had not objected to the application as initially published. [Discussion.]

A-16.7567 The priority date of the permit issued shall be the date and hour of the making of substantial modifications to the application at the hearing, and not the original date of filing of the application. [Discussion.]

B-5.690 Gravel washing is a beneficial use of water.

B-5.6979 To command 12 cfs up to 6560 acre-feet per year merely to provide a means of diverting 700 gpm up to 237 acre-feet per year is unreasonable and will result in a waste of water resources.

E-22.480
P-18.720 Assuming without deciding that a rise in water table level would be adverse effect, the examiner concludes that the evidence does not support such a claim. Even more striking evidence based on coincidence has been denied probative value in related ground water contexts.

I-14.900
J-21.800 Evidence is sufficient to grant an interim permit. Permit not required for, and not appropriate for, dewatering of gravel pit where water only to be gotten rid of, and not beneficially used. [Discussion - **See also** FO.]

J-21.800
S-21.660 Department exceeding statutory time for hearing arguments on permits does not mandate issuance of permit.

U-14.1259.70 Gravel washing is a nonconsumptive use.

Final Order Date:	07/01/81 (G W/C)	**Applicant:**	Griff
Case #/Type:	25534-d76H (C)	**Regional Office:**	Missoula
Application Date:	12/03/79	**Examiner:**	Williams
Hearing Date:	03/30/81	**Use:**	Irrigation

A-4.930 "Opening the floodgates" (granting one will encourage other applications) is not adverse effect.

A-4.930 Injury due to present conditions on the source, not due to change per se, not relevant in this proceeding.

[Change authorized.]

Final Order Date:	08/10/81 (G W/C)	**Applicant:**	Harrington & Bibler, Inc.
Case #/Type:	17743-s76LJ (P) 15948-s76LJ (C)	**Regional Office:**	Kalispell
Application Date:	02/17/78	**Examiner:**	Sandquist
Hearing Date:	02/25/80	**Use:**	Irrigation

A-4.930
U-14.1259
The rights of a prior appropriator will not be adversely affected since the proposed appropriation for lake rejuvenation is not during the irrigation season, and because the permit will be subject to prior rights.

A-4.9392
There will be no adverse effect due to change of place of diversion, place of use, and purpose of use if design of impoundment changed so that it can be adequately regulated, and so that overflow channel is designed to prevent flooding of church crawl space.

B-5.690
E-22.490
Montana legislature has not established a preference system. Lake rejuvenation is a beneficial use.

[Permit issued with conditions.]

Final Order Date:	08/19/81 (DIS)	**Applicant:**	Warfel
Case #/Type:	22632-s41G (P)	**Regional Office:**	Helena
Application Date:	05/04/79	**Examiner:**	Williams
Hearing Date:	None	**Use:**	Irrigation

A-16.7516
S-21.6625
Cannot hold priority date indefinitely by delaying final disposition of permit by having several "good excuses" for not attending hearing.

[Dismissed for failure of applicant to respond to setting of hearing.]

Final Order Date:	09/15/81 (D)	**Applicant:**	Graveley LD Ranch
Case #/Type:	26661-c41I (C) 26662-c41I (C)	**Regional Office:**	Helena
Application Date:	02/25/80	**Examiner:**	Pengelly
Hearing Date:	11/17/80	**Use:**	Irrigation

A-4.9348.10
Applicant applied to expand place of use from 554 acres to 847 acres, but did not prove that this would not increase the consumptivity of the use. Held, this not change, but is new appropriation, which would adversely affect other appropriators if granted as change.

A-16.7516
Motion to dismiss because water to be used on state-owned lands denied. Applicant had lease.

A-16.7567
Application is to change place of use not point of diversion. Objection to motion to correct legal description of point of diversion set forth in application overruled.

E-22.480
Testimony admitted even though the data supporting estimate of efficiency not offered.

E-24.4831
J-21.800
A portion of the right to be changed is not recognized in the Confederate Creek decree. Held, disputed changes in water right made prior to Water Use Act, and Department has no jurisdiction to

determine validity of these changes. Therefore, water rights accepted here as stated.

[Applications denied.]

Final Order Date:	Est. 09/81 (D)	**Applicant:**	City of Helena
Case #/Type:	19084-s41I (P)	**Regional Office:**	Helena
Application Date:	06/13/78	**Examiner:**	Williams
Hearing Date:	07/31/81	**Use:**	Municipal

A-4.9319
E-24.4879
M-5.110
U-14.120

It is not incumbent on appropriator to use most efficient means of diversion. Thus, mere fact that waters run by any particular diversion point does not in and of itself establish the existence of unappropriated water. These waters may be necessary for carriage to point of diversion.

A-4.9348.00
U-14.1259

A municipal entity has no special status as regards its needs for water, and may not enlarge its appropriation to the detriment of other appropriators. [FO]

A-4.9379
E-24.480
W-1.870

Return flows (from sewage treatment) are part and parcel of stream conditions. Therefore, when objectors herein began using applicant’s waste waters, their appropriations embraced this source of supply. [FO]

A-4.9394

Although mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal.

A-16.7516
B-5.690

Although place of use owned by city-county airport, and irrigation will be controlled by this authority, the city has been acting with reference to this application at least in part by direction of the airport. Held, application may be processed, as beneficial use will not be frustrated by actions of airport authority, and even if it is, the permit would not be perfected.

B-21.780
U-14.120

It is unreasonable to accord applicants the duty to invest sufficient funds such that every detail of the proposed appropriation is flushed out in circumstances where the actual amount of water made available might cause substantial reworking of plans.

D-21.310
E-22.480

Change of statutory language does not preclude using new version of statute, as change merely clarifies former legislative intent.

E-22.480
E-24.480

While additions to amounts historically diverted by objectors may affect priority dates, this is in no way relevant as applicant is junior to even such new uses.

E-24.480

On adjudicated streams, after 1921, appropriations not in compliance with the 1921 statute must defer to later appropriations made in compliance.

E-24.480
J-21.800

Whether an appropriator who has historically solely devoted his water to grain production can convert his operations to more water intensive hay production without applying to Department for change need not be decided. Objector may well have irrigated alfalfa in the past.

E-24.4831
S-15.920

While prior appropriators' claims extend only to the natural flow of the source of supply as of the time of their appropriation, subsequent additions to this source generated by runoff from the use

of foreign waters may form the basis for a new appropriation of the same by those existing appropriators. [FO]

E-24.4894
S-15.920
U-14.1259.25
Although the ultimate source of objector's supply appears to derive from points foreign to the natural drainage, this trans-basin aspect of the existing diversion of the applicant is not availing in these circumstances. The right of the applicant extends only to the amount of the original beneficial use, and he may not reuse the water to the detriment of those who had come to depend on this source in the new drainage. [FO]

S-15.920
Source of supply is sewage effluent.

U-14.1259
Downstream objector utilizes all effluent (presently returned to source). Held, no unappropriated water.

Final Order Date:	10/06/81 [26720, 26722 (D); (26718, 26723 (G w/C)] [26719 Granted In Part/Denied in Part]	**Applicant:**	Meadow Lake Country Club Est
Case #/Type:	(a) 26718-s76LJ (P) 26719-c76LJ (C) 26720-c76LJ (C) (b) 26722-s76LJ (P) (c) 26723-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	(a) 11/13/79 (b) 05/13/80 © 01/02/80	**Examiner:**	Williams
Hearing Date:	04/02/81	**Use:**	Irrigation

A-4.930
U-14.120
There is plenty of water available for all in May and June and nothing in the record indicates that diversion by applicant during that period will cause water depletion in later months.

A-4.9321
U-14.120
A reading of "injury" that precludes even the possibility of interference between permittee and prior appropriator proves to be too much. In effect, it argues that water availability must be proven even for the driest year. However, this interpretation would obviate the need for prioritizing new rights, while simultaneously resulting in the waste of vast quantities of water in wetter years. Held, having to hire water commissioner (or call source) more often not adverse effect.

A-16.7516
J-21.800
Mere rerouting of creek across property held not an appropriation within meaning of Water Use Act as there is no intent to divert, impound, or withdraw water. Thus, Department has no jurisdiction to grant permit therefor, and neither does applicant have requisite intent to appropriate.

B-5.690
Irrigation of golf course is beneficial use of water.

B-5.6979
S-20.720
Applicant may not take storage remaining at end of irrigation season and credit it to next year's appropriation, **i.e.**, as applicant is entitled hereunder to only 33 acre-feet per annum if he has ten acre-feet remaining in storage at the end of the irrigation season, he may only appropriate 23 acre-feet of water the next year.

B-21.780
Applicant must prove that it is more likely than not that statutory criteria exist.

B-21.780
Applicant must demonstrate the existence of a water right to be

E-24.4831 changed, and Department is empowered to make such a determination for purposes of implementation of statute, which determination is not an adjudication of the right. [Discussion.]

E-22.480
E-24.4831 Filing of declaration of vested groundwater is **prima facie** evidence of the right only if filing exactly comports with statutory requirements.

E-24.4831 Filing did not comport with statutory requirements and no other evidence in record showing existence or extent of right. Held, applicant failed to establish existing water right alleged by applicant.

S-15.920
U-14.1259 Sewage effluent source would not augment source of supply at the time and place of need of any objectors hereto. Held, effluent is unappropriated and its diversion will not adversely affect objectors.

S-20.720 One-fill (of storage reservoir) rule not applicable in Montana. Therefore, permit may be granted which countenances several refills.

S-20.720
W-1.870 Storage evaporation losses are chargeable to the appropriation. Therefore, even though applicant may lose water from storage, he may not make that up by exceeding the 33 acre-feet he may divert hereunder.

Final Order Date:	12/04/81 (G W/C)	**Applicant:**	North Boulder
Case #/Type:	4501-s41E (P)	**Regional Office:**	Helena
Application Date:	12/30/74	**Examiner:**	Gordon
Hearing Date:	12/15/76	**Use:**	Irrigation

A-4.930 Applicant can claim no protection for its own uses based on infringements by other water users. [FO]

A-4.930 Objector's beneficial water use will be destroyed by inundation of his land. This is an adverse effect. However, permit may still issue with condition that no water may be impounded by applicant unless and until objector's water rights are purchased or condemned by applicant. [FO]

A-4.930
T-5.800 Permit will be conditioned to protect water rights of objector and if interference with such rights is an unavoidable consequence of the proposed appropriation, applicant will have to contract with objector, condemn the water right, or abandon the project.

A-4.930
U-14.1259 Fact that appropriation is small does not make interferences with larger appropriation so trifling as to not be adverse. [FO]

A-4.9348.20
M-5.110 Applicant may not draw more water from Boulder River than is released from storage, and must deduct carriage losses along stretch of river used as carrier. [FO]

A-4.9373 This diversion may actually benefit objector Montana Power Company by evening flows in river system so that Montana Power will get more water when actually needed. However, this does not justify the concomitant reductions during high flow if these have been relied on by Montana Power historically. [FO]

B-5.690 If applicant fails to garner sufficient landowner support to implement the use of the full requested 12,000 acre-feet per year, this appropriative attempt will lapse **pro tanto** according to the deficiencies in the size of the place of use. [FO]

B-5.690	Recreational use of dead storage plus active storage held beneficial. [FO]
B-5.690	Evidence herein fails to indicate how applicant intends to use the water for "sediment" purposes; therefore, whether such use is beneficial cannot be determined. [FO]
B-5.690 **L-1.790**	Benefits from project significantly outweigh costs. [FO]
B-5.6979 **S-21.720**	Carryover storage must be counted as part of next year's diversion. [FO]
B-21.6979	An appropriator may not escrow additional water in source to compensate for future diminution of size of reservoir due to sedimentation. [FO]
B-21.6979 **W-1.870**	Applicant may not fill and refill storage unit so as to exceed the appropriative limit stated on permit in order to offset evaporative, seepage, and carriage losses. [FO]
B-21.780 **E-24.4831**	Objectors have the burden of going forward with sufficient evidence such that reasonable minds may differ as to the scope and extent of their water rights. Unsworn conclusory statements do not suffice for this purpose. [FO]
B-21.780 **L-1.790**	Applicant's burden to provide "clear and convincing" evidence does not extend to negating each and every allegation filed in each and every objection. An applicant cannot be expected to in essence adjudicate a stream system. [FO]
E-22.480 **E-24.48**	Bureau of Reclamation may not salvage its proof of its rights by attempting incorporation of findings in another department matter; naked hearsay, especially in a manner that did not proceed to permit, cannot provide sufficient basis for a finding on a pivotal issue. However, this does not foreclose the possibility of use of findings in future matters. [FO]
E-24.4831	Evidence in record with respect to use by Bureau of Reclamation (claims) is insufficient to prove rights. [FO]
J-21.800	Real property rights, eminent domain, and service contracts not within jurisdiction.
J-21.800	Through the prosecution of the proper action, in the proper forum, a water right may be legally condemned. This, however, is not the proper forum.
J-21.800	Nothing herein authorizes applicant to inundate applicant's land. [FO]
P-5.8021	Seven years to complete is reasonable estimate. [FO]
R-5.930	[Finding #14 stricken on review; further findings added. Conclusion 1 not adopted; further conclusions added.]
T-5.800 **U-14.1259**	Objector Montana Power Company's hydropower rights only satisfied when Cochran Dam is spilling. Therefore, applicant may only divert at times Cochran Dam is spilling. [FO]
U-14.120	Unappropriated water available only during spring runoff. The period of April 1 to August 15 must be excised from permit. [FO]

Final Order Date:	12/17/81 (G W/C)	**Applicant:**	Hammell
Case #/Type:	24668-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	09/25/79	**Examiner:**	Williams
Hearing Date:	09/09/81	**Use:**	Irrigation

A-4.930
T-5.800
Permit conditioned so that applicant must defer to objector's prior right. No adverse effect aside from disobedience to priority rule being apparent and that having been thus dealt with, held, no adverse effect to other appropriators.

A-16.7516
B-5.6979
Applicant is without bona fide intent to appropriate 55.1 acre-feet per year, as 10 acre-feet per year is as much as can be beneficially used on the acreage to be irrigated.

L-1.940
Minor changes in 1981 version of statute make explicit what was implicit; therefore O.K. to proceed under 1981 version although application filed before effective date.

U-12.120
The existence of unappropriated water cannot be measured based on the driest years on record as such would sanction the waste of vast quantities of water and render the priority system nugatory.

Final Order Date:	12/30/81 (G W/C)	**Applicant:**	DeCock
Case #/Type:	19170-s43Q (P)	**Regional Office:**	Billings
Application Date:	06/20/78	**Examiner:**	Williams
Hearing Date:	1981	**Use:**	Irrigation/stock

U-14.1259.00
U-14.1274
M-5.110
A-4.930
W-1.870
Where proposed means of diversion will capture almost exclusively high water flows which historically have run to waste and are in excess of objectors' needs. Held, unappropriated waters available.

J-21.800
P-18.720
O-23.690
Although water in reservoir will inundate county's right-of-way, that alone is not sufficient cause to deny permit. Department has no authority to determine questions of land ownership and use.

P-5.800
E-24.483
M-5.110
A permit merely licenses a prospective appropriator to complete appropriation. Nothing in Montana Water Use Act undermines well established precept that actual application of water to beneficial use or at least completion of diversion works is prerequisite for fully perfected appropriation.

Final Order Date:	01/14/82 (G W/C)	**Applicant:**	Bartell
Case #/Type:	23246-s76L (P)	**Regional Office:**	Kalispell
Application Date:	06/08/79	**Examiner:**	Pengelly
Hearing Date:	05/20/82	**Use:**	Irrigation

E-22.4848
U-14.1259
Objector's assertion that there is no unappropriated water in the source because all the rest of the water besides his, is the tribes, held insufficient to prove that the tribe has in fact appropriated all the rest of the water. (Tribe did not appear.) [FO]

E-24.4831
Finding (that water right was as claimed) sustained, although claimants testified that they needed more than was claimed. [FO]

[Permit granted.]

Final Order Date:	01/18/82 (G W/C)	**Applicant:**	Hoyt
Case #/Type:	33983-s41Q (P)	**Regional Office:**	Havre
Application Date:	06/01/81	**Examiner:**	Williams
Hearing Date:	10/01/81	**Use:**	Domestic/ Stock/Fish

B-5.6979 The amount of water requested for domestic and stock is not excessive, and will not result in waste.

B-5.6934
B-5.6979 There is no evidence reflecting that the applicant's purpose of use, fish and wildlife, reasonably requires this quantity of water. [Discussion.] Applicant afforded further opportunity to supplement evidence in this regard.

E-14.9376
P-19.720 If evidence regarding flood hazard is placed in the record, the Department may use it to assess environmental effects in light of the substantive directives of MEPA.

L-1.940
M-5.110 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. Held, that although this standard may incidentally protect against flood hazard, it does not reach so far as to require that applicant produce evidence that the diversion works can withstand some prescribed level of flood water.

W-1.870 Water to be measured at the point of diversion and seepage and evaporative losses incurred thereafter are charged to the appropriation.

[Amended proposal issued; permit granted.]

Final Order Date:	01/23/82 (G W/C)	**Applicant:**	City of Plentywood
Case #/Type:	32722-g40R (P)	**Regional Office:**	Glasgow
Application Date:	04/1981	**Examiner:**	Williams
Hearing Date:	09/29/81	**Use:**	Municipal

A-4.9395 Only probable adverse effect will be to applicant's own wells. Although it is possible that objector's wells may be drawn down beyond their economic ability to withdraw water, that scenario is not likely, and any permit issued in this matter does not accord the permittee the right to infringe on prior rights. Held, § 85-2-311(1)(b) met.

U-14.1274 Evidence of low transmissivity suggests that pumping at 1,200 gpm will not be sustainable on a continuous basis. However, the volume requested indicates that applicant will not pump continuously. Moreover, it cannot be said that applicant's pumping will exceed aquifer recharge. Held, § 85-2-311(1)(a), MCA, met.

Final Order Date:	01/23/82 (G W/C)	**Applicant:**	Simonson/City of Plentywood
Case #/Type:	33831-g40R (P) 32722-g40R (P)	**Regional Office:**	Glasgow
Application Date:	02/1981	**Examiner:**	Williams
Hearing Date:	09/29/81	**Use:**	Irrigation

A-4.9395 Evidence shows that pumping at 500 gpm will have only modest affect on objector's wells, and nothing indicates that modest drawdowns would lower the water table at any time below the "economic reach" of objectors.

B-5.6979 Requested 931.5 acre-feet held wasteful.

E-24.4831 Objector Plentywood has not filed notices of completion on wells with priority dates between 1963 and 1973. Until these are filed, no right to use that water will be recognized.

U-14.1274 Applicant requests 1,300 gpm up to 931.5 acre-feet per year. However, low transmissivity of aquifer will allow pumping at no more than 500 gpm up to 100 acre-feet per year. Held, § 85-2-311(1)(a), MCA, met only if flow and volume reduced.

Final Order Date:	01/28/82 (G W/C)	**Applicant:**	Cadwell
Case #/Type:	27522-s76M (P)	**Regional Office:**	Missoula
Application Date:	06/06/80	**Examiner:**	Williams
Hearing Date:	1981	**Use:**	Stock

A-4.930
S-15.920 No surface water connection between applicant's source and objectors’; therefore, can be no adverse effect that way.

A-4.9321
U-14.1259 Exception that Department must deny permit if any possibilty of interference with other rights should be indicated in the record overruled. If such were the case, there would be no reason to assign priority at all to any permit. One cannot escrow vast portions of the state's water resources merely to be able to conveniently exercise present rights. [FO]

A-4.9383
B-21.780
U-14.1259 Although there may be groundwater connection between applicant’s source and objectors', it must remain speculative absent data from the applicant's actual water use, whether the capture of the waters intended would ever deprive objectors herein of water during their time of need in light of the inherently slow rate of groundwater movement. Held, no adverse effect.

M-5.110 Means of diversion not adequate because dam is not big enough to hold water for late season use.

S-20.720
U-14.120 Unappropriated waters are available throughout the time of impoundment, although not throughout period of use. Held, § 85-2-311(1)(a), MCA, met.

[Permit granted.]

Final Order Date:	01/28/82 (DIS)	**Applicant:**	Prevol
Case #/Type:	27726-s76F (P)	**Regional Office:**	Helena
Application Date:	N/A	**Examiner:**	Williams
Hearing Date:	None	**Use:**	N/A

A-16.7516 Applicant could not attend hearing and advised that he wishes to have same put off until seven months later. Held, applicant may not have **bona fide** intent. Ordered that he submit affidavit justifying delay, or application would be dismissed. [November 19, 1981 Order.]

S-21.6625 [Applicants could not attend hearing; application for extension denied.]

Final Order Date:	02/09/82 (G W/C)	**Applicant:**	Bureau of Land Management
Case #/Type:	(a) 27757-s40J (P) (b) 27759-s40J (P) (c) 27775-s40J	**Regional Office:**	Havre

Application Date:	(a) 06/23/80 (b) 06/21/80 (c) 06/23/80	**Examiner:**	Williams
Hearing Date:	1981	**Use:**	Wildlife

A-4.9319
S-20.720
If applicant captures water which senior appropriators require for their reservoirs, because of the dryness of the soil, the call system will be of little relief.

B-5.6979
Although 8.9 acre-feet per annum seems excessive for stock water, taking into account seepage and evaporative losses, entitlement to inactive storage to facilitate stock watering, and need for carryover storage to ensure against the occasional dry year, it is not excessive.

B-5.6979
S-20.720
To the extent applicant carries water over into the next year, the amount remaining in storage at the time of initiation of diversions for storage in the present water year must be considered part of the present year's appropriative limit.

E-24.4831
S-20.720
Prior appropriators not entitled to water stored by applicant.

E-24.4879
M-5.110
Irrigation of land by means of allowing water to spill over the top of a reservoir, utilizing no ditches or dikes, requires an unreasonably large amount of water to deliver a small amount of water for beneficial use. It is an unreasonable means of diversion. Therefore, objector's right will be recognized only to the amount reasonably required for customary irrigation of the acreage claimed.

J-1.800
W-1.870
Applicant may not divert more than is set forth in permit to make up for evaporation and seepage.

U-14.120
So long as unappropriated water is available in some years, § 85-2-311(1)(a), MCA, is satisfied.

Final Order Date:	03/01/82 (G W/C)	**Applicant:**	Monforton
Case #/Type:	24921-s41E (P)	**Regional Office:**	Helena
Application Date:	10/24/79	**Examiner:**	Williams
Hearing Date:	06/22/81	**Use:**	Irrigation

A-4.930
Mere fact that other uses on stream interfere with exercise of prior right does not justify the licensing of one more.

A-4.930
U-14.1259
Diversions made by this applicant will inevitably adversely affect Montana Power Company if they are made in periods when there is no spillage at Cochran Dam, by decreasing hydropower generation and forcing Montana Power to rely on more expensive coal based production.

A-4.930
U-14.1259
Applicant asserts that because of the "priority system" no adverse effect can result to prior appropriators as any permittee's use remains inferior and subject to claims of prior uses. However, this result fails to explain why objectors have any right of participation at the administrative level. Although it is possible to recognize adverse effect only in situations where the priority system per se is ineffectual in protecting the water of senior appropriators, **e.g.**, dewatering of aquifer, that is a crabbed reading of adverse effect inconsistent with the broad reach of the statutory language. However, resolution of the issue is not necessary (immaterial) in the present circumstances, in light of the

requirement for unappropriated water. [**Dictum** in FO at pp. 3, 5, 11-13.]

A-4.9321
T-5.800
Although there will be years when no unappropriated water will be available long before August 1, this possibility insufficient to restrict permit further. Prior appropriators cannot play dog in the manger, but can utilize their senior priorities when necessary to obtain water.

B-5.690
U-14.120
Whether there is sufficient unappropriated water for applicant’s intended purposes is immaterial. Department will not make economic decisions for applicant.

B-5.6979
Applicant has requested more water than it can beneficially use.

B-21.780
D-21.310
Minor changes in statute make explicit burden of proof which was formerly implicit. Held, no prejudice by proceeding under new statute.

B-21.780
E-22.480
Substantial credible evidence means that quantum and quality of that will convince a reasonable man of the existence of the ultimate fact. It demands less than a preponderance test, but more than probable cause. [FO]

E-22.480
Fundamental constitutional right to cross-examine not waived by mere failure to conduct discovery and subpoena the actual declarant.

E-22.480
E-24.4831
S-21.6621
Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.

E-24.480
[Digression re history of prior appropriation system of water allocation.]

E-24.480
L-1.940
Prior appropriator may insist that all water remain in stream so long as a useful quantity will reach him.

E-24.4831
A prior appropriator's claim embraces all those waters which accrue to his source of supply.

E-24.4831
L-1.940
Not necessary here to decide whether the **prima facie** statutory derivatives of filing of notices of appropriation survive repeal of sponsoring statute for purposes of determining whether the right exists.

E-24.4831
S-20.720
Unless Montana Power Company's Cochran Dam is spilling water, the flow of the Missouri (to which the source is tributary) is insufficient to supply Montana Power Company with the full measure of its historic water usage.

E-24.4831
S-20.720
U-14.1259
Spills at Cochran Dam are reliable indicators of when unappropriated water is available in the source, assuming that the Montana Power Company is not precluded from its historic practice of filling, refilling, and otherwise successively fillings its reservoirs. [FO lengthy discussion of one fill rule.]

J-21.800
U-14.1259
Montana Power Company's exception as to lack of findings regarding its other Missouri River dams overruled as there is no realistic chance in light of the much higher turbine capacities of Cochran Dam that these other structures would have need of water then Cochran Dam is spilling. Moreover, the Department will not encourage

jurisdictional disputes with the water courts by making findings as to existing uses which are not necessary for the decision. [FO]

L-1.940 Hydropower generation not subordinated to agricultural use.

U-14.120 Unappropriated water almost never available past August 1. Therefore, permit cannot authorize diversion past said date.

U-14.1259 Just because the proposed appropriation is small does not mean it will not affect Montana Power Company's water right.

U-14.1259 Applicant asserts that there must always be unappropriated water available for new appropriations as the historic need of a senior appropriator bears no necessary or inevitable relationship to future need given at least the possibility of future abandonment of that right. However, this assertion encourages speculative claims in the water resource, inconsistent with the requirements of a fixed and definite plan. The Department must assume that the past is prologue. Therefore, as the record shows that in all but two years in the last twenty, Montana Power Company has required the entire flow of the Missouri after August 1 (and in the two years, the spills were either insignificant or too late in the irrigation season to make any difference), it must be concluded that there is no unappropriated water in the source after that date. [FO]

[Permit granted with limitations.]

Final Order Date:	03/02/82 (G W/C)	**Applicant:**	Pettapiece
Case #/Type:	24199-s41QH (P)	**Regional Office:**	Lewistown
Application Date:	08/28/79	**Examiner:**	Williams
Hearing Date:	04/30/81	**Use:**	Irrigation

B-5.690 Department will not consider whether economic benefits of appropriation will successfully amortize the capital investment in the diversion works in its determination of beneficial use.

B-5.690
R-5.930 Montana Power Company's exception that it was substantially prejudiced by report leading to finding of beneficial use overruled. Montana Power's rights are fully protected by proposal; therefore, it cannot have been prejudiced. [FO]

B-5.6979 Amount of water applied for held excessive for demonstrated use.

E-22.480 Report admitted into record (although author not present for cross-examination) as "business record" exception to hearsay prohibition.

E-22.480 Copies of notices of appropriation comply with best evidence rule when other parties given opportunity to compare them with originals.

E-22.480 Apparently **prima facie** effect of notices of appropriation assumed to have survived repeal of statute.

E-24.4879 Allowing objectors to insulate available waters in the source based on the assertion that these waters are not sufficient for applicant's purposes in effect allows the objectors the privilege of commanding substantial quantities of water merely to extract a small portion thereof. An appropriator's right does not carry that far.

R-5.930 Findings as to acreage to be irrigated in error. [FO]

R-5.930 August 10th termination of any diversion by applicant

U-14.1259 based on unreasonably optimistic estimate of water availability. Permit modified to require cessation as of August 1. [FO]

T-5.800
U-14.1259 There is unappropriated water when Cochran Dam is spilling Permit may issue if diversion limited to such periods.

U-14.1259 Objector Montana Power Company's requirements yield no unappropriated water in source after the middle of July in most years. [Discussion of Montana Power's rights.]

U-14.1259 Cannot allow even a small appropriation where all water of stream appropriated, even if prior appropriation is for downstream hydropower.

[Permit issued with restriction.]

Final Order Date:	03/05/82 (G W/C)	**Applicant:**	I X Ranch
Case #/Type:	26858-s40H (P)	**Regional Office:**	Havre
Application Date:	03/10/80	**Examiner:**	Williams
Hearing Date:	1981	**Use:**	Irrigation

A-4.9348.00
L-1.940 The existence of an established water right does not give that appropriator a right to increase his demand upon the source without making a new appropriation. [FO]

A-16.7576 Lapse of four months between filing of application and publication of notice does not render notice invalid.

A-16.7576
D-21.310 Whether or not objector should have been served with notice individually, the appearance of objector obviates the necessity to make such determination.

B-5.6979
E-22.480
E-24.480 Evidence as to applicant's existing rights irrelevant in proceeding for permit, except as relates to beneficial use of amount of water applied for.

E-24.4831 Nothing in the record indicates that objector Bureau of Reclamation's uses of water are beyond the purview of congressionally delegated authority.

E-24.4831
U-14.1259 Defeasance of Warren contracts (for surplus stored water) dependent only on need within project boundaries, not on the needs in the entire basin.

E-24.4834 Do not have to decide whether Bureau of Reclamation can appropriate for fish and wildlife purposes.

T-5.800
U-14.1259 Conditioning permit so that water cannot be stored except in April and May and then only if water spilling at Vandalia Dam untenable because of short high volume nature of spills. However, permit could be conditioned so that applicant may store, but must release stored water if Vandalia fails to spill subsequent to applicant's storage.

U-14.1259 When Vandalia Dam spills no water, there is no unappropriated water in the Milk River system.

U-14.1259 Fact that applicant's diversion of 500 acre-feet would be immeasurable at Vandalia Dam does not make interference trifling.

U-14.1259 Department report that shows Vandalia Dam spills outside April-May does not mean that unappropriated water exists in source outside April-May period because report fails to account for impoundment by

other facilities. However, proposal fails to take into account fact that such analysis as was used (showing that water is available for applicant when Vandalia Dam spills in April-May) is valid anytime outside of the irrigation season. [FO]

Final Order Date:	03/22/82 (G W/C)	**Applicant:**	Wilson/Holst
Case #/Type:	34145-76LJ (P)	**Regional Office:**	Kalispell
Application Date:	04/29/81	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Fish

A-4.930 Concern here is that appropriation will increase drainage problems. However, evidence indicates this probably not the case, and permit proceedings merely contemplate a first look. Permit issuance does not deprive them of their rights.

A-4.930
J-21.800 Department has no authority to assess damages for future abridgments of senior rights. [FO]

A-16.7516 Applicants have a **bona fide** intent to appropriate water pursuant to fixed and definite plan. Although pond will not be stocked with fish for several years, hiatus necessary to assure pit will remain stable.

B-5.6934
B-5.6979 While a situation may exist where persons could require 803.5 acre-feet per year for a fishery in a 2.5 acre-feet impoundment, by the evidence presented here, the Department concludes that only 5 acre-feet per year are necessary. Fish portion of permit reduced accordingly. [FO]

B-5.6979 Amount of water applied for held excessive for irrigation in view of soil moisture holding capacity.

L-1.940
P-18.720 Flooding concerns per se are not within the purview of the Water Use Act. Thus, unless drainage problems interfere with the right of another appropriator to divert and beneficially use water, these difficulties are not an infringement or an adverse effect to the rights of a prior appropriator. [FO]

Final Order Date:	04/20/82 (G W/C)	**Applicant:**	Kyler Ranch
Amended Final Order:	05/14/82		
Case #/Type:	21956-g41A (P)	**Regional Office:**	Helena
Application Date:	02/27/79	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.9383 Applicant's pumping will not induce more recharge from Boulder River. Therefore, surface user Montana Power will not be adversely affected hereby.

A-4.9395 Evidence shows there will be no adverse effect to others by well interference.

A-16.7576
D-21.310 Description of proposed points of diversion different points of diversion different than public notice. Held, difference insignificant; no prejudice.

B-5.6979 Limited water holding capacity of soil justifies seemingly extravagant volume requested.

D-21.310
E-22.480 Statute of 1981 may be used without prejudicing applicant who applied before effective date.

P-5.8021 Although it is difficult to tell whether applicant's proposed well

U-14.1274 will produce 2,000 gpm, permit may issue for same and volume requested as volume may be produced at a lower flow rate, and flow rate can be reduced at verification.

U-14.1259 Such waters as applicant will pump are surplus to needs of other ground water appropriators, as amounts withdrawn will be compensated for from Boulder River recharge to aquifer.

Final Order Date:	04/29/82 (G W/C)	**Applicant:**	Fairhurst
Case #/Type:	17076-s41F (P)	**Regional Office:**	Bozeman
Application Date:	01/23/78	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930
U-14.1259 No adverse effect to source users because these tail waters have not historically returned to the source on the surface, and because it is unreasonable to assume that tail waters percolating into the ground move at any degree of dispatch to any surface stream.

S-15.920
W-1.870 Waste (tail) water is appropriable.

Final Order Date:	05/06/82 (G W/C)	**Applicant:**	Krutzfeldt
Case #/Type:	(a) 24489-s42J (P) (b) 26009-s42J (P) (c) 26010-s42J (P) (d) 26011-s42J (P) (e) 26012-s42J (P) (f) 26013-s42J (P) (g) 26016-s42J (P) (h) 26020-s42J (P) (i) 26021-s42J (P)	**Regional Office:**	Miles City
Application Date:	(a) 09/18/79 (b) thru (i) 11/06/79	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930 Reservoir on stream. Applicant may not divert more from stream than is released from storage.

A-4.930
D-21.310 Any delay (in processing application) that merely preserves the status quo on a stream cannot adversely affect objectors.

A-4.9321 The test of adverse effect to prior appropriators within the guise of the permitting process is not the possibility of infringement or even the certainty of such infringement should applicant disregard the priority system.

A-16.750
S-20.720 Applicant may not fill and refill his series of reservoirs if he would exceed the annual volume applied for.

B-5.6979
S-20.720 Carryover storage must be deducted from next year's volume appropriated, for to authorize the use of the carryover in addition to the full annual volume would countenance diversion of water in excess of the appropriator's stated needs. [Discussion in FO]

B-21.780
D-21.310 No objector is prejudiced by imposing on applicant the lesser standard of proof as specified in the 1981 version of the statute for large applications.

D-21.310 Changes in 1981 statute merely express what was implicit. Therefore, no prejudice by testing applications against the 1981 version.

Final Order Date:	06/07/82 (G W/C)	**Applicant:**	Walton
Case #/Type:	30542 (C)	**Regional Office:**	Glasgow
Application Date:	1981	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.9348.20 Historic use will not be expanded by change in place of use and point of diversion.

T-5.800 Applicants must install gated inlet structure on dike spreader system so juniors can get water when applicant does not need.

[Change authorized.]

Final Order Date:	06/08/82 (D)	**Applicant:**	U.S. Department of Interior
Case #/Type:	(a) 26419-s40J (P) (b) 26420-s40J (P) (c) 26421-s40J (P) (d) 26422-s40J (P) (e) 26423-s40J (P) (f) 26424-s40J (P) (g) 26425-s40J (P) (h) 26426-s40J (P) (i) 26427-s40J (P)	**Regional Office:**	Havre
Application Date:	01/21/80 (All)	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Wildlife

B-5.690
E-22.480 Fact that the proposed use may be more productive than objector’s uses is irrelevant in permit considerations.

E-24.4831 Objector's expanded use on decreed stream may not be valid, right as, under the terms of R.C.M. 89-829, post-adjudication appropriations required court approval.

E-24.4831
S-20.720 Objector is entitled to carryover storage under decree. Therefore, that water not available to applicant.

E-24.4879
M-5.110 Appropriation by natural flooding may in certain cases be legitimate if not wasteful and requiring an unreasonable amount of water for delivery.

E-24.4879
M-5.110 Long and leaky ditches not necessarily unreasonable.

S-20.720
U-14.1259 Waters applicant wishes to use are tributary to McLaren Reservoir which spills only on rare occasion; the waters stored therein are used by downstream appropriators. Held, no unappropriated water available.

U-14.1259 Although the proposed diversion may be small in comparison to downstream uses, this does not sanction the interference.

Final Order Date:	06/09/82 (D)	**Applicant:**	Denkinger
Case #/Type:	20771-s76N (P)	**Regional Office:**	Kalispell
Application Date:	N/A	**Examiner:**	Pengelly
Hearing Date:	05/12/82	**Use:**	Irrigation

A-16.7516 [Application dismissed; applicant had no intention of proceeding with the project.]

Final Order Date:	07/19/82 (G W/C)	**Applicant:**	Loomis/Edenfield
Case #/Type:	28224-s41I (P)	**Regional Office:**	Helena
Application Date:	04/25/80	**Examiner:**	Williams
Hearing Date:	12/07/81	**Use:**	Mining

A-4.930 "Opening the floodgates" argument that future similar appropriations will threaten prior appropriator, not relevant. Future appropriators must also get permit.

A-4.9379 Disruption of timing of flows in Confederate Creek caused by delay in return flow from settling ponds via ground percolation may adversely affect objectors. Applicant did not prove otherwise. Held, § 85-2-311(1)(b), MCA, not met.

A-4.9394
T-5.800 Piping return flow directly back to Confederate Creek does not appear to involve any overwhelming water quality problems, and would solve problem of delayed return flow.

A-16.750
D-21.310
E-22.480 New language added to § 85-2-311, MCA, in 1981 merely makes explicit what was formerly implicit. Accordingly, no prejudice to applicant by proceeding under new statute, although application filed before it was passed.

A-16.7516 Volume requested in application reduced because application has no fixed and definite plan for use of part of the water; he was merely providing for hope of increased mine production at some future point.

A-24.980 Applicant's present need for water may be tested without reference to its claim of existing right because "existing right" was established on adjudicated stream without complying with R.C.M. 89-829, and therefore probably does not exist.

U-14.120 Use is nonconsumptive, and water has been shown physically available; held, § 85-2-311(1)(a), MCA, met.

U-14.1259.70 Minimal evaporation loss does not defeat nonconsumptivity of use.

[Proposal to deny.] [Permit granted with condition that return flow must be piped directly back to creek.]

Final Order Date:	07/26/82 (D)	**Applicant:**	Haynes
Case #/Type:	29427 (P)	**Regional Office:**	Kalispell
Application Date:	03/25/80	**Examiner:**	Pengelly
Hearing Date:	05/11/82	**Use:**	Domestic/Stock

U-14.120 Unappropriated water not available throughout period of use and applicant cannot reasonably exercise his water right unless water is available throughout entire period of use. Section 85-2-311(1)(a), MCA, not met.

[Permit denied.]

Final Order Date:	08/13/82 (G W/C)	**Applicant:**	Powers
Case #/Type:	38494 (P)	**Regional Office:**	Missoula
Application Date:	11/10/81	**Examiner:**	Williams
Hearing Date:	7/13/82	**Use:**	Irrigation

E-24.4831 Objector's failure to comply with 1921 statute governing appropriation of water on decreed stream probably invalidates most of his claimed water right.

E-24.4831
J-21.800

Decree for water given by district court adjudicating right with a priority date of 1980 invalid and irrelevant to these proceedings. Department has exclusive original jurisdiction over acquiring water rights since 1973.

U-14.1259

Regardless of status of objector's claim, evidence shows objectors do not always use the water to the full extent of their claims. Held, that there will be some years in which the amount requested herein will be available for applicant's use.

Final Order Date:	08/16/82 (G)	**Applicant:**	Engel
Case #/Type:	29428-s76N (P)	**Regional Office:**	Kalispell
Application Date:	05/02/80	**Examiner:**	Pengelly
Hearing Date:	05/12/82	**Use:**	Domestic/Stock/ Irrigation

A-4.9383

Periodic low flows in objector's springs related to precipitation patterns, not applicant's diversion from other springs. Held, no adverse effect.

Final Order Date:	11/09/82 (G W/C)	**Applicant:**	Klein
Case #/Type:	29795-s76G, (P) 31306-s76G, and 31307-s76G	**Regional Office:**	Helena
Application Date:	10/08/80	**Examiner:**	Williams
Hearing Date:	4/8/82	**Use:**	Mining

A-4.9325
J-21.800
S-15.920

Applicant intends to extract ore directly from stream source, which in turn will affect the capacity of the source of supply to pass water in a given volume as surface flow. Held, this potential effect immaterial in present case as the parameters of the material issues are defined by the taking and use of the water resource.

A-4.9379

Because applicant intends to use settling ponds which delay return, call system may not work adequately. Therefore, only must condition to prohibit applicant from diverting unless water is spilling at objector's diversion.

A-16.7516

Applicants' plans to divert water from one stream to another are so undefined and ill-formed as to be speculative.

A-16.7567

Although amendments contained enlargement of time and place of use, because priority is junior to all on source, no prejudice can accrue by keeping original filing date as priority. However, examiner is not comfortable with such "bootstrapping" by amendment.

A-16.7576

All amendments to applications were reflected in public notice. No prejudice to public or objectors by failure to actually alter original applications.

D-21.310

No trans-basin diversion could be allowed hereunder because of inadequate notice that applicant intended same.

E-24.9879

Objector requires a significant head of water merely to push the waters required for actual beneficial use to their place of use, and the evidence does not show that this is either unreasonable or wasteful. Therefore, objector is entitled to the full head.

E-24.9879

Objectors' uses do not have to be most efficient, only reasonable. [FO]

T-5.800
U-14.120

Evidence shows unappropriated water never or rarely available July 15 - August 15. Held, to meet 85-2-311(1)(a) criteria, said period must be cut out of period of use.

[After FO, motion for rehearing filed.]

R-5.9379

Motion for rehearing denied on basis that Attorney General's Model Rules allow but do not substantively grant a right to administrative rehearing. [Amended FO.]

Final Order Date:	11/09/82 (DIS)	**Applicant:**	Kelly
Case #/Type:	30622 (P)	**Regional Office:**	Missoula
Application Date:	N/A	**Examiner:**	Williams
Hearing Date:	8/18/82	**Use:**	

A-16.7516

No appropriative intent where applicants do not intend to divert more than they have claimed in adjudication.

[Application dismissed.]

Final Order Date:	11/10/82 (G W/C)	**Applicant:**	Erickson
Case #/Type:	32095-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	08/01/80	**Examiner:**	Pengelly
Hearing Date:	05/18/82	**Use:**	Domestic

U-14.1259

Base flow of Walker Creek is two times the filed claims thereon. Held, unappropriated water exists in the source.

Final Order Date:	11/19/82 (G W/C)	**Applicant:**	Bender
Case #/Type:	38719-s43Q (P)	**Regional Office:**	Billings
Application Date:	09/14/81	**Examiner:**	Dockins
Hearing Date:	08/24/81	**Use:**	Irrigation

A-4.930

Can be no adverse effect to upstream senior. Downstream senior did not appear at the hearing; however, obtaining water not apparently his concern.

A-4.930
E-22.480

Determination of whether stream bed alterations made by applicant interfere with objector's water rights is separate and distinct from the issue of whether the appropriation will adversely affect objector's rights. It is not relevant.

E-22.480

Whether subdivision upstream illegally diverting held irrelevant.

E-22.480
S-15.920

Whether or not applicants could make use of water source other than the one for which they are applying irrelevant.

U-14.120

Although flow of Blue Creek is erratic, evidence shows that there will be some years that the amount requested by applicant will be (physically) available. Held,
§ 85-2-311(1)(a), MCA, met.

[Permit granted.]

Final Order Date:	03/24/83 (D)	**Applicant:**	Western Water Co.
Case #/Type:	39786-g76H (P)	**Regional Office:**	Missoula
Application Date:	10/19/81	**Examiner:**	Williams
Hearing Date:	9/28/82	**Use:**	Domestic

A-4.930
E-22.480

Evidence of adverse effect herein outweighs any act of certification from the Department of Health.

A-4.9395 Hydraulic characteristics of aquifer make it probable that applicant's well will create a cone of depression sufficient to draw down objector's wells to the point they cannot be operated. Held, this is adverse effect.

A-4.9395
E-24.4879
U-14.120 Aquifer is at or near its sustained yield, that is, additional consumption may result in "mining" of the aquifer. Although mining of water is not a practice inevitably condemned where the amounts of water tied up by relatively shallow wells is great and the need for water in the overlying basin is critical, applicant has not demonstrated that this is the case. Held, objector's means of diversion are reasonable as against the applicant.

B-5.6979 Whether applicant has requested enough water held immaterial in this case.

B-21.780 Burden of production of evidence of an existing right is on objector.

R-5.930 Broad assertion that proposal is "wrong" is meaningless and insufficient to contest proposal. [FO]

[Permit denied.]

Final Order Date:	03/28/83 (D)	**Applicant:**	East Bench Grain & Machinery, Inc.
Case #/Type:	25170-g41B (P)	**Regional Office:**	Helena
Application Date:	12/08/79	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930
B-21.780 Applicant's arguments that there is a lack of evidence supporting a finding of adverse effect are unpersuasive. The evidence must support a finding of no adverse effect, and it is applicant's burden to provide it. If he does not, the permit cannot issue, whether adverse effect is affirmatively found, or if the evidence as to adverse effect is nonexistent or inconclusive. [FO]

A-4.930
T-5.800
U-14.120 The Department cannot "find" unappropriated water and no adverse effect merely by conditioning the permit subject to existence of same. [FO]

A-4.9395 To show no effect on objector is possible, applicant must show more than a mere lack of surface connection. Here, subsurface connection is apparent. [FO]

A-4.9395
E-24.4879 Evidence shows that the proposed appropriation will draw down objectors' well to a point where it is inoperable. Although objectors' well is somewhat shallow in terms of present day irrigation wells in the area, the objector is not entangling the greater portion of the aquifer against all subsequent uses merely to extract the top portions thereof. Rather, it is the too close spacing of applicant's well to objectors' which is the culprit. Therefore, it is concluded that unless applicant defrays the cost of the necessary deepening of objectors' well, there will be adverse effect to objectors.

B-5.6979 Diversion of 415 acre-feet per year in this instance excessive.

M-5.110 There is water available in the source; however, applicant's diversion location may require a well so deep to obtain these waters

as to be prohibitively expensive. Cannot tell until drilled. (But means of diversion held adequate.)

U-14.120 An applicant makes a **prima facie** showing of unappropriated water and no adverse effect where the evidence indicates that water is physically available and proposed use can be properly regulated in times of shortage in deference to senior demand. [FO]

[Applicant was allowed additional time to supply information regarding adverse effect.]

Final Order Date:	04/14/83 (G W/C)	**Applicant:**	Cox
Case #/Type:	42358-s43D (P)	**Regional Office:**	Billings
Application Date:	01/12/82	**Examiner:**	Pengelly
Hearing Date:	01/18/83	**Use:**	Irrigation

U-14.120 In some years there are unappropriated waters in the source of supply throughout the period of appropriation. Held, §85-2-311 (1)(a)(iii), MCA, met.

Final Order Date:	05/25/83 (D)	**Applicant:**	Diamond City Mining Co.
Case #/Type:	29912 (P) 29913 (P)	**Regional Office:**	Helena
Application Date:	10/16/80	**Examiner:**	Roberts
Hearing Date:	01/20/83	**Use:**	Mining

A-16.7516 Applicant is speculating as to how much and when water will be available. Therefore, no **bona fide** intent.

E-22.480 Examiner relied on findings made in **Loomis** (28224), that there was no unappropriated water in Confederate Creek after notifying parties at prehearing that he would do so.

J-21.800 Statement in **Rankin v. Mathews** that water rights therein decreed not for mining, does not deprive Department of original jurisdiction to grant mining permit, nor does it compel Department to seek district court approval of mining permit before granting.

U-14.120 Although water flows from source into Canyon Ferry Reservoir, this insufficient to show unappropriated water because evidence rebutted by testimony of objector who lives near confluence that such water is in fact rising groundwater.

U-14.120 Under § 85-2-311, MCA, an applicant makes a **prima facie** showing of unappropriated water and a lack of adverse effect to prior appropriators when the evidence indicates that (a) there is water physically available for the appropriator's use in the quantity sought; and (b) the proposed use can be properly regulated in times of shortage in deference to senior demand. However, when an objector makes proof of existing water rights, applicant must then demonstrate that his water use will not for all practical purposes capture water otherwise required by established uses.

U-12.1459.70 Difference between consumptive and nonconsumptive use defined.

U-12.1459.70 Fact that applicant must divert up to 81,340 gallons of "make-up" water to replenish water consumed during mining process, coupled with fact of time delays in returning water to source, demonstrates use is not nonconsumptive.
[Permit denied.]

Final Order Date:	05/25/83 (G W/C)	**Applicant:**	Babcock
Case #/Type:	42136-s76M (P)	**Regional Office:**	Missoula
Application Date:	02/09/82	**Examiner:**	Roberts
Hearing Date:	03/09/83	**Use:**	Domestic

B-21.780 The parties stipulated to the existence of the statutory criteria. No evidence was presented. Held, criteria met. [Permit granted.]

Final Order Date:	05/25/83 (G W/C)	**Applicant:**	Ahearn/Morris
Case #/Type:	45875-s76M (P)	**Regional Office:**	Missoula
Application Date:	04/15/82	**Examiner:**	Roberts
Hearing Date:	03/09/83	**Use:**	Domestic/Irrigation

B-21.780 Parties stipulated to existence of all criteria. Held, criteria met. [Permit granted.]

Final Order Date:	05/27/83 (G)	**Applicant:**	Morse
Case #/Type:	28975-c43C (C)	**Regional Office:**	Billings
Application Date:	09/03/80	**Examiner:**	Pengelly
Hearing Date:	01/19/83	**Use:**	Irrigation

A-4.9348.20 There was no showing by any of the objectors that the proposed change in point of diversion would adversely affect any of their water rights. Section 85-2-402, MCA, met.

J-21.800
R-5.9397 Once final order issued, the Department no longer retains jurisdiction to rehear case or substantively amend final order. Applicant's motion for clarification is really a motion for reconsideration which must be denied. [FO]

[Change authorized.]

Final Order Date:	05/27/83 (G W/C)	**Applicant:**	Morse
Case #/Type:	45541-s43C (P)	**Regional Office:**	Billings
Application Date:	04/27/82	**Examiner:**	Roberts
Hearing Date:	01/19/83	**Use:**	Irrigation

B-5.6979 Permit granted for less than requested as applicant already had water appurtenant to land, and that plus the requested amount excessive. [Permit granted.]

Final Order Date:	(Est)June 83(G W/C)	**Applicant:**	Lee
Case #/Type:	31585-s41O, (P) 36164-g41O, (P) and 35862-g41O (P)	**Regional Office:**	Havre
Application Date:	02/05/81 09/29/81 09/14/81	**Examiner:**	Williams
Hearing Date:	2/23/82 & 2/28/83	**Use:**	Irrigation

J-21.800 Not all terms of agreement incorporated in order; only those elements of agreement responsive to the issues framed by § 85-2-311, MCA, incorporated.

S-15.920 The waters which will be intercepted by this well if left undiverted would affect the flow of Ralston Gap. Such waters are therefore not groundwater within the meaning of the Water Use Act.

[Case settled by parties; withdrawal of objections pursuant to agreement.]

Final Order Date:	09/16/83 (D)	**Applicant:**	Halverson
Case #/Type:	46920-s76F (P)	**Regional Office:**	Helena
Application Date:	06/11/82	**Examiner:**	Roberts
Hearing Date:	03/11/83	**Use:**	Mining

A-4.9348.20 Placer settling pond to be used. Held, evidence provided insufficient to prove that the use is truly nonconsumptive as settling pond could significantly delay return of water to source.

A-16.7516
B-5.690 Where applicant admitted she will never use the amount of water requested, held she is speculating in the amount of water needed. Not a sufficient basis for granting permit.

A-16.7516
M-5.110 An applicant is not required to prove that he owns the property over which water is to be conveyed.

A-16.7516
M-5.110 Existence of injunction preventing applicant from working mining claims (and thus diverting water therefor) does not preclude Department from issuing permit.

Final Order Date:	09/16/83 (G W/C)	**Applicant:**	MacDonald
Case #/Type:	49371-g43Q (P)	**Regional Office:**	Billings
Application Date:	07/01/82	**Examiner:**	Roberts
Hearing Date:	06/06/83	**Use:**	Irrigation

A-4.9395
U-14.120 Uncontradicted expert testimony showing that the proposed appropriation caused no significant drawdown in either applicant's well or any of the surrounding objector's wells held sufficient to prove § 85-2-311(1)(a) and (b).

R-5.930 Conclusory, vague, and argumentative language in exception held insufficient to warrant consideration.

[Permit granted.]

Final Order Date:	10/03/83 (G W/C)	**Applicant:**	Reiter/Grunstead
Case #/Type:	43024-s43D (P)	**Regional Office:**	Billings
Application Date:	02/19/82	**Examiner:**	Roberts
Hearing Date:	04/21/83	**Use:**	Irrigation

A-4.930
B-21.780 Objectors failed to present evidence of adverse effect to their water rights in an orderly and understandable manner, or to bring out salient points of law or fact. Their case simply was not persuasive or sufficient to persuade the examiner that the permit should be denied.

J-21.800
M-5.1129
P-5.8021 Permit right does not include ditch rights. These must be obtained separately. Failure to prosecute the diversion works is grounds for revocation. [FO]

R-5.930 New evidence not allowed in exceptions to proposal. [FO]

U-14.120 Determination of whether surplus water exists for appropriation cannot be made solely by examining the driest years of the water commissioner's records. Prior appropriators cannot paralyze the development of unused portions of the stream system merely to protect against potential interferences in dry years.

U-14.120 There are periods of time when water is physically available for proposed use, and the proposed use can be properly regulated in

times of shortage in deference to senior demand. Thus, applicants have made a **prima facie** showing of "unappropriated water" and "no adverse effect."

Final Order Date:	12/16/83 (G W/C)	**Applicant:**	Kruse
Case #/Type:	39577-s41E (P)	**Regional Office:**	Helena
Application Date:	12/21/81	**Examiner:**	Williams
Hearing Date:	9/23/82	**Use:**	Mining

A-4.9325 The proposed use (placer mining) is nonconsumptive; thus, the only effect it can have on downstream users is disruption of pattern of flow.

A-4.9373 Because downstream users (including Montana Power Co.) are below a glacial moraine which restricts and regulates flow, whether diverted water returns to the source by percolating through the ground will not affect pattern of flow to them. Held, no adverse effect by disruption of pattern of flow.

E-24.4831
O-2.490 Montana Power Co. objection should be stricken (**see In re Don Brown**) however, Montana Power will not be adversely affected regardless of actual extent of their right, as use is nonconsumptive. **See** below.

U-14.120 Unappropriated water available at least in some years. Held, § 85-2-311(1)(a), MCA, met.

[Permit granted.]

Final Order Date:	12/19/83 (D)	**Applicant:**	Pitsch
Case #/Type:	9357-s40A (P)	**Regional Office:**	Lewistown
Application Date:	09/01/76	**Examiner:**	Throm
Hearing Date:	11/07/77	**Use:**	Irrigation

A-4.9394 Increase in water salinity making same undrinkable by stock is an adverse effect to stock water right. [FO]

B-21.780
E-22.480 Although application did not specify flow rate, clear and convincing was correct evidentiary standard. [FO]
L-1.790

E-22.480 Admission of evidence for a limited purpose is well accepted, even when the formal rules of evidence apply. [FO]

J-21.800
S-21.660 Failure of Department to take action within time prescribed does not yield automatic grant of permit. [FO]

O-2.490 Determination of whether objections are valid is a determination expressly within the discretion of the Department. [FO]

R-5.930 The fact that the hearing examiner, one William Throm, may have somewhat inarticulately botched the explanation of the law, does not excuse a represented party from not knowing the law. [FO]

R-5.930 Although the specified proposed "Findings of Fact" in the proposal are phrased to reflect their testimonial nature, this idiotic phraseology does not impair their function as proposed findings. [FO]

Final Order Date:	03/20/84 (G W/C)	**Applicant:**	Moldenhauer
Case #/Type:	G-05081-41I (C) G-05083-41I (C)	**Regional Office:**	Helena

Application Date:	09/19/82	**Examiner:**	Roberts
Hearing Date:	04/29/83	**Use:**	Irrigation

A-4.930
B-21.780
Objector made no showing that the proposed change will result in adverse effect to its rights, but argues that the adverse effect is to its claim of ownership and that applicant is causing harm by using the water which both parties claim. This insufficient. [FO]

A-4.930
E-24.480
When objector claims same water rights as applicant proposes to change, a determination of adverse effect cannot be made until the ownership issue is resolved.

A-4.930
E-24.480
Department rejects examiner's conclusion that "without knowing the true owner of the water rights proposed to be changed, no meaningful determination of adverse effect can be made". Questions of whether other existing uses of water will be affected can be answered as matters of fact without making a final determination as to whether applicant has title to water right. [FO]

A-4.930
J-21.800
It is not a correct statement of the law to say that the Department must issue a permit where there has been no finding made re adverse effect. [FO Memo.]

A-4.9348.20
The proposed change in point of diversion will not adversely affect the rights of other persons. [FO]

A-4.9379
B-21.780
Objector did not present sufficient evidence to support a determination of adverse effect from loss of return flow. [FO]

B-5.690
D-21.310
J-21.800
The Department rejects the argument that a denial of a change authorization denies applicants the use of their water right. [FO Memo.]

B-21.780
Objectors have burden of proof to prove injury in change proceeding. [**Caution** - This rule has been superseded.]

E-24.480
Applicant made a sufficient showing of ownership to justify the Department proceeding to a determination of adverse effect to other persons. [FO]

E-24.480
J-21.800
Department has no statutory authority to determine ownership of contested water rights.

E-24.4820
J-21.800
Approval of the application for change is in no way a grant of a 311 permit. If applicant is ultimately determined by the water court not to have a water right, applicant would obtain no vested right to use water by his exercise of the changed right in the interim. [FO Memo.]

J-21.800
A decision on ownership made for the purposes of allowing the Department to proceed with a determination on whether a proposed change in water use will adversely affect other persons does not reach the **res judicata** level of finality as is obtained in the adjudication. Therefore, the Department does not usurp water court jurisdiction in making such determinations. Further, the Department does have the implied power to make initial determinations of water rights in order that it may effectively discharge its duties. [FO]

J-21.800
Department has no authority to deny permit for misconduct of applicant pursuant to § 85-2-402(5), MCA. [FO Memo.]

J-21.800
The statutory time periods are directory rather than jurisdictional,

S-21.660 and failure to act within them does not trigger a mandatory duty either to grant or deny. [FO Memo.]

O-2.490 An objector's failure to request a hearing is not fatal to his objection. [FO Memo.]

R-5.930 [FO - Department adopted additional findings of fact to support final order different than proposal.]

R-5.930 Finding of fact, though wholly irrelevant to proceeding, cannot be rejected or modified at final order unless clearly erroneous. [FO Memo.]

S-21.6621 **Res judicata** is a judicial doctrine, and a party to an administrative proceeding is not entitled as of right to its protections. However, the equitable concerns that underlie the doctrine may dictate that the branch of **res judicata** known as collateral estoppel be applied. [FO Memo.]

S-21.6621 Because of the inherent lack of clarity in the 1975 order, and because that order was in part the result of a stipulated settlement, the order lacks **res judicata** force. [FO Memo.]

[Authorization granted.]

Final Order Date:	04/06/84 (G)	**Applicant:**	Smith
Case #/Type:	G18583-43Q (C)	**Regional Office:**	Billings
Application Date:	06/16/81	**Examiner:**	Pengelly
Hearing Date:	01/12/84	**Use:**	Storage/Irrigation

S-20.720 [Application to change certificate of groundwater right, to wit: change in point of diversion and addition of 1,000 gallons of storage. Approved.]

Final Order Date:	04/06/84 (D)	**Applicant:**	Landon
Case #/Type:	49483-s43Q (P)	**Regional Office:**	Billings
Application Date:	11/23/82	**Examiner:**	Pengelly
Hearing Date:	03/05/84	**Use:**	Irrigation

A-16.7567 Notice of groundwater completion cannot be relied upon to gain an earlier priority date than that of application filing for surface water flow derived from that source.

M-5.1129 Lack of an easement is not a basis for denying a permit.

S-15.920 The waters of a developed spring, once flowing on the surface of the ground are considered surface waters.

U-14.120 Under facts presented, held no unappropriated water exists in unnamed tributary. [Permit denied.]

Final Order Date:	04/16/84 (G W/C)	**Applicant:**	Peterson
Case #/Type:	40064-g76G (P)	**Regional Office:**	Helena
Application Date:	02/01/82	**Examiner:**	Pengelly
Hearing Date:	02/15/84	**Use:**	Irrigation

B-5.6979 Where 62.4 acre-feet are needed to efficiently irrigate acreage, and applicant already has a claim for 40 acre-feet, permit can issue for only 22.4 acre-feet. [Permit granted in part.]

Final Order Date:	04/23/84 (G W/C)	**Applicant:**	Kunneman
Case #/Type:	W138008-43A (C)	**Regional Office:**	Bozeman
Application Date:	04/30/82	**Examiner:**	Bond
Hearing Date:	09/29/83	**Use:**	Irrigation

E-22.480 Administrative notice of a Supreme Court decision is improper, as administrative notice is a rule of evidence which is not applicable to the substantive law governing the case.

E-22.480 If an "objection" to a question is made, but party then argues the substance of the issue as part of its "objection", an objection was not made; rather evidence or argument is being given in anticipation of the response to the question.

E-22.480
E-24.480
J-21.800 Evidence of pre-1973 use of a water right on land other than that described in a decree is not a collateral attack upon the decree, nor is Department recognition of the altered place of use a modification of such decree, as appropriator had a right to alter the place of use at will before 1973 subject only to district court modification to prevent injury.

E-24.480 A water right is not permanently appurtenant to the land to which it was decreed; before 1973 it could be moved at will subject only to district court modification upon proof of adverse effect to other appropriators.

J-21.800
P-18.720 The Department does not have jurisdiction to deny a change application based on adverse effect to property other than water rights. [Reasoning: Proposal for Decision, Preliminary Matters; Final Order.] However, a Department change authorization does not insulate applicant from property damage claims resulting from such change made presented in a court of competent jurisdiction.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Woods
Case #/Type:	10841-s41G (P)	**Regional Office:**	Helena
Application Date:	12/29/76	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930
U-14.1259 The uses of the waters applied for herein will not adversely effect the rights of prior appropriators as applicant's diversion will not inevitably or necessarily capture waters otherwise required for downstream demand, and because in times of scarcity, applicant's use is junior to such demand.

B-21.780 [Discussion with citations on allocation of the burden of proof.]

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

D-21.310 Language of 1981 statute makes express what was implicit before. No prejudice to applicant in applying 1981 statute.

D-21.310 Objectors have no right to expeditious processing of application; therefore, lower burden of proof (1981 statute) on applicant not prejudicial.

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480
L-1.940 Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]

E-24.4831
J-21.800
S-21.6621 Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

S-21.6621 Findings and conclusions of **In re Brown** adopted herein, and Montana Power Company and Bureau of Reclamation are collaterally estopped from relitigating the scope of their water rights already determined therein.

[Permit granted.]

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Jefferson River Acres & Lane
Case #/Type:	11493-s41G (P) 15211-s41G (P)(Lane)	**Regional Office:**	Helena
Application Date:	02/28/77 09/15/77 (Lane)	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

[See also 16696, Jack Creek Ranch.]

B-21.780 [Discussion with citations on allocation of the burden of proof.]

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480 Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]

E-22.480
E-24.4831
S-21.6621 Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction However, findings made in such case may not be void for all purposes.

E-22.480
E-24.4831

Notices of appropriation not in strict compliance with statute are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.

E-24.480
U-14.1259

The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.

E-24.4831

[Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]

E-24.4831

Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has failed to demonstrate an appropriative intent to sell water to private irrigators.

E-24.4831

Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.

E-24.4831

Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.

E-24.4831
J-21.800
S-21.6621

Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

E-24.4831

Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the Bailey rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

E-24.4879

The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.

E-24.4879
S-20.720

The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.

E-24.4894
F-5.250

Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, **i.e.**, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.

F-5.250 Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.

T-5.800
U-14.1259
W-1.870 There are unappropriated waters in the source of supply, and there is no need to limit period of diversion to periods when Chocran is is spilling (as was done **In re Pettapiece**, **In re Monforton**, and **In re North Boulder Drainage District**, where no showing of the Bureau of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Brown, Don L.
Case #/Type:	12016-s41G (P)	**Regional Office:**	Bozeman
Application Date:	03/31/77	**Examiner:**	Williams
Hearing Date:	Est. 1983	**Use:**	Irrigation

B-21.780 [Discussion with citations on allocation of the burden of proof.]

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480
L-1.940 Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]

E-22.480
E-24.4831 Notices of appropriation not in strict compliance with statute are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.

E-22.480
E-24.480
S-21.6625 Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.

E-24.480
U-14.1259 The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.

E-24.4831 [Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]

E-24.4831	Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has filed to demonstrate an appropriative intent to sell water to private irrigators.
E-24.4831	Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.
E-24.4831	Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.
E-24.4831	Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the **Bailey** rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.
E-24.4831	The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.
E-24.4831 **J-21.800** **S-21.6621**	Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]
E-24.4879	The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.
E-24.4894 **F-5.250**	Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, **i.e.**, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.
F-5.250	Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.
T-5.800 **U-14.1259** **W-1.870**	There are unappropriated waters in the source of supply, and there is no need to limit period of diversion to periods when Cochran is spilling (as was done **In re Pettapiece**, **In re Monforton**, and **In re North Boulder Drainage District**, where no showing of the Bureau of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Jack Creek Ranch Trust thru Richard K. Webel, Trustee
Case #/Type:	16696-s41F (P)	**Regional Office:**	Helena
Application Date:	12/19/77	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation/Stock

A-4.930	The proposed appropriation will not adversely affect prior rights as applicant is junior to these uses, and as the water to be appropriated is not inevitably otherwise required for downstream use.
A-16.7516	Compromise reached at hearing resulting in shortening in period of appropriation does not belie the existence of bona fide intent.
B-21.780	Objector bears burden of going forward with evidence such that reasonable minds might differ over the scope and extent of their water rights. This burden derives from necessity of objector demonstrating cognizable interest in the proceedings.
B-21.780	[Discussion with citations on allocation of the burden of proof.]
B-24.4879	Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]
E-22.480	Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]
E-22.480	Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]
E-22.480 **L-1.940**	Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]
E-22.480 **E-24.480** **S-21.6625**	Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.
E-22.480 **E-24.4831**	Notices of appropriation not in strict compliance with statutory are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.
E-24.480 **U-14.1259**	The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.
E-24.4831	[Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]
E-24.4831	Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has filed to demonstrate an appropriative intent to sell water to private irrigators.

E-24.4831 Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.

E-24.4831 Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.

E-24.4831 Not necessary here to decide whether the **prima facie** statutory derivatives of filing of notices of appropriation survive repeal of sponsoring statute for purposes of determining whether right exists.

E-24.4831 Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the Bailey rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

E-24.4831
J-21.800
S-21.6621
Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

E-24.4879 The Bureau of Reclamation can reasonably exercise its right, which includes the right to carry over storage, if upstream development continues.

E-24.4879 The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.

E-24.4894
F-5.250
Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, **i.e.**, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.

F-5.250 Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.

M-5.1188
S-15.920
Applicant has dug drainage ditches to remove excess water which has subirrigated and saturated his land naturally. Applicant will control the operation of these ditches to allow waters to subirrigate within the root zone of alfalfa crop. Held, this means of diversion is reasonable and will not result in waste of resource. However, this should not be construed to vest an interest in applicant in this particular means of diversion.

S-15.920 Groundwaters herein are tributary to surface stream flows of Madison, and are therefore surface waters for purposes herein.

T-5.800
U-14.1259
W-1.870
There are unappropriated waters in the source of supply and there is no need to limit period of diversion to periods when Cochran is is spilling (as was done **In re Pettapiece**, **In re Monforton**, and **In re North Boulder Drainage District**, where no showing of the Bureau

of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.

U-14.1259.25 Some of the waters herein are properly termed salvage as they are saved by eradication of phreatophytes. However, some waters are tributary to surface source, and the relative percentages of each remain unknown. Further one may not claim he has developed water by removal of phreatophytes. Held, salvage not pivotal to determination of unappropriated water.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Robbie
Case #/Type:	20301-s41F (P)	**Regional Office:**	Helena
Application Date:	09/14/78	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

B-21.780 [Discussion with citations on allocation of the burden of proof.]

B-21.780
S-20.110 Objector must produce evidence demonstrating its interest in the administrative proceeding.

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau of Reclamation is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company, etc.) [FO - 51-page discussion.]

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480
L-1.940 Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious actions. [FO]

E-22.480
E-24.480
S-21.6625 Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.

E-24.480
U-14.1259 The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting form storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.

E-24.4831 [Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]

E-24.4831 Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau of Reclamation has failed to demonstrate an appropriative intent to sell water to private irrigators.

E-24.4831 Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be made absent the actual sale of the use of such waters.

E-24.4831 Montana Power's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.

E-24.4831 Not necessary here to decide whether the **prima facie** statutory derivatives of filing of notices of appropriation survive repeal of sponsoring statute for purposes of determining whether right exists.

E-24.4831 Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the Bailey rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

E-24.4831
J-21.800 Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

E-24.4879 The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.

E-24.4879 The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial sue is unreasonable means of diversion. It is wasteful of the resource.

E-24.4894
F-5.250 Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, **i.e.**, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.

F-5.250 Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.

T-5.800
U-14.120
W-1.870 There are unappropriated waters in the source of supply and there is no need to limit period of diversion to periods when Cochran is spilling (as was done in **In re Pettapiece, In re Monforton**, and **In re North Boulder Drainage District**, where no showing of the Bureau's wasteful practices was made), as such limitation is unwarranted in view of the waste at Canyon Ferry.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Hensley
Case #/Type:	21949-s41I (P)	**Regional Office:**	Helena
Application Date:	02/26/79	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930 Applicant's proposed use will not inevitably or necessarily capture waters otherwise required for downstream demand, nor will applicant's right be unadministrable in times of scarcity when her junior status will force curtailment in deference to senior requirements. Held, no adverse effect to prior rights.

A-4.9373
E-24.4831
J-21.800
An appropriator may not extend the time or extent of use without initiating a new water right.

B-5.6979 Use of 741 acre-feet for stated purposes is unreasonable.

B-21.780
D-21.310
Objectors can claim no prejudice by lessening of applicant’s burden of proof by change in statute.

D-21.310
E-22.480
New statutory language merely makes explicit what was formerly implicit. Therefore, can use new statute in case where application filed prior to its effective date.

E-22.480 Substantial credible evidence means such evidence that a reasonable mind will accept as supporting a particular conclusion.

L-1.940
S-21.6621
U-14.1259
Principles of **stare decisis** and collateral estoppel dictate deference to prior Department decisions (**In re Brown,** etc.) regarding objectors', Bureau of Reclamation, and Montana Power Company's existing water rights, and whether there is unappropriated water in the source. In these decisions, it was determined that there is unappropriated water in the source.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Iverson
Case #/Type:	22188-s41I (P)	**Regional Office:**	Lewistown
Application Date:	03/26/79	**Examiner:**	Williams
Hearing Date:	1982	**Use:**	Irrigation

A-4.930 No adverse effect as use will not inevitably or necessarily capture waters otherwise required for downstream demand, and in times of scarcity applicant's uses will be junior to such demand.

B-21.7808 [Discussion with citations on allocation of the burden of proof.]

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau of Reclamation is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company, etc.) [FO - 51-page discussion.]

D-21.310 No prejudice in applying 1981 statute although application filed prior to effective date.

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480
L-1.940
Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious actions. [FO]

E-24.4831
J-21.800
S-21.6621
Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative

determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

S-15.920 Waste and seepage waters are subject to appropriation.
W-1.870

S-21.6621 Principles of **stare decisis** and collateral estoppel dictate
U-14.1259 deference to prior Department decisions (**In re Brown,** etc.)
L-1.940 regarding objector Bureau of Reclamation existing water rights, and whether there is unappropriated water in the source. In these decisions, it was determined the Bureau of Reclamation is wasting water and thus that there is unappropriated water in the source.

Final Order Date:	04/24/84 (G W/C)	**Applicant:**	Anderson Ranch
Case #/Type:	24550-s41QJ (P)	**Regional Office:**	Lewistown
Application Date:	09/27/79	**Examiner:**	Williams
Hearing Date:	1983	**Use:**	Irrigation

A-16.750 The 1979 version of the statute controls the disposition of this
L-1.940 application as that was the law in effect at the time of its filing.

B-5.6979 Appropriator is entitled to the most water he can reasonably use for his purposes. Thus, amount granted not limited to amount needed in wet years. [FO]

B-21.780 Objector has burden of production as to scope and extent of its water rights.

E-22.480 The Pick-Sloan Plan is an instrument reflecting legislative intent.
L-1.940 As such, it is the subject of argument, not fact finding, and therefore, its consideration herein has nothing to do with official notice. Deciphering the law is not controlled by evidentiary boundaries. [FO]

E-22.480 An applicant may not insulate his own junior use by “pointing
U-14.1259 fingers" at other wasteful or "inferior" uses. [FO]

E-24.4831 Montana Power Company's asserted "right" to increased flows made available by Canyon Ferry operations are not part of Montana Power Company's rights as against the applicant by virtue of federal law. **See In re Brown**. [FO]

E-24.4831 **Prima facie** effect of claim does not supplant need for evidence detailing the amount of water put to beneficial use. [FO]

E-24.4831 [Memorandum: Federal preemption of state appropriation law; Montana
F-5.250 Power Company's rights no more than the direct flow of the Missouri
U-14.1259 without Canyon Ferry; the measure of additional flow attendant to the returns from the bureau's use at Canyon Ferry is available for appropriation by users downstream from Canyon Ferry (**e.g.**, applicant) as against the claims of Montana Power Company.]

S-15.920 Appropriation of tail waters expressly recognized in Montana. [FO]

U-14.120 The reach of § 85-2-311(1)(a), MCA, is met when the factors indicate that there is unappropriated water in the source in the amount applicant seeks throughout the period of use in at least some years. [FO]

Final Order Date:	05/03/84 (D)	**Applicant:**	Evans
Case #/Type:	28744-g40A (P)	**Regional Office:**	Lewistown
Application Date:	08/18/80	**Examiner:**	Bond
Hearing Date:	11/01/83	**Use:**	Irrigation

A-4.9395 Uncontradicted evidence that proposed well will reduce flow of spring which supplies Half Breed Creek upon which objector has water right. Held, reduction in flow would adversely affect objectors who probably could not reasonably exercise their water right if spring flow reduced. Failure of application to contradict is failure of proof of no adverse effect.

E-22.480 Right to cross-examine is a constitutional right. Must be protected under any rules of evidence.

[Permit denied.]

Final Order Date:	05/30/84 (G W/C)	**Applicant:**	Chaffee
Interlocutory Order:	03/06/84		
Case #/Type:	34204-s42M (P)	**Regional Office:**	Miles City
Application Date:	06/11/81	**Examiner:**	Williams/Elting
Hearing Date:	None	**Use:**	Stock/Recreation

A-4.9373 As concluded in previous permit, objectors are entitled to their historic pattern of use, therefore, drainage device necessary.

A-16.750
S-21.6621 Although the doctrine of **res judicata** may not apply in administrative proceedings, the branch thereof known as collateral estoppel applies where a prospective appropriator attempts to relieve himself of conditions placed on prior permits issued to him or his predecessors by abandoning same and attempting to subject objectors to those permits to new proceedings involving the identical issues.

S-21.6621 Collateral estoppel applies where the same land, same reservoir, same uses of water, same objectors and objections are involved as well as substantially the same quantity of water, even if applicant is not the same.

S-21.6621 Applicant in this case did not show cause for avoidance of summary determination by collateral estoppel of the issues of the validity of objector's water rights, and the necessity of installing a drainage device in dam structure. Applicant barred from relitigating these issues. [IO - **see** memo attached for complete discussion as to why applicant failed to show good cause.]

S-21.6621
T-5.800 To avoid summary determination by collateral estoppel (that certain terms and conditions imposed on a previous permit must be incorporated in the permit presently applied for) applicant must show that former proceedings on an identical application did not provide a full and fair opportunity to litigate the issues, or that the permit previously issued was unjust or inequitable.

[Permit granted with conditions.]

Final Order Date:	06/14/84 (G W/C)	**Applicant:**	Miller Colony, Inc.
Case #/Type:	31711-g41O (P)	**Regional Office:**	Havre
Application Date:	02/13/81	**Examiner:**	Bond
Hearing Date:	10/12/83	**Use:**	Irrigation

A-4.9395 Guthrie drain ditch used to collect water for irrigation. Held

U-14.1259 applicant's pit which collects subsurface water will not adversely affect Guthrie's right (if permit conditioned to preclude applicant's diversion, when water table rises to level of Guthrie's ditch.)

A-16.750 Where evidence shows that applicant does not require a minimum amount of water to operate the proposed appropriation, application treated as asking for up to and including the amount stated.

A-16.7567 Objector had actual but not formal notice of change in application.
D-21.310 Held, objector not denied due process right of notice.
D-21.310 The informal nature of the permit hearing demands that the Department (examiner) assist unrepresented parties in their presentation for the record.

E-22.480 The content of a previous decision of the Department is not a fact subject to official notice.

J-21.800 Department's authority to condition permit limited to conditions
T-5.800 designed to protect water rights, not to settle ongoing disputes. Accordingly, not all portions of stipulated settlement included as permit conditions. [FO]

L-1.940 Since 1972, all waters in the state of Montana regardless of manner
S-15.920 of occurrence are subject to the system of prior appropriation.

R-5.930 No evidence may be taken at the exception to proposal stage. [FO]

S-15.920 However, groundwater as defined in the statute may be subject to a separate system of priorities governing ground water only.

S-21.660 Motions to dismiss made at the end of applicant's case in chief, at the end of Department's testimony, and at the closing of the record denied. Held, dismissal at early stages of hearing is contrary to the contested case provisions of MAPA, and further that applicant put on sufficient evidence to preclude dismissal under Rule 41(6), M.R.Civ.P.

U-14.120 It is not necessary to delay issuance of permit pending completion of study of area subsurface water. Held, decision made on present evidence proper; if insufficient unappropriated water in aquifer, can modify permit at verification. [FO]

[Permit granted, with conditions.]

Final Order Date:	06/14/84 (D)	**Applicant:**	Mancoronal
Case #/Type:	43117-s41P (P)	**Regional Office:**	Havre
Application Date:	?	**Examiner:**	Bond
Hearing Date:	12/12/83	**Use:**	Irrigation

A-4.930 Permit would be downstream from Senior A, but upstream from another appropriator (Senior B) who is senior to both Senior A and permittee. Held, Senior A would be adversely affected should Senior B choose to call Senior A instead of the permittee, as Senior A, could not call the permittee, as permittee is downstream and his release of water would do Senior A no good.

A-4.930 Applicant has a senior water right in addition to the right he is applying for. Held, because he could divert early in the irrigation season during high water under the new right, then divert later in the season during low water under the senior right, the burden on the source could increase during the later part of the season

thereby adversely affecting those appropriators with rights junior to his senior right.

U-14.1259 Whether in determining whether unappropriated water available, the Department may look beyond the SB #76 statements of claim and examine actual water use need not be addressed because no evidence of actual water use was provided at hearing anyway. [FO]

[Permit denied.]

Final Order Date:	07/25/84 (G W/C)	**Applicant:**	Lehrer
Case #/Type:	35527-s41H (P)	**Regional Office:**	Bozeman
Application Date:	07/22/81	**Examiner:**	Bond
Hearing Date:	10/05/83	**Use:**	Stock Water

A-4.9348.48 Because use is nonconsumptive proof that sufficient water physically present at point of diversion fulfills § 85-2-311(1)(a), MCA.

A-4.9348.48 Pond to be used for fishing, ice skating, and watering two horses. Held, these are nonconsumptive uses. [?]

A-16.7576 Because amendment simply reduced quantity of water sought from that published and sought no other changes, no republication required.

A-16.7516 An applicant cannot file his application without present intent to appropriate, and then, by successive requests for continuance, maintain that priority date for later development.

A-16.7567
D-21.310 Amendment to application proposed at hearing. Objection thereto by current objectors overruled as record shows they had actual notice of the amendment.

B-5.6934
J-21.800 Whether a private appropriator may divert, impound, or withdraw water for private fish and wildlife use need not be decided herein because the stock use which encompasses the same pond may be granted.

D-21.310
E-22.480 However, objection to admission of document based on deprivation of fundamental right of cross-examination could be sustained if right violated.

D-21.310
E-22.480 Where public agency prepared document in course of ordinary business that document entitled to greater "respect" than regular hearsay. No fundamental right denied by its admission.

D-21.310
E-22.480 Document prepared by private entity not present for cross-examination admitted solely for purpose of showing applicant's **bona fide** intent to appropriate. No abridgment of fundamental right.

E-22.480 Objection that inability to cross-examine author of document rendered same inadmissible, overruled as formal rules of evidence regarding hearsay do not apply herein.

E-24.4834 Instream private fish and wildlife appropriations do not exist in Montana. Not considered beneficial use.

J-21.800
M-5.110 Averred that pond not necessary for watering stock from source and therefore permit need not issue. Held, the mere existence of alternative means of appropriating water does not necessitate the denial of the permit. An appropriator may not be forced to use the most efficient means, only a reasonable one. [FO]

Final Order Date:	08/07/84 (D)	**Applicant:**	Carney
Case #/Type:	53221-s40Q (P)	**Regional Office:**	Glasgow
Application Date:	07/21/83	**Examiner:**	Pengelly
Hearing Date:	04/17/84	**Use:**	Recreation

B-5.690
S-20.720
Storing of water is not a beneficial use per se.

D-21.930
Applicant made no showing that the full requested 270 acre-feet is necessary for recreational use. Held, applicant has not shown that the amount of water requested will be put to beneficial use, and no permit may issue.

E-22.480
The naked assertion that a proposed use is for "recreation" does not show beneficial use. Applicant must be more specific.

M-5.110
S-20.720
Applicant failed to prove appropriation works adequate by failing to submit plans for construction of reservoir.

[Exceptions filed; above holdings sustained.]

Final Order Date:	09/07/84 (G W/C)	**Applicant:**	Meyer
Case #/Type:	42727-s76H (P)	**Regional Office:**	Missoula
Application Date:	03/24/82	**Examiner:**	Bond
Hearing Date:	None	**Use:**	Irrigation

B-21.780
Parties having withdrawn their objections, implicitly stipulate to the existence of all statutory criteria for permit issuance. Held, criteria met. [Permit granted.]

Final Order Date:	09/14/84 (G W/C)	**Applicant:**	Orem
Case #/Type:	18845-s76LJ (P) 18846-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/08/78	**Examiner:**	Elting
Hearing Date:	01/19/84	**Use:**	Irrigation/Stock

A-4.930
Potential impact of proposed appropriation on game and wildlife habitat not adverse effect within meaning of statute.

A-4.930
E-22.480
S-20.110
Statute does not prevent issuance of permit because of possible adverse effects to unidentified appropriators whose existence has only been alleged.

A-4.9395
Wells located in "deep" aquifer, or in shallow aquifer outside of three-quarter mile cone of depression will not be adversely affected.

A-4.9395
S-15.920
Since there is no evidence in the record to suggest there is any hydrological connection between the applicant's source and Morning Slough, or between Morning Slough and the Brabham well, Mr. Brabham's implied chain of adverse effect is unfounded. [FO]

E-24.4879
Objector's prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

E-24.4879
M-5.1188
While a subirrigator does have a water right, the extent of that right is the volume of water. The means of diversion, however, is unreasonable and will not be protected. A water user is not entitled to continue receiving a volume by means of subirrigation.

[Permit granted.]

Final Order Date:	05/03/84 (G W/C)	**Applicant:**	Hunt
Case #/Type:	33484-g40A (P)	**Regional Office:**	Lewistown
Application Date:	03/19/81	**Examiner:**	Bond
Hearing Date:	11/01/83	**Use:**	Irrigation

A-4.9383 Pumping water from mine connected to river by aquifer will have only minimal effect on Mussellshell River.

A-4.9395 Although it is clear that unappropriated water exists in the mine, there is the possibility that natural recharge to the mine is insufficient to supply applicant's needs. If not, his pumping may adversely affect objectors' wells by inducing increased flow from their aquifer. However, the evidence indicates the likelihood of this is minimal.

A-4.9395 The mere possibility that objectors' water pressure might be reduced is insufficient to constitute adverse effect.

A-4.9395
E-22.9879 If existing wells can still be reasonably operated, mere effects thereon are not adverse.

S-15.920 Source of supply is hydrologically related to Mussellshell and therefore is not groundwater within the meaning of the Water Use Act.

[Permit granted.]

Final Order Date:	10/09/84 (G W/C)	**Applicant:**	Johnson, Gordon
Case #/Type:	52062-s76H (P)	**Regional Office:**	Missoula
Application Date:	05/02/83	**Examiner:**	Bond
Hearing Date:	03/22/84	**Use:**	Hydroelectricity

A-4.930 Having to hire water commissioner not adverse effect.

B-21.780 Held, applicant's burden of proof met where all parties have stipulated to the existence of the statutory criteria. (This holding contradicted in later decisions.)

[Proposed order did not accurately reflect the stipulation of the parties. Final Order modified to accurately reflect same.

Final Order Date:	10/31/84 (G W/C)	**Applicant:**	Simpson
Case #/Type:	50240-s40J (P) 50241-s41J (P)	**Regional Office:**	Glasgow
Application Date:	04/16/82	**Examiner:**	Bond
Hearing Date:	01/05/84	**Use:**	Irrigation

A-4.930
E-24.4894
M-5.1188 Even if bureau "uses" seepage from slough, the means of diverting it into the Milk River is tantamount to subirrigation which is an unreasonable and thus unprotectable means of diversion. [FO]

A-4.9394
E-24.4894
U-14.1259 Because objector cannot capture the seepage from Nelson Reservoir which provides the main source for applicant's proposed use of water, it does not matter whether or not objector claims the exclusive right to same; the seepage is unappropriated. [**See** attached memorandum for discussion of state and federal precedent re recapture and reuse of water by initial appropriator.]

A-4.9394
S-20.720
Dead storage, seepage from reservoir, and escape of water from around headgates are common to storage and diversion facilities. The extent of these losses is not unreasonable; there is no waste.

B-5.6979
The amount of water applicant seeks is greater than that which can be applied beneficially.

J-21.800
W-1.870
Because applicants would not divert from the Milk River main stem, and because closure order expressly excludes seepage water tributary to the main stem, Milk River closure does not prevent issuance of permit.

R-5.300
Objectors' failure to order a transcript of hearing not grounds for challenge to accuracy of findings. [FO]

U-14.1259
T-5.800
Conditioning permit to prevent applicant's diversion of water when surface flows exist between McNeil slough and the Milk River held adequate to comply with Milk River closure conditions, despite fact that pumping when they are not connected may itself preclude connection in times of marginal flow. [FO]

U-14.1259
W-1.870
While there may well be some seepage reaching purchasers of Nelson Reservoir, water via percolation of reservoir seepage from McNeil slough into Milk main stem, objector Bureau of Reclamation (seller) does not capture or control the seepage and cannot therefore be considered as "using" the seepage water from Nelson Reservoir. Finding that seepage unappropriated sustained. [FO]

U-14.1274
Possible future diminution of the source due to potential development of a presently inchoate right held not a ground for denying permit.

Final Order Date:	10/31/84 (D)	**Applicant:**	Ernster
Case #/Type:	51938-s42M (P)	**Regional Office:**	Glasgow
Application Date:	03/16/83	**Examiner:**	Bond
Hearing Date:	03/28/84	**Use:**	Irrigation

A-4.9392
Cannot issue permit with period of use described simply as "high spring runoff".

A-4.9394
Water quality is a protectable element of a water right.

A-16.7567
B-5.690
W-1.870
Applicant could not make use of source water except at times of extremely high runoff because "Application of North Fork water to irrigation use at any other time would be detrimental". Accordingly, diversion at any other time would result in waste. Period of use shortened.

B-21.780
E-24.4831
Uncontroverted testimony that historic use less than that claimed held sufficient to rebut presumption of validity of the right created by the filing of the claim. Accordingly, objectors Jarvis/Buxbaum have not met their burden of proof regarding the right.

E-22.480
The testimony of an expert need not be accorded greater weight than that of farmers of longstanding familiarity with the area.

E-24.480
M-5.1188
If objectors had filed claims for subirrigation rights, they would at least have a colorable claim to maintenance of stream flow for subirrigation of their pastures.

E-24.480
An objector is not allowed to prevent subsequent appropriation based

U-14.1259 on an inflated claim, nor is he allowed to assert that more volume was used than has been stated on a claim.

J-21.800 The Department may issue a permit with conditions.
T-5.800

J-21.800 Cannot issue permit for diversion outside period unappropriated
U-14.120 water shown available.

L-1.790 Because the application requested 22.28 cfs, the criteria listed in
L-1.940 § 85-2-311(2), MCA (1983), must be proved, and the applicant is not exempted from this burden simply because the application was filed before the effective date of the statute. The filing of the application creates no vested rights, other than to a priority date as of the date of filing should any permit issue. (In response to this holding, applicant successfully moved to amend its application to request only 14.9 cfs, thereby avoiding 85-2-311(2).

T-5.800 Unappropriated water exists only during high spring runoff. Held, that without substantial credible evidence quantifying "high spring runoff", any condition or period of use the examiner would impose would be arbitrary and impermissible.

Final Order Date:	11/01/84 (D)	**Applicant:**	Brown, Edgar
Case #/Type:	50049-s41I (P)	**Regional Office:**	Lewistown
Application Date:	09/28/82	**Examiner:**	Bond
Hearing Date:	05/22/85	**Use:**	Irrigation

E-22.480 Evidence of possible applicant infraction of a court order prohibiting applicant from wasting water is irrelevant; the Department is limited to analysis of the proposed appropriation and may not deny same based on applicant's performance in other areas.

E-22.480 Because water availability analysis fails to take into account
U-14.1259 rights in 1903 decree upon which no SB #76 claims were filed, the analysis is of little use in determining water availability.

E-24.4831 Even though objector failed to file SB #76 claims, until the Water Court issues a decree which conclusively determines that water rights have been abandoned, the stream will be administered pursuant to the rights as established in the 1903 decree, the 1966 update and post-1973 permits and certificates.

M-5.110 The proposed appropriation works are not adequate, but can be made so by cleaning and straightening the ditches, and calibrating the measuring boxes.

U-14.1259 Because seniors on the source do not get their full right even when a water commissioner has been appointed, there is insufficient evidence to find availability of unappropriated water.

[Preliminary Order strikes MPC objection. Regardless, permit denied.]

Final Order Date:	11/28/84 (G W/C)	**Applicant:**	Crop Hail Mgmt.
Case #/Type:	41432-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	12/29/81	**Examiner:**	Elting
Hearing Date:	02/06/84	**Use:**	Domestic/Commercial

A-4.9395 Evidence shows that applicant's well should have only a minimal effect on any of objector's wells if pumped at no more than 313 gpm;

held no adverse effect to objectors if permit limited to 313 gpm. (Applicant had previously agreed to such reduction from the flow rate initially requested.)

B-5.6979 Record shows applicant will need only 336 acre-feet per annum; therefore, permit will issue for only 336 acre-feet which is less than the amount requested.

J-21.800 No permit is required for fire protection purposes.
L-1.940

Final Order Date:	11/28/84 (G W/C)	**Applicant:**	Nilson Enterprises
Case #/Type:	50765-s41Q (P)	**Regional Office:**	Lewistown
Application Date:	11/15/82	**Examiner:**	Pengelly
Hearing Date:	05/08/84	**Use:**	Irrigation

E-24.4810 Subirrigation "rights" upon which objector has not filed SB #76 claims are abandoned and are not a basis for objection

E-24.4831
M-5.1188 Water rights applied by subirrigation are recognized as valid rights. The limit of such rights however is the volume of water necessary to produce a comparable crop utilizing a conventional flood or sprinkler irrigation system.

E-24.4879 Objector does not have a right to continuance of the existing subirrigation process so long as the right can be reasonably exercised by conventional diversion.

O-2.490 Untimely objector not entitled to except to proposal. [FO]
R-5.930

R-5.930 Cannot present evidence in exception to proposal. [FO]

[Granted]

Final Order Date:	12/27/84 (G W/C)	**Applicant:**	Lockwood Water Users Assn.
Case #/Type:	54172-s43Q (P)	**Regional Office:**	Billings
Application Date:	03/28/84	**Examiner:**	Bond
Hearing Date:	09/28/84	**Use:**	Municipal/Industrial Domestic

B-5.690 Where an appropriator's actual use depends upon the actions of third parties, **i.e.**, where appropriator is a water supply company, a right to a greater amount than present need may be permitted.

B-5.690 It is not within the purposes of the permitting procedure to allow municipality a **de facto** reservation for the infinite future in unknown proportion under the aegis of a water sales permit.

B-5.690 Here, it is the occurrence of the events (population growth) that must necessarily arise before the need to use water arises which is speculative, not the intent.

B-5.690 The need for water must be contemplated and reasonably foreseeable.

B-5.690 The doctrine of relation back has been incorporated in the permit system

B-5.690 It is reasonable to allow the applicant a present appropriation for the projected population in 1995.

B-21.7835 Regardless of objector's default, applicant retains burden to show that statutory criteria are met.

D-21.910 If applicant's claims are sustained in the adjudication, then no more volume than is set in those claims may be appropriated hereunder as it has not been established that more volume could be beneficially used.

R-5.850 The Department may permit a use which interferes with planned uses for which water has been reserved so long as such interference is not unreasonable.

R-5.850 Under Board Order, Department may issue temporary permit for diversion of reserved waters.

Final Order Date:	01/02/85 (G W/C)	**Applicant:**	Hanson
Case #/Type:	49230-s76M (P)	**Regional Office:**	Missoula
Application Date:	12/13/82	**Examiner:**	Elting
Hearing Date:	02/10/84	**Use:**	Hydroelectricity

A-4.930 Held, project will not cause alleged additional freezing problems.

A-4.9348.48 Even though creek is overappropriated, a nonconsumptive use may be allowed.

A-4.9348.48 Since water is physically available at the proposed point of diversion, and since all of it will be returned to the stream for downstream use (use is nonconsumptive), despite the fact that the source is overappropriated on paper, there are unappropriated waters in the source of supply.

A-16.750
U-14.120 Applicant can make use of less flow than was requested; accordingly, the amount requested is considered to include lesser flows as well.

A-16.7516 No evidence in record that project so blatantly economically unfeasible as to believe **bona fide** intent.

I-14.870
S-20.110 Objectors do not have standing to object on basis of harm to wild fisheries' use. Fish and Game proper party.

Final Order Date:	01/03/85 (G W/C)	**Applicant:**	Pope
Case #/Type:	32257-s76L (P) 32236-c76L (C) 32237-c76L (C) 32238-c76L (C)	**Regional Office:**	Kalispell
Application Date:	01/09/81	**Examiner:**	Bond
Hearing Date:	None	**Use:**	Irrigation

A-4.930
B-21.780 Stipulation implies that there will be no adverse effect to objectors. Held, stipulation satisfies applicant's burden under § 85-2-402, MCA.

A-4.9348
J-21.800 An appropriator may not "change" a greater right than he possesses.

A-16.7567
D-21.310 Whether clarification of point of diversion, not intelligible from the public notice, requires republication depends on whether difference in descriptions is material. Published point of diversion and clarified point of diversion not very different. Held, that in this case republication not required as difference not material. [FO]

E-22.980 Point of diversion not stated on relevant Senate Bill #76 claim cannot be recognized as existing point of diversion, and hence cannot be changed.

J-21.800 It is beyond the scope of Department proceedings to establish a division of existing water rights on the source. [FO]

J-21.800
L-1.940 Section 85-2-402, MCA, applies to existing water rights acquired prior to the effective date of the Water Use Act.

J-21.800
T-5.800
R-5.930 Only those portions of stipulation relating to fulfillment of statutory criteria may be included in permit conditions. [FO] In its exception applicant clarified point of diversion. Held, the Department will accept this clarification at the post proposal stage. [FO]

Final Order Date:	01/09/85 (G W/C)	**Applicant:**	City of Bozeman/ Lichtenberg
Case #/Type:	20736-s41H (P) 20737-s41H (S) (Lichtenberg)	**Regional Office:**	Bozeman
Application Date:	10/23/78	**Examiner:**	Williams
Hearing Date:	1984	**Use:**	Municipal

A-4.930 Occasional freezing of the source not adverse effect attributable to applicant. [Memo.]

A-4.9348.00 Enlargements of historic use are significant precisely because they change the stream conditions to the detriment of junior appropriators. [Memo.]

A-4.9348.00 The ultimate test for the protection of junior rights to maintenance of stream conditions is whether the burden on the stream will be changed under the changed senior use. [Memo.]

A-4.9348.00 Change application must show that it has title to water right so as to preclude simultaneous use of water right by alleged vendor. [Memo.]

A-43.9348.48 Although change involves transfer of water to another basin, because only consumptive portion moved, no adverse effect to users in original basin. [Memo.]

A-4.9348.48 Lichtenberg diversion resulted in return flow to Hyalite Creek; however, city's diversion will be 100% consumptive as to Hyalite users, while yielding return flow downstream on the East Gallatin. This would adversely affect Hyalite users. [Memo.]

A-4.9348.48
E-24.48 Enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right. (Parameters of right set forth in decree are predicated on use during dry year, and do not define limit of right in terms of volume.) However, historic use may not be expanded under guise of change. [Memo.]

A-4.9373 Effect of change of right from agricultural to domestic right must not involve alteration of pattern of use within period of use. Thus Bozeman must be limited to those times when the Lichtenberg right has been exercised historically, to wit: May 25 - June 10; June 25 - July 10; August 1 - August 10. [Memo.]

A-4.9373 Since pattern of use differs from municipality, it is necessary to

T-5.800	condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture. Here, must look to average water years and characteristic agricultural land management scheme. [Memo.]
A-16.7516 **A-16.7567**	Disposition of application for permit will reflect only that quantity of water the evidence shows is currently needed. [Examiner notes that this conclusion is at odds with **In re Plentywood**, 32722/33831.]
B-5.6979 **J-21.800**	Record does not contain reliable probative and substantial evidence to support a finding of the amount of future need. Thus, no water could be granted for future use, even if Department has jurisdiction to grant. [Memo.]
B-21.780	Preponderance of evidence test is a higher burden than substantial credible evidence test. [?]
B-21.780	[Discussion of Burden of proof/burden of production in change proceeding. **See** Addendum to Memo.]
B-21.780 **E-14.9376** **E-22.480**	Not necessary to decide whether Montana Environmental Protection Act supplements the "exclusive" criteria of § 85-2-311, MCA, as Department of Fish, Wildlife and Parks' allegations of adverse effect to environment are naked hearsay and immaterial.
B-21.780 **E-24.4831**	Objectors have burden to produce evidence as to existence and extent of their claimed existing rights, and as to the type and character of injury complained of.
E-22.480 **E-24.4831**	Blaney-Criddle method adequate to calculate agricultural consumptivity. Historic consumption is 301 acre-feet per annum. City limited to that. [Memo.]
E-22.480 **E-24.4831**	Notices of appropriation here given no force and effect, as they do not supplant the need of proof of beneficial use over a reasonable period of time.
E-22.480 **S-21.6621**	Findings and conclusions made herein reach issues connected with Bozeman's future uses, as these uses were argued at the hearing, and because such findings and conclusions may have evidentiary significance before the board. It is possible that parties may be collaterally estopped from rearguing same before board during reservation process.
E-24.480 **J-21.800**	This proceeding is not an adjudication. **In re Brown**, **In re Monforton**.
E-24.480 **O-2.490**	Objections of Montana Power Company and Bureau of Reclamation Reclamation stricken on basis that objections state no cognizable claim. **In re Brown**, **In re Anderson Ranch**.
E-24.4831	It is proper, and not an adjudication of the right, to inquire into the existence of the right, and the extent of its historic use. [Memo.]
E-24.4879 **S-20.720**	Merely because a reservoir has the capacity to store water does not mean that water can be stored to that capacity to the detriment of others. Rather, the talisman of the right and the limit of storage, is the quantity of water reasonably required to fulfill the historic use.
E-24.4879	If applicant makes a **prima facie** showing of objectors' waste, and

U-14.1259
W-1.870

the amount of that waste is pivotal to the issue of unappropriated water, a permit should issue subject to the express condition precedent that the prospective appropriator enjoin such waste in a court of competent jurisdiction.

E-24.4879
W-1.870

City of Bozeman has made a **prima facie** showing that Hyalite Reservoir utilizes an unreasonable means of diversion, and hence wastes water. However, the issue of waste at Hyalite is not here pivotal as there is water otherwise available for Bozeman's application.

J-21.800

This Department has no authority to order the owner of an existing right to do anything (unless applying for a change).

J-21.800
R-5.850

Application for permit for municipal future use denied for lack of subject matter jurisdiction. Application for permit contemplating future uses of water, not presently known, not properly before examiner. The legislature has expressly provided for the future needs of municipalities with the water reservation statute. [Discussion.]

S-20.110

Ditch companies and other carrier entities do have standing to object on behalf of the interests of all water uses attendant to the respective projects.

U-14.1259

City seeks water in winter when only uses are stock water. Unappropriated water available. [Memo.]

Final Order Date:	01/15/85 (G)	**Applicant:**	Bartos
Case #/Type:	34551-c76H (C)	**Regional Office:**	Missoula
Application Date:		**Examiner:**	Williams
Hearing Date:	1984	**Use:**	Irrigation

A-4.9348.20

Applicant wishes to move point of diversion upstream. Held, because of possible increased carriage losses in the new conveyance system, change in point of diversion could harm objectors who have right to receive their decreed amount at historic point of diversion.

[Authorization issued with conditions protecting objectors.]

Final Order Date:	01/21/85 (G W/C)	**Applicant:**	Ben Lund Farms
Case #/Type:	51282-s41Q (P) G139972-41Q (C)(D)	**Regional Office:**	Havre
Application Date:	05/20/83	**Examiner:**	Bond
Hearing Date:	06/06/84	**Use:**	Irrigation

A-4.930
A-4.9394

The fact that the lake is recharged and that the recharge is "cleaner" than the lake water held sufficient to prove no adverse effect to stock rights.

B-21.780
E-24.4831

Change applicant must make a **prima facie** showing that he has an existing right. [**See** attached memo for discussion of this and following four holdings.]

E-22.480
E-24.4831

Although the filing of an SB #76 claim is **prima facie** proof of its content, evidence adduced at the hearing held sufficient to overcome the claim.

E-24.4831

Mere filing of a notice of intent to appropriate does not create a water right; it is only upon actual diversion from benefit that the right is created.

E-24.4810 Nonuse for an extended period of time is strong evidence of intent to abandon.

E-24.4831 Held, that there is insufficient evidence in the record to determine whether the right to be changed exists as stated on SB #76 claim.

R-5.930 Receipt of additional evidence in an exception not proper. [FO]

U-14.120 Evidence that 700 to 2,857 acre-feet per year enter Harwood Lake; that the lake is slowly getting bigger; that there are no perennial streams in or out of the lake; and that there are only stock water rights out on the lake held sufficient to prove existence of unappropriated water.

[Permit granted; change denied.]

Final Order Date:	03/29/85 (G W/C)	**Applicant:**	Pitsch
Case #/Type:	26751-s40A (P)	**Regional Office:**	Lewistown
Application Date:	02/15/80	**Examiner:**	Williams
Hearing Date:	1984	**Use:**	Irrigation

A-4.9321
U-14.120 The permit process does not supplant the need for regulation of rights according to their priorities, but merely blocks those uses for which there is never as a practical matter unappropriated water.

A-4.9383
E-24.4831 It is not adverse effect to downstream appropriators to reduce water behind dam, thereby reducing pressure, thereby reducing seepage, because downstreamers not entitled to dam seepage, only to natural flow. [FO]

A-16.7567
D-21.310
W-1.870 Appropriations are measured at the headgate. Seepage and evaporation losses are chargeable to the appropriation. However, provision to divert more water than applied for to make up for such losses cannot be made in the present proceeding.

S-20.720
U-14.120 Unappropriated water exists during periods of low flow only when reservoir outflow equals or exceeds inflow.

Final Order Date:	04/02/85 (D)	**Applicant:**	Donaghy
Case #/Type:	51709-s76D (P)	**Regional Office:**	Kalispell
Application Date:	01/17/83	**Examiner:**	Bond
Hearing Date:	None	**Use:**	Hydroelectricity

U-14.1274 Applicant failed to provide evidence that the amount of water requested was physically available at the point of diversion (even though given a second chance to get such information into the record). [Permit denied.]

Final Order Date:	04/02/85 (G W/C)	**Applicant:**	Christley
Case #/Type:	G110476-76H (C)	**Regional Office:**	Missoula
Application Date:	N/A	**Examiner:**	Bond
Hearing Date:	1984	**Use:**	Irrigation

A-4.930 Adverse effect determination must follow the precepts of the common law, which the legislature did not change by enactment of the Water Use Act.

A-4.9348
E-24.7630
T-5.800 Where applicant seeks to move a portion of his right to irrigate a new place of use, but will continue to irrigate the entire old place of use with the remainder of the right and with contract water, a measuring condition must be placed on the change authorization to

ensure that the total amount of water diverted under the right does not increase.

E-22.480
E-24.4831 Evidence given insufficient to rebut **prima facie** effect [evidence] of claim.

E-24.7630 The appropriator may not "bootstrap" a new use onto an existing right through the guise of a change proceeding.

W-1.870 Whether applicant's source is seepage or not, so long as it is tributary to objector's source, the rights must be administered on the same ladder of priorities.

Final Order Date:	05/02/85 (G W/C)	**Applicant:**	Zinne Brothers
Case #/Type:	50642-s40A (P)	**Regional Office:**	Lewistown
Application Date:	05/17/85	**Examiner:**	Chronister/Elting
Hearing Date:	09/11/84	**Use:**	Irrigation

A-4.930
R-5.930 Refusal to require bypass flow sustained. [FO]

E-22.480
S-21.6621
U-14.120 Prior decisions of the Department relating to the existence of unappropriated water in the source are **prima facie** proof regarding existence thereof. No collateral estoppel however, as prior findings are subject to challenge. [FO]

R-5.930 Finding of Fact #2 held clearly erroneous. [FO]

U-14.1259 Imposes "Musselshell" conditions. [FO]

[Granted]

Final Order Date:	05/14/85 (G W/C)	**Applicant:**	Zinne Brothers
Case #/Type:	22465-s40A (P) 27941-s40A & 27942-s40A	**Regional Office:**	Lewistown
Application Date:	05/29/80	**Examiner:**	Williams
Hearing Date:	1984	**Use:**	Irrigation

U-14.120 Existence of unappropriated water in the Musselshell discussed.

Final Order Date:	05/29/85 (G W/C)	**Applicant:**	Frost
Case #/Type:	52031-s76H	**Regional Office:**	Missoula
Application Date:	04/04/83	**Examiner:**	Bond
Hearing Date:	04/05/84	**Use:**	Recreation

A-4.9348.48 Even if no unappropriated water exists for a consumptive use, water may still be available for nonconsumptive use. [FO]

A-4.9348.48
R-5.930 Record shows use nonconsumptive because of substantial credible evidence that there would be little or no more evaporation from the proposed pond than already occurs due to high water table in area. Held, examiner's finding use nonconsumptive will not be overturned. [FO]

E-22.480
S-21.6621 Whether a permit issued to a different applicant contained particular conditions held irrelevant unless elements of **res judicata** can be shown.

J-21.800 "Appropriate" means to divert, impound, or withdraw a quantity of

S-21.660 water. Held, offstream fish pond is an appropriation within meaning of Water Use Act, and therefore, is within Department jurisdiction.

J-21.800
S-21.660 Applicant has diverted water prior to issuance of permit. Held, criminal sanctions may apply, however, there is no statutory authority to deny a permit on such grounds. [FO]

S-15.920 Whether the water course from which applicant would divert is a ditch or a natural water course held irrelevant. [Later contrary holding in **Zemliska**, 57870.]

Final Order Date:	05/31/85 (D)	**Applicant:**	Bowman
Case #/Type:	54154-s43Q (P)	**Regional Office:**	Billings
Application Date:	02/22/84	**Examiner:**	Elting
Hearing Date:	09/19/84	**Use:**	Domestic

B-15.690 An illegal use of water is not a beneficial use.

U-14.1259 Only evidence of record re unappropriated water shows that claims on Blue Creek far exceed the flow. Held, applicant failed to prove unappropriated water in source.

Final Order Date:	07/08/85 (G W/C)	**Applicant:**	Sillivan
Case #/Type:	27197-s40A (P)	**Regional Office:**	Lewistown
Application Date:	03/26/80	**Examiner:**	
Hearing Date:	03/17/82	**Use:**	Irrigation

U-14.1259 Musselshell River water availability study indicates that there is unappropriated water in the drainage, although there is not always as much as applicant requests, and water is almost never available in July and August. However, applicant can make use of whatever water is available under the terms of permit to which he has agreed. [Case settled; permit issued.]

Final Order Date:	07/15/85 (G W/C)	**Applicant:**	McAllister
Case #/Type:	31441-g41R (P)	**Regional Office:**	Lewistown
Application Date:	01/21/81	**Examiner:**	Elting
Hearing Date:	12/01/83	**Use:**	Irrigation

E-22.4879
M-5.110 Although utilizing artesian flow is an adequate means of diversion, it is not a protectable one. An appropriator may not prevent new appropriations where he can reasonably exercise his water right under the changed conditions. He cannot monopolize the source simply so he may have a convenient means of diversion.

J-21.800
M-5.110 Court will use a balancing approach in assessing damages to prior appropriator who must upgrade his means of diversion if they were reasonable.

[Permit granted.]

Final Order Date:	07/15/85 (D)	**Applicant:**	Miller
Case #/Type:	V157350-76H (C)	**Regional Office:**	Missoula
Application Date:	08/08/83	**Examiner:**	Elting
Hearing Date:	06/27/84	**Use:**	Irrigation

A-4.9373 Applicant must show the pattern of the historic use.

B-21.780 It is applicant's burden to delineate the scope of its existing right.

E-22.480
E-24.4831
An SB #76 claim constitutes **prima facie** evidence of the existence, scope, and extent of a water right; however, if objectors introduce contradictory evidence, applicant must introduce more evidence on the existence and scope of the right.

E-24.4831
A water right is defined by actual beneficial use, not amount claimed or even decreed.

E-24.4831
Although it lacks jurisdiction to adjudicate a water right, the Department must be able to ascertain with reasonable certainty the scope of an existing right in order that it may determine whether a change can be authorized.

J-21.800
L-1.940
Fact that parties have entered into private sales agreement in no way exempts party who is changing a water right from Water Use Act. (FO)

J-21.800
P-18.720
Department has no jurisdiction to deny permit based on injuries to property other than water rights.

Final Order Date:	07/25/85 (G W/C)	**Applicant:**	Sackman, Inc.
Case #/Type:	54911-g42M (P)	**Regional Office:**	Miles City
Application Date:	01/26/84	**Examiner:**	Elting
Hearing Date:	10/12/84	**Use:**	Irrigation

I-14.900
Interim permit for testing will not automatically get provisional permit.

I-14.900
Applicant must pay for well monitoring system.

Final Order Date:	09/18/85 (D)	**Applicant:**	Northydro, Inc.
Case #/Type:	51722-s76D (P)	**Regional Office:**	Kalispell
Application Date:	01/25/83	**Examiner:**	Bond
Hearing Date:	None	**Use:**	Hydroelectricity

A-16.7516
Bona fide intent can be evidenced by applicant's submission of filed FERC applications or evidence otherwise showing it is pursuing the proposed appropriation with reasonable diligence. (IO)

B-15.890
J-21.800
Applicant submitted no evidence that it is pursuing the necessary local state and federal permits, etc., to do the project. Held, proper to issue interlocutory order (allowing applicant to retain priority date) requiring that applicant present evidence that the necessary FERC authorization has been made in order to receive favorable proposal. (IO)

E-14.9376
Because of mitigative measures (including minimum instream flow), held that EIS not warranted. (IO)

E-14.9376
It appears that information required by and prepared by USFS special use permit satisfies the MEPA EIS requirement. (IO)

[Applicant failed to comply with Interlocutory Order; application denied without prejudice.]

Final Order Date:	09/19/85 (D)	**Applicant:**	Blakely
Case #/Type:	14295-g41F (P)	**Regional Office:**	Bozeman
Application Date:	07/27/77	**Examiner:**	Bond
Hearing Date:	02/13/85	**Use:**	Irrigation

A-16.7567
J-21.800
Applicant amended application at hearing. Priority date changed to date of hearing.

E-22.480
U-14.1274
Unsupported statement that there is sufficient water in the pit is insufficient evidence of water availability on which to base a provisional permit.

M-5.110
Applicant's description of project so vague as to be unidentifiable.

R-5.930
Rehearing expressly prohibited under ARM 36.12.231, except as required under specified statutes which do not apply. [FO]

R-5.930
No portion of the "exceptions" filed by applicant specifically sets forth what part of decision is being excepted to. They are therefore accorded little attention. [FO]

Final Order Date:	09/24/85 (P-G w/C) (C-D)	**Applicant:**	Bladholm
Case #/Type:	12123-s76M (P) 9782-c76M (C)	**Regional Office:**	Missoula
Application Date:	10/08/76	**Examiner:**	Williams
Hearing Date:	1984	**Use:**	Irrigation

A-43.9348.48
Although change involves transfer of water to another basin, because only consumptive portion moved, no adverse effect to users in original basin. [Memo.]

A-4.9348.48
Lichtenberg diversion resulted in return flow to Hyalite Creek; however, city's diversion will be 100% consumptive as to Hyalite users, while yielding return flow downstream on the East Gallatin. This would adversely affect Hyalite users. [Memo.]

A-4.9348.48
E-24.480
Enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right. (Parameters of right set forth in decree are predicated on use during dry year, and do not define limit of right in terms of volume.) However, historic use may not be expanded under guise of change. [Memo.]

A-4.9348.00
J-21.800
T-5.800
The result herein does not inevitably determine that a change authorization should have been a condition precedent to the applicant's switch from flood to sprinkler irrigation. Even assuming, however, that such authorization is not required, the effects of the alteration are relevant in devising conditions to alleviate injury where the change at issue is clearly within Department jurisdiction. [Memo]

A-4.9373
Effect of change of right from agricultural to domestic right must not involve alteration of pattern of use within period of use. Thus Bozeman must be limited to those times when the Lichtenberg right has been exercised historically, to wit: May 25 - June 10; June 25 - July 10; August 1 - August 10. [Memo.]

A-4.9373
It is not feasible based on the evidence herein to conjure any condition which would assure that the new 58.1 acre tract would be irrigated in the same fashion as the old 58.1 acre portion of the original tract. [Memo]

A-4.9373
E-24.4831
Applicant failed to prove the diversion rate of its existing right. Further, there is no evidence that all 174 acres were regularly and customarily irrigated. (Rather, it appears that water was rotated over the fields, and that not all acreage was irrigated every year.) Held, applicant's use on new 58.1 acre tract pursuant to changed

right would [could] result in an enlargement of the appropriation by increasing the quantity historically diverted to irrigate the old 58.1 acre portion. [?]

A-4.9373
T-5.800
Since pattern of use differs from municipality, it is necessary to condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture. Here, must look to average water years and characteristic agricultural land management scheme. [Memo.]

A-16.750
S-20.720
Applicant applied for 167 acre-feet per annum to be impounded in reservoirs of the same capacity. He may not fill and refill reservoir in the same season. [Memo]

B-5.6979
S-20.720
Applicant must charge to its appropriative limit any carryover storage as 167 acre-feet is maximum that can be beneficially used in a year. [Memo]

B-21.780
Applicant has burden of proof by a preponderance.

B-21.780
Preponderance of evidence test is a higher burden than substantial credible evidence test. [?]

B-21.780
[Discussion of Burden of proof/burden of production in change proceeding. **See** Addendum to Memo.]

B-21.780
E-24.4831
Objectors have burden to produce evidence as to existence and extent of their claimed existing rights, and as to the type and character of injury complained of.

E-22.480
E-24.4831
Blaney-Criddle method adequate to calculate agricultural consumptivity. Historic consumption is 301 acre-feet per annum. City limited to that. [Memo.]

E-22.480
E-24.4831
Notices of appropriation here given no force and effect, as they do not supplant the need of proof of beneficial use over a reasonable period of time.

E-22.480
E-24.480
S-21.6621
Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes. [Addendum B.]

E-22.480
S-21.6621
Findings and conclusions made herein reach issues connected with Bozeman's future uses, as these uses were argued at the hearing, and because such findings and conclusions may have evidentiary significance before the board. It is possible that parties may be collaterally estopped from rearguing same before board during reservation process.

E-24.480
J-21.800
This proceeding is not an adjudication. **In re Brown**, **In re Monforton**.

E-24.480
S-20.720
Mere fact that water may pass through a storage structure does not make them stored waters. A wide spot in a ditch is not a storage appropriation. Direct flow and storage rights are different creatures with different incidents, and are spawned by different appropriative intents. Thus, the claim of existing right must be analyzed as a direct flow use. [Memo]

E-24.4831 It is proper, and not an adjudication of the right, to inquire into the existence of the right, and the extent of its historic use. [Memo.]

E-24.4831 Notices of appropriation not in strict compliance with statute are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices. [Addendum B]

E-24.4831
O-2.490 Objections of Montana Power Company and Bureau of Reclamation stricken on basis that objections state no cognizable claim. **In re Brown**, **In re Anderson Ranch**.

S-20.720
T-5.800
U-14.1259 The statutory thresholds of unappropriated water and adverse effect vis-a-vis the new appropriation yield no significant questions in so far as applicant seeks an appropriation by way of storage. Although source is highly appropriated during irrigation season, it is not during off season. Period of diversion limited to September 15 - June 15. [Memo]

U-14.120 The permit scheme is not a replacement for the need of stream administration according to priority, but merely blocks use that would otherwise always have to be curtailed in light of existing demand on source. [Memo]

Final Order Date:	10/24/85 (D)	**Applicant:**	Gannon
Case #/Type:	46560-s41K (P)	**Regional Office:**	Lewistown
Application Date:	03/12/82	**Examiner:**	Bond
Hearing Date:	05/23/85	**Use:**	Irrigation

E-24.4894
U-14.1259 Applicant could only guess at the amount of water available in the source absent "return flows" from Sun River Project, which are not available for appropriation as the project has not relinquished control of them after the first use, but rather has the intent to reuse such flows by utilizing the source as a conduit for such flows which are then in fact reutilized by the project. Held, applicant failed to prove § 85-2-311(1)(a) met.

S-15.920 It does not matter whether the source is considered a water course or not. Post-1973 rules of water appropriation same regardless of source.

[Permit denied.]

Final Order Date:	10/29/85 (EXT G)	**Applicant:**	Yellowstone Village
Case #/Type:	31587-g41F (P)(SC) 33294-g41F (P)(SC)	**Regional Office:**	Bozeman
Application Date:	04/24/80	**Examiner:**	Bond
Hearing Date:	08/28/84	**Use:**	Domestic

A-16.7516
B-5.6979 While permittee's present intent allows it to attempt gradual development of water for 239 units, a line must be drawn between present intent and speculation. Permit is for 450 acre-feet; however, the maximum amount needed for 2,390 units is 358.5 acre-feet. Permit must be modified to allow diversion of only 358.5 acre-feet.

A-16.7516
P-5.8021 Department cannot allow permittee so much time to complete that the permit is effectively for future uses.

A-16.7516 **P-5.8021** **T-5.800**	There are no guidelines as to what time period is reasonable. However, without deciding whether a completion deadline of 20 years is too long because many of board reservations were granted for a period of about 20 years, it can still be said that 18 years is too long. Fourteen years seems appropriate. [?]
B-21.780 **P-5.8021**	Department in modification proceeding has burden of production to show that reasonable minds may differ regarding whether permittee has completed the appropriation. The burden of persuasion is on the permittee.
D-21.310 **E-22.480**	Right to cross-examine is fundamental; applies under either formal informal rules of evidence.
D-21.310 **J-21.800** **P-5.8031**	In the usual case, the provisional permit volume would not be amended as a result of the field investigation unless actual volume applied was less than that permitted. However, in this proceeding, an extension for completion of a still inchoate right is being considered. Thus, there is no reason not to correct the original error of granting too much volume.
E-22.480	Formal rules of evidence do not apply unless all parties stipulate thereto. Department in modification proceeding did not so stipulate. Held, informal rules apply.
E-22.480	Cost benefit analysis of permitted use is neither relevant nor material to this modification proceeding.
E-22.480 **P-5.8021**	Department's objection to evidence of permittee's intent subsequent to filing of notices of completion overruled. Because of the facts of the case, notices of completion cannot be given the legal effect of eliminating permittee's chance to continue incremental development of its appropriation up to the use applied for. Such evidence relates to intent of permittee vis-a-vis incremental development.
F-5.250 **J-21.800**	Congress did not intend in bankruptcy statutes to deprive the state jurisdiction over water rights. Held, that the Department has concurrent jurisdiction with regard to debtor's water rights by virtue of the governmental regulatory exception to the automatic stay of proceedings, and further that the Department also has concurrent jurisdiction over that portion of the water rights not the property of the debtor. [Lengthy discussion.]
F-5.250 **J-21.800**	Because of lack of federal intent to preempt state water law and because operation of state law does not frustrate the essential purpose of the Bankruptcy Act, Department actions in determining to what extent permits have been completed are not preempted.
J-21.800	Bankruptcy court has exclusive jurisdiction over the water rights (permits) in issue once they have been defined by the Department, because the unknown equitable interest of the debtor subjects the entire water right to the category of "property of the estate".
J-21.800	Jurisdictional issues of the Black Letter Law must be raised **sua sponte** by a court of limited jurisdiction, even if not argued by parties.
J-21.800	Department has the discretion to remedy its own wrong.
J-21.800	Filing of notices of completion did not divest the Department of

P-5.8031 jurisdiction to grant an extension of time to complete the appropriation.

P-5.8021 The **Bailey v. Tintinger** rule of gradual development where appropriator relies on third parties to complete actual use has been incorporated in the statute allowing the Department to set time limits for completion.

P-5.8021 Although **Bailey v. Tintinger** seemed to allow vesting of a water right upon mere compliance with the statute rather than upon actual use, the Water Use Act incorporating the **Bailey** rule added the statutory requirement for actual use of water prior to vesting.

P-5.8021
T-5.800 Department erred in limiting time for completion of all water use for 239 domestic units to 9 or 13 months. Obviously, more time is reasonably needed.

P-5.8031 To obtain extension of time, permittee must have been prosecuting the appropriation with due diligence.

P-5.8031 Diligence does not require an unusual or extraordinary effort, but it does require the steady application of effort. This must be determined on a case-by-case basis.

[At Final Order, the Department adopted only those Conclusions of Law in the proposal relating to Department jurisdiction over water rights involved in a bankruptcy. The following summaries reflect conclusions substituted.]

D-21.310
T-5.800 Department gave permittee more time than was requested. However, as such short period was nevertheless a limit, due process required that the applicant receive with the permits a statement of opinion regarding the time limits, and notice that they could be appealed. The Department failed to do this, a technical procedural error. To correct this error, the agency will reissue the permits with a completion date of 1995, and issue the necessary statement of opinion with notice of right to request hearing. If no request is received, the permits as issued will constitute the final agency order. [FO]

J-21.800 Because of technical procedural error, there was no final agency decision and therefore revocation/modification of permit premature. Therefore, conclusions relevant to revocation/modification are rejected. [FO]

P-5.8031 The Department expressly rejects any finding [**sic**] to the effect that intent and due diligence considerations outside of time limits established by a permit can be considered by the Department unless made during the application process or pursuant to a timely request for extension. [FO]

R-5.930
S-21.6621
T-5.800 Permittee could have contested the short completion dates in exceptions to the original proposal to grant the permits. It did not. Further, it could have appealed the final order to district court. It did not. However, because a technical procedural error occurred in the issuance of the permit, in this instance, the permit did not constitute an appealable final agency order, and the failures to appeal do not estop revision of dates. [FO]

[Permit reissued with 1995 completion date.]

Final Order Date:	11/14/85 (D)	**Applicant:**	Dan
Case #/Type:	42667-s41I (P)	**Regional Office:**	Helena
Application Date:	11/03/81	**Examiner:**	Elting
Hearing Date:	05/10/85	**Use:**	Irrigation/stock/ domestic

A-16.7516
P-5.8021
Not only must an applicant have *bona fide* intent, he must proceed to develop the project with due diligence. Here, Applicant testified he could not proceed with diligence, indeed, he may not have the requisite intent since he stated he might not develop the project even if he could.

Final Order Date:	01/08/86 (G W/C)	**Applicant:**	Ward
Case #/Type:	49643-s41C (P) 49644-s41C (P)	**Regional Office:**	Bozeman
Application Date:	12/17/82	**Examiner:**	Bond
Hearing Date:	None	**Use:**	Hydropower

A-4.9312
L-1.790
T-5.800
Applicant failed to prove by clear and convincing evidence that the proposed large appropriation of water would not adversely affect objector as objector's point of diversion may be between intake and return, and thus the use may be consumptive as to her. However, imposition of condition subjecting nonconsumptive permit to stream commissioners will ensure her senior priority is enforced despite general characterization of the use as nonconsumptive. Large appropriation criteria held met with the condition.

E-14.9376
No environmental impact statement was prepared; however, because the Department has clearly taken a good, hard look at the issues, publicly noticed the application, and retains supervisory control over the provisional permits, the dictates of MEPA are met.

P-5.8021
FERC denial of authorization shall result in revocation of the permit.

S-21.660
Burden of showing the existence of a factual dispute normally falls on party opposing summary judgment and that burden cannot be discharged by reliance on pleadings or speculative allegations. However, Department will not grant motion without great scrutiny of the record, whether or not opponent responds.

[Granted.]

Final Order Date:	01/20/86 (G W/C)	**Applicant:**	Carter
Case #/Type:	49573-s43B (P)	**Regional Office:**	Bozeman
Application Date:	09/13/82	**Examiner:**	Bond
Hearing Date:	08/29/84 03/07/85	**Use:**	Hydropower

A-4.930
More frequent appointment of a water commissioner is not an adverse effect.

A-4.930
Where application does not fall into public interest review, no requirement that Department take possible adverse effect to aesthetic interests into account. [FO]

A-4.9348.48
Legal requirement for a use to be nonconsumptive. **i.e.**, that there be little or no diminution in supply and that the water be returned to the source sufficiently quickly that little or no disruption will occur in stream conditions below the point of return, met.

A-16.750	Whether venture is ultimately profitable not relevant to whether use beneficial. [FO]
A-16.7516 **M-5.110**	Permit will issue despite fact that applicant has not yet obtained FERC operating license as evidence shows applicant is presently diligently pursuing same.
A-16.7567	Downward amendment of application at hearing permitted with proviso that the record would be left open for further evidence specific to amendments.
E-14.9376	Pine Creek is navigable under State law because susceptible of public use and therefore public trust must be considered.
E-14.9376	Public trust doctrine applies to State decisions regarding allocation of natural resources.
E-14.9376	Assuming **arguendo** that public trust considerations are mandated in the case of small appropriations, it need not be decided here what those considerations are as they cannot be stretched so far as to require more than the type of mitigation already provided for by applicant.
E-14.9376	Examiner did not conclude that enabling statute omitting trust considerations for smaller appropriations precludes application of the public trust doctrine. [FO]
E-14.9376	Examiner did not conclude that private riparian ownership precluded application of the public trust doctrine. [FO]
E-24.4831	Testimonial evidence presented at the hearing may rebut the **prima facie** effect of SB #76 claims.
I-14.870	If FERC license requires minimum bypass flow, such flow will be protectable in addition to the 12 cfs hereby appropriated despite fact that it is not included in permit. [**See** Final Order for more detailed explanation.]
R-5.930	Record reopened for new testimony after initial hearing over because facilitates complete understanding of case and no prejudice to applicant.
S-20.120	There is no requirement that the objector's case be detailed in the proposal for decision. [FO]
S-21.660	Objector's motion to dismiss after presentation of applicant's case overruled because dismissal would contravene the intent of the Administrative Procedure Act, and because parties (applicant) would not have opportunity to cross-examine Department employee, who authored document contained in the Department file already part of the record.
U-14.1259.70 **U-14.1274**	Even if source often will not generate the requested flow, upappropriated water criterion fulfilled if applicant for nonconsumptive use can make use of lesser flows than the flows requested. [FO] [Granted.]

Final Order Date:	01/21/86 (G W/C)	**Applicant:**	Campbell
Case #/Type:	28306-s41I (P)	**Regional Office:**	Helena
Application Date:	07/23/80	**Examiner:**	Bond
Hearing Date:	04/26/85	**Use:**	Mining

A-4.9325 **U-14.1259.70**	Where return flow significantly delayed, the use must be considered consumptive.
A-16.7516	Priority date of filing an application cannot include amounts requested which are premised on the hope or belief of increased production at some future point.
A-16.7516 **D-21.310** **J-21.800**	Applicant argued that requiring an immediate effective date was an unconstitutional deprivation of property without due process as he had filed the application before passage of the act requiring date specification. However, the statute allowing the Department to cease action if no date specified, merely expresses prior substantive law regarding speculative appropriations. In other words, only procedure was changed, not substantive law, and it is entirely proper to apply the new statute retroactively.
D-21.310 **E-22.480**	Objection to evidence based on no notification prior to hearing. Held, because applicant's demand for production was contingent on objection to Department Exhibits 1 and 2, and objector did not object to those exhibits, no duty to produce exhibit prior to hearing. Second, Department computer printouts are authenticated documents, and are thus admissible under any standard.
E-22.480	Objection to testimony based on allegation that, because documents had been admitted no further testimony thereon is proper, overruled. Admission of evidence initiates questioning, it does not end it. Document is admitted if it complies with certain rules designed to guarantee a minimal level of veracity; then, there is open season on same. Without admission, topic is barred.
E-22.480	Findings of fact in prior decisions are admissible as rebuttable evidence even as against persons not parties or in privity with parties hereto.
E-22.480 **U-14.1259**	Applicant did not quantify flow in Confederate Creek, and findings in prior Department decisions regarding the creek show the stream is overappropriated. Held, applicant did not prove existence of unappropriated water for consumptive use.
E-24.4820	The Department must use discretion in certifying issues of existing rights to the Water Court, as if it does not, all cases before the Department would be certified, bringing the permitting process to a screeching halt.
E-24.4820	Certification may be well advised in a change proceeding because were an applicant's right recognized by the Department as larger than it really is, and allowed to be changed, irreparable harm could be done to other appropriators (especially juniors). However, in applications for a new use, as here, such dangers to other appropriators do not exist.
E-24.4831	Where testimony contradicts filings (notices of appropriation of Senate Bill #76), the filings may be successfully rebutted.
S-21.660	Long delay in bringing case to hearing is not due to lack of diligence on part of applicant. Held, dismissal will not lie.
T-5.800 **U-14.1259.70**	If permit conditioned so that use is nonconsumptive, **i.e**., so that there is no delay in return flow, then it may be found that unappropriated water exists in the source (so long as water physically available at point of diversion).

U-14.1259.70 Where water to percolate through ground on its return, and time delay not known, must presume significant delay.

U-14.1259.70 **De minimus** accidental spill of water onto ground would not render the use consumptive. [FO]

Final Order Date:	01/21/86 (G W/C)	**Applicant:**	Mikesell
Case #/Type:	31382-g41J (P)	**Regional Office:**	Lewistown
Application Date:	01/27/81	**Examiner:**	Bond
Hearing Date:	04/02/85	**Use:**	Irrigation

A-4.9321 The increased expense of hiring a water commissioner is not adverse effect to senior appropriators.

A-4.9394 Objector who has been receiving cleaner water than was historically received is not adversely affected even if applicant's appropriation would reduce quality of objector's water back to original.

B-5.690 Poor water quality in Hot Springs Creek is unsuitable for irrigation. Held, appropriation from this source cannot be permitted because cannot be beneficially used for stated purpose.

S-15.920 Subsurface water which is ultimately tributary to surface water courses is not "groundwater" within the meaning of Water Use Act.
U-14.1259.25 Applicant has brought subsurface water to the surface. However, there is insufficient evidence that such water would not have eventually risen to the surface anyway. Therefore, such water cannot be deemed developed water and is subject to call by prior appropriators on Hot Springs Creek.

[Permit granted.]

Final Order Date:	03/03/86 (D)	**Applicant:**	Luckcuck
Case #/Type:	4409-s41I (P) 4410-s42I (P)	**Regional Office:**	Billings
Application Date:	12/09/74	**Examiner:**	Spaeth
Hearing Date:	11/13/75	**Use:**	Stock

U-14.120 No unappropriated waters in source. [Permit denied.]

Final Order Date:	03/03/86 (G W/C)	**Applicant:**	Ridgeway
Case #/Type:	53498-s41S (P)	**Regional Office:**	Lewistown
Application Date:	11/14/83	**Examiner:**	Scott
Hearing Date:	09/12/85	**Use:**	Irrigation

A-4.930 The possibility that applicant will not comply with a call on the source is not adverse effect.

A-4.9321 Objectors will be adversely affected if they have to call the source every time they need water; therefore, the permit must be conditioned to require that applicant bypass sufficient flow.

B-5.6979
S-21.760 Water right cannot be greater than the amount needed to serve the use. Application is for supplemental water. Held, permit to be issued in conjunction with other rights for a combined appropriation not to exceed the irrigation requirements of the place of use.

I-14.870
S-21.760 Applicant uses existing groundwater right for same purposes as water here applied for (irrigation of the same place of use). Held, applicant may utilize well water to supplement creek flow to meet bypass condition.

M-5.110 Means of diversion not presently adequate to divert full requested amount. Held, permit may issue for the amount requested subject to modification upon verification.

[Exceptions filed; above holdings sustained.]

Final Order Date:	03/07/86 (D)	**Applicant:**	Grayson
Case #/Type:	55390-s76H (P)	**Regional Office:**	Missoula
Application Date:	05/14/84	**Examiner:**	Scott
Hearing Date:	10/25/85	**Use:**	Irrigation

A-24.4810 Although a water right may have been lost by failure to claim within time limit specified by water court, conclusive presumption of abandonment does not apply to corresponding ditch right.

E-24.4879
U-14.1259 Applicant asserted there would be sufficient water in Blodgett Creek if the seniors' means of delivery were not so inefficient. However, applicant did not prove that the ditches were unreasonably inefficient, or that an increase in efficiency would satisfy exercised prior rights.

M-5.1129 Whether applicant presently has an easement to construct or use ditch not relevant to determination of whether proposed means of diversion are adequate.

U-14.1259 Senior user of Blodgett Creek testified that there is never a year when he gets his full appropriation. Held, no unappropriated water in source.

Final Order Date:	03/17/86 (G W/C)	**Applicant:**	West Kootenai Water Users Association
Case #/Type:	39887-s76D (P)	**Regional Office:**	Kalispell
Application Date:	05/26/81	**Examiner:**	Elting
Hearing Date:	07/27/84	**Use:**	Irrigation/Power Generation

A-4.930 Downstream user possesses a permit which requires a 5 cfs bypass flow. Held, applicant must pass same in order that permittee not be adversely affected.

E-22.480
M-5.110 General notions about how a hydropower facility would be incorporated into system for appropriating irrigation water held insufficient to show appropriation works adequate.

E-24.4831
I-14.870 Even though Water Court has not recognized validity of instream flow claim in temporary preliminary decree, Department must recognize a claim as **prima facie** evidence of its content until issuance of final decree.

J-21.800
L-1.940 No permit necessary for emergency fire use. Person entitled to make initial diversion to pressurize hydrants in nonemergency; however, no other diversion allowed except in actual emergency.

M-5.110 Irrigation appropriation works held adequate if applicant installs screens to prevent fish and fry from entering the system.

[Permit granted.]

Final Order Date:	03/18/86 (G W/C)	**Applicant:**	Hochstetler
Case #/Type:	52793-s76D (P)	**Regional Office:**	Kalispell
Application Date:	07/06/83	**Examiner:**	Elting
Hearing Date:	07/27/84	**Use:**	Irrigation

A-4.930
I-14.870
Permittees below applicant's proposed point of diversion have a permit which imposes a 5 cfs instream flow requirement. Held, applicant must allow 5 cfs to bypass his point of diversion to prevent adverse effect to permittees.

E-14.930
[Final Order addresses concerns re whether environmental protection concerns were reason for imposing instream flow requirements rather than specific 85-2-311 criteria.]

E-24.4831
I-14.870
Instream flow requirements based on filed claims which state flows rather than on federal reserved rights which do not; held flowby requirements not based on unquantified right. [FO]

I-14.870
T-5.800
Applicant has volunteered to comply with FWP claimed instream flows; therefore, permit conditioned so that he must forgo diverting when source flow falls below 25 cfs.

M-5.110
T-5.800
Proposed means of diversion adequate if measuring devices installed at or below point of diversion to ensure required minimum instream flow.

U-14.120
Although full requested flow may not be available throughout period of use because applicant can make full use of what water there is, 85-2-311(1)(a) held fulfilled.

Final Order Date:	03/31/86 (Remand)	**Applicant:**	MacMillan
Final Order Date:	07/19/84 (Orig.) (G W/C)		
Case #/Type:	42666-g41F (P)	**Regional Office:**	Bozeman
Application Date:	03/17/82	**Examiner:**	Elting
Hearing Date:	04/27/83	**Use:**	Hydropower

A-4.9390
The thermal content of water is a protectable element of the appropriator's water right to the extent necessary to allow him to reasonably exercise those rights.

A-4.9390
Objectors have had to mix cold water with the geothermal water in order to use it for the hot pool; accordingly, a small drop in thermal content of the water due to applicant's appropriation will not adversely affect them. They can still reasonably exercise their right.

A-4.9390
Withdrawals of geothermal water greater than the sustained yield of the geothermal aquifer will work adverse effect to other water rights by thermal loss.

A-4.9395
Even if applicant's appropriation should reduce artesian pressure, the well would not be drawn down to a point where it could not be readily pumped. No adverse effect.

A-4.9395
Objector's certificates are junior to this application. They are thus subject to any permit issued herein and therefore cannot be adversely affected.

A-4.9395
Objector has several wells and springs, any of which can supply the various uses. Therefore, even if one or two of the wells are significantly impacted, the uses can still be served. No adverse effect.

A-16.7516
B-5.6910
Recreation is a beneficial use of water whether commercial or private. [FO]

B-21.780
Objector's burden of production re his existing right is discharged

E-24.4831 when the evidence and all proper inferences therefrom viewed in a light most favorable to the objector are sufficient to allow a reasonable mind to conclude that an existing right exists. [FO]

E-22.480 Official notice may be taken of facts not presented in testimony as long as the parties are made aware of the facts noticed and have an opportunity to contest them. Reference to officially noticed facts may first be made in the proposal, and may contest them by filing exceptions. [FO]

E-24.4810 Assuming the Department has jurisdiction to make such a determination, the evidence in this record is not sufficient to support a finding that applicant's rights are abandoned. [FO]

E-24.4831
U-14.1259 However applicant has presented a much more compelling case that one objector's rights, the pool right, is exercised only periodically, **i.e.**, is normally utilized only when filling the pool (three days out of twelve). Accordingly, there is that much more flow which is statutorily unappropriated, and which applicant may appropriate (subject to call, of course). [FO]

E-24.4831
U-14.1259 Applicant failed to prove that objector's water rights do not exist; consequently, his attempt to show that the corresponding amount of water is unappropriated water failed. [FO]

R-5.930 Reiteration of Findings of Fact in a proposed Conclusion of Law does not render the conclusion improper. [FO]

[Final Order appealed to District Court; case remanded for receipt of more evidence. Revised Proposal for Decision (RP4D) issued.]

A-4.9395
E-24.4879
J-21.800 The Department can require that an applicant pay certain cost to ensure that a prior appropriator will not be adversely affected, and has done so in the past. However, that past requirement was based on a specific finding that the senior's means of diversion was reasonable, the opposite of the instant case. It is premature to make the determination now; however, it is possible that costs may be imposed on applicant if objectors are unable to obtain their senior water rights by a reasonable means of diversion. [RFO]

D-21.310 No harm or undue surprise where testimony of expert based on data already in the possession of the party. (RP4D)

E-22.480 Objection that testimony of expert should be disallowed because "his position [interest] in the matter is unclear" overruled. (RP4D)

E-22.480 Although testimony of expert was based on data collected by someone not present at the hearing, **i.e.**, was based on hearsay, his testimony is admissible under ARM 36.12.221. (RP4D)

E-22.480 Hydrology is not an exact science. The Department therefore cannot deal in certainties, but must rely on the best available information. [RFO]

E-22.480
E-24.4831 The Department is empowered to make preliminary administrative determinations as to the existence and extent of claimed water rights, with the proviso that such determinations are only to further the Department's duties and are not **res judicata**, but are subject to decisions in the adjudication process. (RP4D)

E-24.4810 Although nonuse of water right may or may not lead to finding of

U-14.1259 abandonment, it is evident that water is available for applicant's use. [RFO]

E-24.4831 Spring flows only 20 gpm; claim was for 40 gpm. Held, only 20 gpm protectable. (RP4D)

E-24.4831 The springs which supply objector's pool right cannot be turned off. Therefore, the spring flow must be allowed for on a continuous basis rather than on a periodic basis as was done in the initial Final Order. (Spring flow also used for sewage lagoon.) [RP4D]

E-24.4831 [Revised Final Order (RFO) contains long discussion of why Department must make preliminary administrative determinations of the extent of the objector's water rights.]

E-24.4879 Artesian flow is not a protectable means of diversion. [RP4D]

E-24.4879 A court could conceivably require applicant to share the expense of installing a new means of diversion, depending on the reasonableness of the objector's means of diversion, extent of the adverse effect, the economic reach of the parties, and the maximization of beneficial use of the water. [RP4D]

E-24.4879 An appropriator must make a reasonable and economical use of water even though changing to a reasonable diversion method might occasion "some additional expense" to the appropriator. [RFO]

U-14.1259 Unappropriated water determination based on normal actual use by senior appropriator. If senior later must make use of his right to the full extent of his claim, he can call the source. [RFO]

Final Order Date:	05/27/86 (G W/C)	**Applicant:**	Tangen Ranch
Case #/Type:	54628-g41O (P)	**Regional Office:**	Havre
Application Date:	11/10/83	**Examiner:**	Scott
Hearing Date:	11/06/85	**Use:**	Irrigation

A-16.750
U-14.120 Applicant desires and can make use of any water which is available. Therefore, the application is to be understood as seeking amounts of water up to and including the requested amount.

E-24.4831 Although objector Guthrie constructed the ditch which diverts water from the aquifer, he did so in 1983 and no permit was obtained for the use of the water. Therefore, neither he nor the Eldorado Canal Company are entitled to use water diverted by the Guthrie Ditch.

E-24.4894 Even if Eldorado Canal Company does have a right to divert runoff from Guthrie irrigation (with shares of Eldorado water) and return same to its ditch for reuse, it does not have a right to use the straight ditch constructed by Guthrie in 1983 (which replaced the old contour ditch), for it changed the place of diversion and no authorization was obtained.

E-24.4894
S-15.920
U-14.1259
W-1.870 Because Eldorado does not have the right to divert using the Guthrie Ditch, water runoff from Eldorado share irrigation is waste water and is subject to appropriation as such

M-5-110 Neither does a permit grant an easement.

M-5.1129 Means of diversion are adequate if feasible. Statute does not require a showing of present easement over the land of another.

S-15.920 Because Ralston Gap aquifer is hydrologically related to surface water, it is considered surface water under Water Use Act.

S-15.920
U-14.120 Because the means of diversion was installed as a drain ditch, and will continue to function as such, this appropriation will create no additional burden on the aquifer.

Final Order Date:	06/25/86 (G W/C)	**Applicant:**	Graveley
Case #/Type:	47276-s41I (P)	**Regional Office:**	Helena
Application Date:	06/28/82	**Examiner:**	Elting
Hearing Date:	07/30/85	**Use:**	Irrigation

A-4.930
J-21.800 Possibility applicant will not abide by permit conditions or that water commissioner is corrupt held not a sufficient basis on which the Department will deny a permit.

A-4.9325 Downstream seniors are adversely affected if they cannot reasonably exercise their senior rights by calling permittee because of substantial delay in arrival of released water.

T-5.800
U-14.120 Applicant did not present evidence that he could make do with less than the full requested amount; accordingly, the requested period of use must be curtailed to such period as the full amount more likely than not will be available.

U-14.200 Although Confederate Creek is overappropriated on paper (SB #76 filings), testimony that there is unappropriated water in June and July coupled with evidence of flows sufficient to supply applicant at the outlet of the source during this period show that there is sufficient unappropriated water.

[Permit granted.]

Final Order Date:	07/07/86 (G W/C)	**Applicant:**	Kenney
Case #/Type:	55362-s76H (P)	**Regional Office:**	Missoula
Application Date:	04/27/84	**Examiner:**	Scott
Hearing Date:	11/22/85	**Use:**	Irrigation

A-4.930
A-4.9383 It is possible that applicant could adversely affect objector ditch owners by placing his infiltration gallery too close to the ditch thereby inducing seepage therefrom. Held, Department will test for induction during first season, and applicant must modify system if there is induction.

A-16.750
U-14.120 If Applicant can make use of such amounts of water as are available for his use, § 85-2-311(1)(a)(ii) and (iii), MCA, are met. The amount requested is viewed as an upper limit on the appropriation.

U-14.1259
W-1.870 Appropriators only possess the corpus of water diverted so long as it remains in their control; once it seeps out of the ditch it was lost to their control and is appropriable by another as waste.

W-1.870 However, even if a permit is granted for the appropriation of waste water, the generators of such waste cannot be compelled to continue generating it.

Final Order Date:	08/08/86 REVOKED	**Applicant:**	McDonald
Case #/Type:	31883-g76L (R)	**Regional Office:**	Kalispell
Application Date:	01/16/81	**Examiner:**	Elting
Hearing Date:	06/19/86	**Use:**	Irrigation

B-21.780
P-5.8021
Department met burden of going forward in matter of revocation of by putting on evidence that work on the permitted appropriation had not begun, etc.

B-21.780
P-5.8021
P-5.8031
Permittees failed to meet their burden of persuasion both as to whether there is good cause to grant an extension of time to complete and as to whether there is good cause not to revoke as they failed to appear at the hearing and as the Department file alone will not support a finding of good cause.

[Permit revoked.]

Final Order Date:	08/26/86 (D)	**Applicant:**	Brookside Estates
Case #/Type:	56738-s76M (P)	**Regional Office:**	Missoula
Application Date:	07/19/84	**Examiner:**	Scott
Hearing Date:	12/16/85	**Use:**	Recreation

A-4.9348.48
For a use to be nonconsumptive there must be (1) little or no diminution of the source, and (2) water diverted must be returned to the stream sufficiently quickly that little or no stream disruption occurs in stream conditions.

A-4.9348.48
Initial fill of reservoir is a consumptive use.

A-4.9348.48
Where use is truly nonconsumptive, unappropriated water exists in the source if water is physically present at the point of diversion.

A-4.9348.48
A-4.9394
Where applicant could dispose of used water either by returning it to the source, or by diverting it into a ditch from which other source users divert, absent plans showing how no more water would be shunted downditch than the users thereon required, there is a substantial possibility that the proposed use would be consumptive and wasteful.

A-4.9394
B-21.780
The evidence indicating possible diminished quality of return flow, one objector alleging downstream domestic use, applicant has the burden to prove that the domestic use will not be adversely affected by the proposed appropriation.

B-5.6910
B-5.6979
Assuming without deciding that aesthetic use is beneficial, applicant must nonetheless prove that the full amount requested can be used without waste for the stated purpose.

J-21.800
Cannot make change in existing right at hearing on application for new permit.

M-5.1129
Grant of a permit does not implicitly grant a ditch right.

Final Order Date:	09/04/86 (G W/C)	**Applicant:**	Allred
Case #/Type:	41255-g41B (P)	**Regional Office:**	Helena
Application Date:	02/16/82	**Examiner:**	Bond
Hearing Date:	02/21/85	**Use:**	Irrigation

A-4.930
Mere diminution of water supply is not necessarily adverse effect to objectors. [FO]

A-4.9395
Evidence shows that appropriators of subsurface water will not have to deepen their wells. Held, no adverse effect to them.

B-5.6979
To prevent waste, permit can issue only in conjunction with applicant's existing rights. [FO]

B-21.780
S-15.920
U-14.1259.25

Subsurface water is presumed tributary to surface source, and applicant claiming to have developed water (by removing it from the ground and adding it to surface source) has burden to show that subsurface water was not in fact tributary. However, applicant here has not claimed the water was developed.

E-24.480

Under certain circumstances, surface appropriators may be required to withdraw underground water tributary to a stream to satisfy their appropriations. [**Obiter dictum**.]

E-24.4879
J-21.800
S-21.720

If actual stream administration deprives permittee of his water in priority, remedy is in District Court. If Clark Canyon Dam is operating with excess carryover storage (waste), Allred would have cause of action to enjoin.

S-15.920

Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary.

S-21.850

Subirrigation not a protectable means of diversion. None of the objectors have the right to maintenance of the status quo in the aquifer so that their crops will be subirrigated in the spring.

U-14.120

To fulfill § 85-2-311(1)(a), MCA, all that need be shown is that there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is in fact administrable.

U-14.1259.00

Although sum of SB #76 claims seems to exceed capacity of source, testimony that all appropriators on source have sufficient water in normal years held sufficient to prove that unappropriated water exists in source under Water Use Act.

U-14.1259.00

Objectors argue that prior to construction of Clark Canyon Dam, stream was overappropriated, and that any further withdrawals can thus only be made by purchase of shares from Clark Canyon Water Supply Co. However, now it is difficult to determine whether unappropriated water exists because the current regime of river is not governed by priorities but rather by a public water supply company. (Therefore, examiner's conclusion that there is unappropriated water sustained?) [FO]

U-14.1259.25

Assuming that water is available to applicant because of Clark Canyon Dam, if company which developed that water cannot control it, it cannot deny applicant its use. [?] [FO]

[Permit granted.]

Final Order Date:	09/10/86 (G W/C)	**Applicant:**	Grether
Case #/Type:	G34573-76H (C)	**Regional Office:**	Missoula
Application Date:	07/08/81	**Examiner:**	Williams
Hearing Date:	08/20/82	**Use:**	Irrigation
Oral Argument Date:		07/16/85	

A-4.9348.10

Appropriator's new system does not waste water which previously was unavoidably wasted due to reasonable inefficiency of old irrigation practices. Held, water salvaged by new system can be used for new beneficial purposes (extending place of use) by appropriator under priority date attendant to old use so long as there is no adverse effect to other appropriators. [Discussed at length in Proposal for Decision and Final Order.]

A-16.7576
D-21.310
Because public notice misleading, it must be republished (and receive no new objections) before proposed disposition becomes effective.

J-21.800
O-2.490
Objection based on Objector claiming legal title to water rights also claimed by applicant stricken as it does not require expertise of administrative agency for resolution.

O-2.490
S-21.6621
Parties which objected to application did not object to misleading public notice. Held, they are collaterally estopped from objecting, post-proposal.

Final Order Date:	11/14/86 (D)	**Applicant:**	Frederick
Case #/Type:	58432-s43A (P)	**Regional Office:**	Bozeman
Application Date:	04/29/85	**Examiner:**	Elting
Hearing Date:	02/21/86	**Use:**	Irrigation

A-4.930
Where record shows that objector would have to call applicant every time objector wishes to divert water, there is adverse effect to the objector.

B-21.780
E-22.480
U-14.120
Where applicant presents unsubstantiated testimony there is unappropriated water in the source, and that testimony has been contradicted by objector's equally unsubstantiated testimony, applicant has not met his burden of proof regarding the criterion.

Final Order Date:	11/21/86 (G W/C)	**Applicant:**	Shesne
Case #/Type:	56173-s43D (P)	**Regional Office:**	Billings
Application Date:	08/13/84	**Examiner:**	Elting
Hearing Date:	10/28/85	**Use:**	Irrigation

E-24.4879
M-5.1188
Subirrigation is not an adequate means of diversion, nor is it a protectable means of diversion.

W-1.870
Waste appropriator cannot compel continuance of ditch seepage.

W-1.870
U-14.1259.25
Water which seeps out of ditch, flows down a coulee and subirrigates trees is waste water lost to source and may be considered unappropriated.

Final Order Date:	12/03/86 (G W/C)	**Applicant:**	Meyer
Case #/Type:	50510-s76L (P)	**Regional Office:**	Kalispell
Application Date:	03/11/82	**Examiner:**	Scott
Hearing Date:	03/21/86	**Use:**	Domestic/ Recreation

A-4.9321
The possibility that applicant or his successors will not cooperate with senior users held no adverse effect.

B-5.690
No evidence that requested year round lawn and garden use would be beneficial in winter months. Use restricted to growing season.

B-5.6939
B-5.6979
Because applicant failed to present evidence demonstrating that the amount of water requested was reasonably necessary for the support of several hundred fish, fish pond use denied. However, pond may be used for storage for other uses applied for.

E-24.4848
Permit should contain condition subjecting it to Indian rights. [FO]

U-14.120
Testimony of objectors that they do not believe that applicant's use would deprive them of water, together with evidence of physical

availability of water at the proposed point of diversion held sufficient to prove unappropriated water exists.

[Permit granted]

Final Order Date:	12/31/86 MODIFIED	**Applicant:**	Erwin
Case #/Type:	21673-s41H (R)	**Regional Office:**	Bozeman
Application Date:	01/26/79	**Examiner:**	Elting
Hearing Date:	08/19/85	**Use:**	Irrigation
Oral Argument Date:	12/03/85		

B-21.780 The permittee has the burden of persuasion that it is more likely than not that insufficient grounds exist for modification of the permit.

B-21.780
P-5.8021 In revocation, Department has burden to produce evidence that shows a question exists as to whether the permit was perfected as issued.

D-21.310
E-22.480
J-21.800 Department is not bound by initial recommendation of field office that water right be reduced to .25 acre-feet based on field office estimate of water actually applied when evidence at hearing shows this estimate too large.

P-5.8021 Only one acre out of two actually irrigated for only two hours during one season. Permit must be modified to reflect this reduced actual use.

P-5.8021 During the two hours of irrigation, permittee exceeded the flow rate allowed in the permit. Held, the permit cannot be perfected outside the permit terms; therefore, the volume of water diverted as the result of exceeding the permit flow rate is not part of the perfected right.

Final Order Date:	02/13/87 (D)	**Applicant:**	Crumpled Horn
Case #/Type:	G40605-41O (C)	**Regional Office:**	Havre
Application Date:	03/10/82	**Examiner:**	Elting
Hearing Date:	06/12/85	**Use:**	Irrigation
Oral Argument Date:	01/07/87		

E-24.4810 Claim filed for irrigation water appropriated by means of dam and reservoir is **prima facie** evidence of existence of water right. However, other record evidence tends to show that dam washed out 85 years ago, and that right has not been used since 1908. Held, **prima facie** effect of claim overcome, and absent proof by applicant that right exists as claimed, change authorization cannot issue.
[Authorization denied.]

Final Order Date:	03/03/87 (D)	**Applicant:**	Cutler
Case #/Type:	56782-s76H (P) 56830-s76H	**Regional Office:**	Missoula
Application Date:	08/15/84	**Examiner:**	Scott
Hearing Date:	04/25/86	**Use:**	Irrigation

A-4.930 Where there is unappropriated volume in a source but no unappropriated flow, applicant can only divert when the senior is not diverting. In such case, if the applicant is upstream, and it appears that the senior will have to call upon applicant every time he requires water, the senior is adversely affected.

A-4.9394 Department of Health and Environmental Sciences' issuance of discharge permit is not conclusive proof that water quality of the source will not be diminished. [Final

Order]

B-21.780 Objector need not prove that an adverse effect will occur. [FO]

B-21.780
J-21.800 It is not necessary for objectors to raise issue of reasonable amount; it is the Department's independent duty to ascertain. [FO]

E-22.480
E-24.480
U-14.1259 All claims filed by objector for irrigation of the same place of use may be considered in determining the extent to which a given claim of existing water right is actually used.

E-24.4820 Department declined to certify claim of existing right.

E-24.4831 Claim stands as **prima facie** proof of its content. Applicant attempted to overcome the claim by providing estimates of objector's requirements to show that claim was overstated, but failed because such estimates were based on optimum efficiencies not required of objector by law.

U-14.1259.25 The developer of a supply of water theretofore not part of the source (surface or subsurface) available to other appropriators has the first right to take and use such increase.

U-14.1259.25 Where applicant has brought water to surface by means of infiltration gallery, but has not proved that such water would not have risen below to the benefit of other appropriators, he has not proved that such water is developed water.

U-14.1259.25 Merely piping water around a 15-year old blockage in a natural stream is not development of water.

Final Order Date:	03/04/87 (D)	**Applicant:**	Crisafulli
Case #/Type:	50272-g42M (P)	**Regional Office:**	Glasgow
Application Date:	10/05/82	**Examiner:**	Bond
Hearing Date:	03/29/84	**Use:**	Irrigation

A-16.7567
D-21.310 Held, no prejudice to objectors due to 11th hour amendment to application reducing acreage to be irrigated. [IO]

B-5.690
W-1.870 The Department tests an application for economic benefit only to the extent that lack of economic benefit is indicative of waste. [IO]

E-22.480 Certain hearsay not allowed; right of cross-examination must be protected. [IO]

E-22.480 Testimony of lay witness given great weight where witness has long standing familiarity with the area at issue. [IO]

I-14.900 Applicant entitled to interim permit because actual diversion the only way to find out whether pumping well will deplete surface water source to detriment of objectors. [Interlocutory Order attached memo]

I-14.900 Issuance of an interim permit does not entitle applicant to a provisional permit. [IO]

S-20.120 "Groundwater" here not groundwater within meaning of statute because hydrologically connected to surface water. [IO]

[Applicant's failure to do testing for which interim permit granted resulted in summary proposal to deny. Denied.]

Final Order Date:	03/16/87 REVOKED	**Applicant:**	Staton
Case #/Type:	20074-s76G (R)	**Regional Office:**	Helena
Application Date:	08/28/78	**Examiner:**	Elting
Hearing Date:	01/07/87	**Use:**	Irrigation

B-21.780 In revocation proceeding, Department has burden of producing evidence tending to show that a question exists as to whether the permit was perfected within its terms.

P-5.8021 Water collecting in reservoir has never been used for the purposes permitted, irrigation and fish, as reservoir will not hold water long enough to allow for such uses. Mere construction of a reservoir is not completion of the appropriation. Water must be put to beneficial use.

[Permit revoked.]

Final Order Date:	03/23/87 (G W/C)	**Applicant:**	Eagle Creek Colony
Case #/Type:	G113493-41N (C)	**Regional Office:**	Havre
Application Date:	05/31/85	**Examiner:**	Elting
Hearing Date:	04/30/86	**Use:**	Reservoir

A-4.930 Where applicant presents evidence that, except in very high water periods, water entering source above a reservoir never makes it past the reservoir, and objectors present no evidence refuting same, and applicant's proposed change concerns only that water in the source above the reservoir, there can be no adverse effect to objectors below the reservoir regardless of the effects of the change, except during high water.

A-4.930 Where objectors rely on high water to fill their reservoirs, applicant cannot change his diversion so that water which was not previously captured during high water would now be captured. Authorization must be conditioned to preserve high water status quo.

A-4.930
B-21.780 Objector's claims also stand as proof of their content; however mere mere recitation of the claim is not sufficient to fulfill objector's burden of production as to adverse effect. The record must also contain some evidence of a causal connection between the proposed change and the alleged adverse effect.

B-21.780
E-24.4831 Where applicant has presented claims which objectors allege are invalid or erroneous, but objectors provide no evidence to support such allegation, the claims stand as proof of their content, and are sufficient to make the necessary threshold showing of the existence of the water rights to be changed.

Final Order Date:	04/06/87 (G W/C)	**Applicant:**	Pitsch
Case #/Type:	53547-s40A (P)	**Regional Office:**	Lewistown
Application Date:	02/02/84	**Examiner:**	Elting
Hearing Date:	11/22/85	**Use:**	Irrigation
Oral Argument Date:	03/18/87		

U-14.1259 Recorded claims indicate stream overappropriated; however, evidence also indicates that not all of the rights are used, and all parties agreed that there is in fact unappropriated water in the source during spring runoff. Held, that there is unappropriated water in the source during spring runoff.

[Musselshell conditions imposed.] [Oral argument held; above holding sustained.]

Final Order Date:	04/23/87 (G W/C)	**Applicant:**	Lloyd
Case #/Type:	55834-s76LJ (P) 56386-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/04/84 07/02/84	**Examiner:**	Scott
Hearing Date:	06/09/86	**Use:**	Domestic/Irrigation

A-4.930
B-21.7835
Objector's burden of production as to potential adverse effect is not limited to describing the kind and character of an alleged adverse effect; he must also produce evidence that would if viewed in the light most favorable to him provide a reasonable basis to conclude that there is a substantial potential that such adverse effect would occur. Mere allegation that applicant's pipeline might blow out (as some other appropriator's apparently had at one time) and wreck objector's water delivery system held insufficient to meet that burden.

B-15.690
If applicant has a fixed and definite plan which is not made contingent upon future circumstance, but is subject to defeat only by unanticipated contingency, he is definitely committed to the plan and his intent is **bona fide**. [Discussion.]

B-15.690
Applicant stated that he has no present plans to build homes and cannot therefore estimate a date of completion of domestic water appropriation, and that he may sell some of the property and would like permit to increase property value. Held, his intent is speculative, not **bona fide**.

U-14.1259
Although Station Creek is overclaimed, actual use data show that the full claimed amount is not utilized. Held, that at least in some years there will be sufficient unappropriated water available to supply 330 gpm requested.

Final Order Date:	05/15/87 (G W/C)	**Applicant:**	Estate of Ryen
Case #/Type:	G120401-41H (C) G120403-41H (C)	**Regional Office:**	Bozeman
Application Date:	06/01/1866	**Examiner:**	Elting
Hearing Date:	05/31/84	**Use:**	Irrigation

A-4.9373
Applicant must make threshold showing of historic use pattern so that Department may determine whether the use is not being enlarged to the detriment of other appropriators under the guise of a change.

B-21.780
E-24.4831
If applicant fails to show historic use pattern, Department cannot grant change without more information.

B-21.780
M-5.110
Objectors must show reasonableness of their means of diversion.

E-24.4820
Because both applicant and objectors failed to provide sufficient information regarding their existing rights for the Department to make a determination re adverse effect, certain questions regarding the existing rights in this matter were certified to the Water Court.

E-24.4831
Applicant for a change must make threshold showing of the existence and extent of the underlying right.

Final Order Date:	05/27/87 (G W/C)	**Applicant:**	City East Helena
Case #/Type:	62231-g41I (P)	**Regional Office:**	Helena
Application Date:	05/19/86	**Examiner:**	Elting
Hearing Date:	01/28/87	**Use:**	Municipal

A-4.9395
B-21.780
Where evidence shows a maximum one foot of drawdown in the wells of objectors, but objectors provide no evidence to suggest that they could not reasonably exercise their water rights under these conditions, and it does not appear that the proposed appropriation will result in long-term depletion of the aquifer, applicant has proven there will be no adverse effect to other appropriators.

D-21.310
E-22.480
Where the parties themselves are the only witnesses called, their testimony will not be suppressed for failure to formally answer discovery request for names of witnesses as it is reasonable to assume that the parties will appear and testify.

D-21.310
E-22.480
Where parties failed to provide a summary of their testimony pursuant to discovery request, but no issues are raised which the discoverer could not have reasonably surmised from the contents of the documents on file, the testimony in question will not be suppressed.

J-21.800
P-18.710
Time limits stated in §§ 85-2-309 and 85-2-310, MCA, are directory rather than jurisdictional, and failure to act within those limits does not trigger a either mandatory approval or denial of the application. [Case citations.]

S-21.660
Because other criteria besides adverse effect to objectors must be proved by applicant, summary judgement for applicant is not an appropriate sanction where objectors failed to respond to applicant's discovery requests.

T-5.800
Where applicant has agreed to conditions to be imposed on any permit granted, and certain objectors have withdrawn their objections based on that agreement, such conditions will be placed on any permit issued, regardless of whether the application goes to hearing providing that those conditions are relevant to fulfillment of issuance criteria.

U-14.120
If the applicant for percolating groundwater is physically able to access that water, and it is shown that his appropriation thereof will not adversely affect other appropriators, the logical conclusion is that the requested water is available and is not needed to meet the appropriation needs of other users, **i.e.**, that it is unappropriated.

Final Order Date:	05/28/87 (G W/C)	**Applicant:**	Thoft
Case #/Type:	G128519-76H (C)	**Regional Office:**	Missoula
Application Date:	04/18/85	**Examiner:**	Scott
Hearing Date:	04/28/86	**Use:**	Irrigation

A-4.930
Prior court approval is not a necessary prerequisite to proof of § 85-2-402(2), MCA.

A-4.9348
S-21.760
T-5.800
Where several water rights are appurtenant to the same parcel, and applicant wishes to move the place of use of one of them, and all rights have historically been necessary to fully irrigate the parcel, the change authorization must restrict the use of the rights <u>remaining</u> appurtenant to the original parcel, so that greater than

historic volumes are not diverted pursuant to those rights after removal of the changed right.

E-22.480
R-5.930
The Department will reopen the record in a case if the evidence to be taken is either evidence which a party could not, with reasonable diligence, have discovered and produced at the hearing, or evidence which for other justifiable reason was not produced at the hearing and which the Department finds essential to a determination of the case. Here, specifically, the record was reopened for the justifiable reason that applicant believed in good faith that the Department would not review and condition the use of other water rights, not specifically captioned in the change authorization, in order to ameliorate adverse effect. (Final Order.)

E-24.4831
Claim constitutes **prima facie** proof of its content; thus, if no contradictory evidence is presented, the right is presumed to be as claimed.

J-21.800
Existence of a provision in a decree which forbids transfer of water right without prior court approval does not deprive the Department of jurisdiction over change.

W-1.870
Runoff which does not return to the source is waste and is not protectable. [Caution: This is an incomplete and somewhat erroneous statement of the law. In some circumstances an appropriator of waste is protected.]

Final Order Date:	06/18/87 REVOKED	**Applicant:**	Haugen
Case #/Type:	P2049-g40R (R) P2050-g40R; P2051-g40R; P3480-g40R thru P3490-g40R; P3529-g40R	**Regional Office:**	Glasgow
Application Date:	04/23/74	**Examiner:**	Elting
Hearing Date:	04/09/87	**Use:**	Irrigation

B-21.780
Department met its burden by producing evidence that permittees had not filed notices of completion, and had not commenced work on the project.

P-5.8021
Permittee defaulted by not appearing and otherwise failed to meet her burden to persuade that the permits had been perfected.

[Permits revoked.]

Final Order Date:	06/22/87 (D)	**Applicant:**	Anson
Case #/Type:	27665-s41I (P)	**Regional Office:**	Helena
Application Date:	06/17/80	**Examiner:**	Elting
Hearing Date:	06/18/85	**Use:**	Irrigation
Reconvened:	08/21/85		
Oral Argument Date:	01/18/86		

M-5.1129
O-23.6994
Whether objector has acquired the needed easements is not necessary since the existence of a ditch right does not determine the validity of a claimed use right. Water rights are wholly distinct and severable from ditch rights.

U-14.1259.00
U-14.1274
B-21.21
E-22.480
Allegations that objector does not have a valid water right at its upper diversion does not constitute evidence of legal or physical availability. Applicant carries the burden of proof on the existence of unappropriated water and adverse effect. Here, applicant attacked objector's means of diversion as unreasonable, but produced no flow measurements or any other information to show the availability of water.

M-5.110
O-23.6994
J-21.800

It is possible objector's diversion systems are very inefficient; however, any determination of the reasonableness of objector’s means of diversion must be made in the ongoing adjudication or another forum.

J-21.800
W-1.870

As part of its statutory duties, the Department may review reasonableness of objector's means of diversion to determine if waste is occurring. [FO]

Final Order Date:	07/20/87 (D)	**Applicant:**	Cochran
Case #/Type:	53892-s76H	**Regional Office:**	Missoula
Application Date:	09/01/83	**Examiner:**	Elting
Hearing Date:	09/27/85	**Use:**	Irrigation

B-15.690

Although soils are poor, many areas in Montana that have poor soils are irrigated, and it is not up to the Department to determine whether the benefits to the appropriator are "sufficient", as long as he is not wasting water.

U-14.1259

Applicant failed to address the issue of unappropriated water. The mere fact that a ditch rider has been hired in only six out of the last twenty years does not mean there is sufficient unappropriated water in Kootenai Creek.

[Permit denied.]

Final Order Date:	07/30/87 (G W/C)	**Applicant:**	Blair
Case #/Type:	G33710-41S (C)	**Regional Office:**	Lewistown
Application Date:	09/07/83	**Examiner:**	Scott
Hearing Date:	09/26/85	**Use:**	Irrigation

A-4.930

Original diversion off Smith Creek, a tributary of Wolf Creek. Application to move point of diversion downstream onto Wolf Creek. Held, under change, applicant can only divert that portion of Wolf Creek flow which represents water contributed thereto by Smith Creek. Diversion of more would increase burden on source and adversely affect objectors.

A-4.9321

If a proposed change would substantially increase the number of calls a downstream appropriator must make, the change will adversely affect that appropriator. (**Dictum**)

A-4.9348.00
B-21.780

Change applicant has the initial burden to show the proposed change will not increase the burden on the source.

A-16.7567
D-21.310

Amendment to application proposed first time at hearing disallowed. Held, to allow would deny due process to interested parties who might have objected.

B-21.780
E-24.4831

In change proceeding, objectors must produce evidence as to the existence, scope, and character of their water rights, and the basis of anticipated injury to these rights.

E-22.480
J-21.800

Change proceeding is not the proper forum to challenge the original grant of the permit applicant wishes to change. Evidence pertaining thereto irrelevant to issues in change proceeding.

Final Order Date:	08/07/87 (G W/C)	**Applicant:**	Estate of Ryen
Case #/Type:	49632-s41H (P) G120401-41H (C)	**Regional Office:**	Bozeman

	G120403-41H (C)		
Application Date:	12/02/82	**Examiner:**	Elting
Hearing Date:	05/31/84	**Use:**	Hydroelectricity

A-4.9348.00 **A-4.9379**	No adverse effect to objector because of delay in return flow where water is electronically released almost instantaneously and distance back to source is only a few thousand feet.
A-4.9394	The element of water quality will be protected to the extent that water in the source will be satisfactory for downstream uses.
A-4.9394 **B-21.780**	Objector must present more than a paucity of evidence that operation of the project will result in aeration or nitrogenation of the source to the extent that the water cannot be used for domestic purposes.
A-16.7516 **B-5.690**	Absent clear-cut evidence that a project is blatantly economically unfeasible, the Department will not find in the negative on the question of whether the use is beneficial.
A-16.7516 **M-5.110**	FERC approval not required in advance of obtaining permit to appropriate for hydropower.
B-21.780	Burden to produce evidence of character of their rights and anticipated injury thereto on objectors. If this burden fulfilled, applicant has burden to prove no such injury will occur.
B-21.780 **E-24.4831**	In conjunction with the requirement that the underlying water right must be shown to exist before it can be changed, applicant must also show the extent and pattern of the past use of water, **i.e.**, its historic use, to ensure that the use is not being enlarged under the guise of a change.
E-22.480	Testimony of a person who has several decades of experience with source is entitled to great weight.
E-24.4820	Issues pertaining to the extent of applicant's water right certified to Water Court.
E-24.4831	Applicant must make a threshold showing of the existence of the water right he seeks to change.
E-24.4831 **J-21.800**	Determining the existence and character of a water right for the purposes of implementing the change statute has nothing to do with adjudicating that right. [Discussion]
I-14.870 **U-14.1259**	Should FERC require greater instream flow protection than imposed herein pursuant to Department of Fish, Wildlife, and Parks' recommendation, permit will be reviewed for new determination of water availability. [FO]
L-1.790 **L-1.940**	Department not applying criteria of § 85-2-311, MCA, (1983) to applications filed before April 29, 1983, the effective date of the statute.
U-14.1274	Even if full requested flows may not always be physically available, applicant can make use of whatever amount of water is available to increment his power generation.
	[Granted.]

Final Order Date:	08/11/87 (G W/C)	**Applicant:**	Klein, Jr.
Case #/Type:	G31306-s76G (C)	**Regional Office:**	Helena
Application Date:	01/12/81	**Examiner:**	Scott
Hearing Date:	08/06/86	**Use:**	Mining

A-4.9348.20
A-4.9394
The proposed changes cannot affect upstream objector, and will not result in increased degradation of water quality to downstream objector. Held, no adverse effect.

E-24.4831
J-21.800
Because certain points of diversion and places of use are not included in the descriptions in the permit, applicant has no present right to utilize same. However, the permit may properly be changed to include same in this proceeding.

E-24.4831
J-21.800
It is not appropriate in change proceeding to attempt to retroactively define the term "mining" in the original permit. However, examiner may have to decide what was probably meant by the term "mining" if such determination is necessary to resolution of the change proceeding. Held, determination not necessary under facts of this case.

[Change authorized.]

Final Order Date:	08/11/87 (G W/C)	**Applicant:**	Houston
Case #/Type:	60117-g76L (P)	**Regional Office:**	Kalispell
Application Date:	05/30/85	**Examiner:**	Scott
Hearing Date:	06/27/86	**Use:**	Irrigation

A-4.930
B-21.780
E-24.4831
Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. If objector thus meets his burden of production, then applicant must prove by substantial credible evidence that the anticipated adverse effect will not occur. If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

A-4.9395
B-21.780
Where objector alleged his well will be interfered with by the one to two-foot drawdown which applicant has shown may occur, but does not state why he could not reasonably exercise his water right under the changed conditions, he has not met his burden of production.

B-5.6979
T-5.800
To ensure that the amount of water requested is put to beneficial use, permit conditioned so that total volume applied to place of use under permit is reduced by volume applied pursuant to other rights already appurtenant to that place of use.

U-14.120
If percolating groundwater is physically available at the well head, it is unappropriated within the meaning of the statute if there is no adverse effect to other wells in the aquifer. [Caution: Statement in proposal for decision at p. 24 that diversion of appropriated water always adversely affects prior appropriators is true only where their seniority cannot be readily exercised, as in the case of percolating groundwater.]

Final Order Date:	09/25/87 (D)	**Applicant:**	Zemliska
Case #/Type:	57870-s76M (P)	**Regional Office:**	Missoula
Application Date:	04/29/85	**Examiner:**	Scott
Hearing Date:	04/13/87	**Use:**	Fish Ponds

A-4.930
P-18.720
The corpus of water diverted for beneficial use is the personal property of its appropriator (until after he has used and relinquished it). Use thereof by another, without the owner's permission, constitutes trespass (**i.e.**, interferes with his right to the exclusive use and enjoyment of the water). [Note: Although the proposal states that trespass is adverse effect to a water right as a matter of law, whether the trespass equals adverse effect is probably a question of fact. Does the trespass actually interfere with the beneficial use of the water by the legitimate appropriator?]

S-15.920
U-14.1259
If all water in a private ditch was legally diverted for beneficial use, there is no unappropriated water in that ditch.

U-14.1259
Water which has been legally diverted by an appropriator is perforce appropriated, **i.e.**, is not unappropriated water.

Final Order Date:	09/28/87 MODIFIED	**Applicant:**	Harpole Family Corp.
Case #/Type:	32798-s76G (P)	**Regional Office:**	Helena
Application Date:	04/27/81	**Examiner:**	Scott
Hearing Date:	11/25/86	**Use:**	Fire Protection

E-13.310
Whether water may be impounded for temporary emergency use pursuant to § 85-1-113(3), MCA, is unclear. However, if the statute is ultimately interpreted to authorize such anticipatory diversion, the board should adopt rules limiting the size of such impoundment.

L-1.940
In case of permit which has not been perfected by putting water to beneficial fire protection use, permittee would normally be considered to have only an inchoate water right. Query: May he call the source to obtain that first beneficial use? Entitlement to such call is only possible if the "Colorado theory" requiring actual beneficial to establish a water right is not applied by the Montana courts in such a case, and the "theory of possessory right" recognized in **Bailey v. Tintinger** for water supply companies is.

P-5.8021
Permittee did not prosecute necessary appropriation works for fire protection, but did create a pond for stock. As stock water was included in the permit, permit modified to delete fire protection, and to reduce size of storage facility to stock pond size.

P-5.8021
T-5.800
Because an estimate of time within which it is reasonable to expect that water diverted and stored for fire protection will have been used to put out an unplanned fire cannot be factually based, and because imposition of any time limit for putting the stored water to the contemplated beneficial use is thus necessarily arbitrary, the Department's imposition of a time limit upon permittee was void **ab initio**, and revocation will not lie upon permittee's failure to use water to put out a fire within such time limit.

T-5.800
However, imposition of a time limit for completion of diversion works, storage of water and installation of fire equipment can be factually based, is therefore not arbitrary, and is valid.

Final Order Date:	10/15/87 (D)	**Applicant:**	Crumpled Horn
Case #/Type:	51353-s41O (P)	**Regional Office:**	Havre
Application Date:	09/30/83	**Examiner:**	Elting
Hearing Date:	06/12/85	**Use:**	Irrigation

A-16.7516
M-5.1129
The criteria do not require as a precondition of permit issuance that applicant prove it has an easement or present right to convey water across the property of another.

B-21.780
Burden of proof on applicant. [FO]

B-21.780
U-14.1259
W-1.870
Objectors made a plausible showing that Brady Ditch seepage already appropriated; applicant failed to prove otherwise. [FO]

D-21.310
Scheduling of hearings back to back within discretion of examiner; no evidence that this schedule prejudiced applicant's case. Motion for rehearing denied. [FO]

D-21.310
E-22.480
Introduction of a PhD. dissertation for the content thereof requires the author be available for cross-examination.

R-5.930
Motion to strike all portions of applicant's oral argument that did not pertain to issues raised in the applicant's exceptions denied. Held, ARM does not provide that written exceptions delimit the scope of oral argument. [FO]

S-15.920
U-14.1259
Stream water which seeps into the stream bed belongs to the stream and its appropriators. [FO]

S-20.110
A riparian stock water user cannot assert such use against irrigation appropriator. [FO]

U-14.1259
Applicant failed to overcome testimony that the full amount of water in Muddy Creek is required by downstream senior appropriators for stock use.

U-14.1274
W-1.870
Applicant seeking to appropriate water which has leaked from Brady Ditch into Muddy Creek for many years did not quantify amount of leakage or when it occurs. Held, applicant failed to show that water is physically available.

[Denied]

Final Order Date:	10/21/87 REVOKED	**Applicant:**	Strickler
Case #/Type:	38493-s43QJ (R)	**Regional Office:**	Billings
Application Date:	N/A	**Examiner:**	Scott
Hearing Date:	10/16/87	**Use:**	Irrigation

P-5.8021
Nothing done to develop permit and demonstrated lack of due diligence is cause to revoke.

P-5.8031
Extended hunting for the "right price" is not due diligence. Cannot grant extension.

[Permit revoked.]

Final Order Date:	11/06/87 (G)	**Applicant:**	Chirico/Tortoreti
Case #/Type:	52843-g76G (E)	**Regional Office:**	Helena
Application Date:	08/17/83	**Examiner:**	Elting
Hearing Date:	09/30/87	**Use:**	Irrigation

A-16.7516
P-5.8021
Filing of a notice of completion instead of a request for extension of time to complete when permittee did not understand the difference held not to lead to finding of lack of intent to appropriate water for undeveloped portion of project.

P-5.8031
Where permittee fails to perfect right, but has proceeded with due diligence, permit will not be revoked; rather an extension of time will be granted if permittee wishes to proceed.

P-5.8031
Permittee otherwise diligently worked on the project, but was unable to complete it due to unforseen supervening circumstance (death in the family). Held, supervening circumstance good cause.

[Extension granted.]

Final Order Date:	11/10/87 Not Mod.	**Applicant:**	Sears
Case #/Type:	783-g41G (R)	**Regional Office:**	Helena
Application Date:	10/23/73	**Examiner:**	Elting
Hearing Date:	11/05/87	**Use:**	Irrigation

B-21.780
P-5.8021
The Department has reasonable cause for requiring the permittee to show cause why the permit should not be revoked.

E-22.480
Well documented findings recently made would normally be entitled to more weight than the perfunctory 1976 field report. However, testimony tended to show the more recent report in error, and the 1976 report was prepared closer to date of completion.

J-21.800
The Department's decision on modification of a permit is discretionary.

[Permit not modified.]

Final Order Date:	11/13/87 (G W/C)	**Applicant:**	Ulm
Case #/Type:	60049-s76H (P)	**Regional Office:**	Missoula
Application Date:	08/21/85	**Examiner:**	Scott
Hearing Date:	08/27/86	**Use:**	Domestic/Stock

A-16.7567
D-21.310
Amending application during hearing to increase size of offstream storage reservoir did not prejudice public or objectors.

U-14.1259
Where evidence shows that there is almost always insufficient water in the source from July 15 to September 15 to supply all existing appropriations, there is no unappropriated water in the source during that period.

Final Order Date:	12/01/87 (D)	**Applicant:**	DeBuff
Case #/Type:	55880-40A (P)	**Regional Office:**	Lewistown
Application Date:	05/09/84	**Examiner:**	Elting
Hearing Date:	03/24/87	**Use:**	Irrigation

A-4.930
U-14.1259
Evidence and applicant's admission show his appropriation will affect surface flow of Cold Spring Creek. However, there is no evidence that the resulting reduction would not aggravate water shortages experienced downstream from area affected by project.

U-14.1274 Full amount of groundwater is physically available during part of period of appropriation; later it fluctuates. However, applicant needs permit for full requested amount in order to appropriate full amount when available.

Final Order Date:	12/11/87 REVOKED	**Applicant:**	Bickford
Case #/Type:	34125-s43B (P)	**Regional Office:**	Bozeman
Application Date:	07/01/81	**Examiner:**	Elting
Hearing Date:	11/30/87	**Use:**	Irrigation

P-5.8021
P-5.8031 Permittee's failure to obtain the diversion and distribution equipment necessary due to continuing economic difficulties held insufficient cause not to revoke.
[Permit revoked.]

Final Order Date:	12/30/87 (G W/C)	**Applicant:**	Galt
Case #/Type:	G146094-41J (C)	**Regional Office:**	Lewistown
Application Date:	02/14/84	**Examiner:**	Elting
Hearing Date:	10/19/87	**Use:**	Irrigation

J-21.800 The legislature clearly intended that adjudication and change processing proceed simultaneously; therefore, changes in claimed rights may be granted prior to issuance of final decree, subject to modification thereafter.

W-1.870 Interruption of the waste appropriator's source of supply cannot not constitute an adverse effect to him as a matter of law, as his water right does not include the right to compel the generator of such waste to continue its generation.

Final Order Date:	01/14/88 (G W/C)	**Applicant:**	Garrison
Case #/Type:	43104-s76D (P)	**Regional Office:**	Kalispell
Application Date:	12/08/81	**Examiner:**	Scott
Hearing Date:	05/08/87	**Use:**	Irrigation

B-21.780
E-14.9376 Assuming examiner must consider the public trust, objectors averring violation of alleged "trust values" failed to establish that lowering of lake level by a few feet would impair such values. Held, there is no proof of trust violation, and permit must issue under mandatory terms of § 85-2-311, MCA.

B-21.780
E-14.9376
J-21.80 Assuming **arguendo** that the Department **qua** examiner must consider the public trust when hearing permit applications, omission from the statute of express requirement that applicant must prove no violation of public trust may simply mean that it is the duty of those averring violation of the trust to prove violation.

D-21.310 Held, untimely objectors may participate in the hearing subject to objection to their presentation of evidence not discovered by applicant.

I-14.900
J-21.800
S-21.660 Failure to obey terms of interim permit not in itself grounds for summary denial of provisional permit.

I-14.900
S-21.660 Failure to collect data pursuant to interim permit may result in summary denial if necessary data was not otherwise collected.

S-21.660 Examiner issuing interim permit did not enter findings and conclusions pertinent to decision on provisional permit, and parties

would not stipulate to new examiner reviewing original hearing record in order to enter these. Held, fresh record must be compiled in **de novo** proceedings re the provisional permit. No summary determination based on old record will lie.

U-14.120 Section 85-2-311(1)(a), MCA, requires that in at least some years, the amount of water applicant seeks is in the source throughout the proposed period of appropriation.

U-14.1274 (Only water rights on lake are small stock water and domestic rights. **See** Findings.) Due to variations in the production of springs supplying it, lake levels may in some years fall below level of applicant's siphon, but in some years will remain at or above it. Held, unappropriated water is available at applicant's point of diversion in at least some years.

Final Order Date:	01/14/88 (G W/C)	**Applicant:**	Reisch
Case #/Type:	60155-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	06/17/85	**Examiner:**	Elting
Hearing Date:	05/11/87	**Use:**	Domestic

U-14.120 Where water shortages occur in July and August, but applicant has diverted the requested amount of water for some time prior to such shortages, the shortages cannot be attributed to his diversion. Thus, there must be at least as much "unappropriated" water in the source during that period as he has diverted in the past.

U-14.1259 Where Orsborn estimation predicts average annual flow of 9 cfs and all claims and permits on the source add up to 6 cfs, there are an average of 3 cfs of unappropriated water in the source. (However, facts here show water shortages in July and August, so average not reflective of whether unappropriated water is available throughout the period of use.)

Final Order Date:	01/20/88 MODIFIED	**Applicant:**	Moholt
Case #/Type:	2134-g41I (R)	**Regional Office:**	Helena
Application Date:	11/03/74	**Examiner:**	Scott
Hearing Date:	11/24/87	**Use:**	Irrigation

B-5.6979
P-5.800 Department may not, after issuance of a permit, revoke same on the basis that the amount of water granted was excessive unless evidence which could not have been adduced at the time of permit issuance has been discovered.

P-5.8032 Permittee's failure to divert full flow allowed under terms of the permit for two consecutive years <u>after</u> the passing of the completion date set forth in the permit does <u>not</u> constitute failure to follow the permit.

Final Order Date:	01/27/88 (D)	**Applicant:**	Meadow Lake Country Club Estates
Case #/Type:	55749-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	03/28/84	**Examiner:**	Scott
Hearing Date:	02/28/86	**Use:**	Domestic/Irrigation

A-4.9395
B-21.780
E-24.4879 Evidence shows that applicant proposed diversion will lower the water levels in objectors' wells. Applicant did not prove that objectors could reasonably operate their wells with lowered water. Held, applicant failed to prove no adverse effect.

A-4.9395
R-5.930 To support a finding of adverse effect, predicted drawdown must be matched with facts showing that such drawdown will

will impair existing wells. [FO]

A-4.9395
R-5.930
Criticisms of Department report made for the first time at oral argument will only result in modification of finding based thereon if report shown to be entitled to virtually no weight, thus rendering the finding not based on substantial credible evidence. Finding that deep aquifer which applicant penetrates and shallow aquifer of objectors' hydrologically connected by "vertical leakage" sustained. [FO]

A-16.750
Applicant company was dissolved and its interests transferred to successor entities. Application treated as if original applicant continued to exist.

B-5.690
S-20.720
Storage for irrigation not a beneficial use in itself, but is necessary and incidental to the irrigation use.

B-5.6910
Golf course irrigation beneficial use.

B-5.6910
Aesthetic use of water assumed **arguendo** to be beneficial use. However, applicant did not show why keeping storage ponds filled with water during winter months would be an aesthetic use of water.

B-21.7835
Objector's testimony that his well was rendered nonfunctional by operation of well similar to one proposed by applicant, and the proximity of his well to objector's well was sufficient to create a plausible (**prima facie**) case of adverse effect to objector. Therefore, applicant had the burden to disprove such adverse effect. [FO]

R-5.930
No justification to reopen record in this case. [FO]

Final Order Date:	02/11/88 (G W/C)	**Applicant:**	Sackman, Inc.
Case #/Type:	54911-g42M (P)	**Regional Office:**	Miles City
Application Date:	01/26/84	**Examiner:**	Elting
Hearing Date:	None	**Use:**	Irrigation

A-4.930
A-4.9395
I-14.900
Applicant did not sustain burden that proposed well would not adversely affect wells of objectors. Held, because groundwater information is inherently difficult to obtain prior to drilling and pumping, interim permit grant proper.

E-22.408
Whether or not applicant has already expended money in furtherance of appropriation not material to decision. [FO]

E-22.408
Although farmer's testimony given great weight, here, expert testimony outweighs it because farmer's testimony nonspecific. [FO]

E-22.408
S-15.690
Whether a prospective appropriator could get water from another source is irrelevant. [FO]

E-24.4879
M-5.110
Appropriators are not entitled to tie up a source of water simply to avoid having to upgrade their means of diversion. [FO]

A-4.9394
I-14.900
Exception to proposal alleging that even interim permit would adversely affect objectors because it would pull alkaline water into aquifer held not probable based on facts in record. [FO]

[Interim testing done. Second proposal issued proposing to grant based on interim testing conclusion of no adverse effect. Second final order issued granting provisional permit.]

Final Order Date:	02/29/88 (G W/C)	**Applicant:**	Hern
Case #/Type:	61197-s76H (P)	**Regional Office:**	Missoula
Application Date:	11/21/85	**Examiner:**	Elting
Hearing Date:	07/13/87	**Use:**	Fish/Stock

A-4.930 No adverse effect where bypass flow which adequately supplies needs of downstream stock use is required.

A-16.7567
U-14.120 Where there is not sufficient unappropriated water available to supply the requested amount, but evidence shows the amount which is available will suffice for the use proposed, the Department may issue a permit for less than the amount requested.

Final Order Date:	03/14/88 (G W/C)	**Applicant:**	Worf
Case #/Type:	V111165-76H(S) V151753-76H(S)	**Regional Office:**	Missoula
Application Date:	04/01/1895	**Examiner:**	Scott
Hearing Date:	03/13/86	**Use:**	Irrigation

A-4.9348.00
A-4.9379 Change from flood to sprinkler irrigation does not in itself increase burden on source, as the water which was diverted and then returned after flood irrigation, need not be diverted at all for sprinkler irrigation.

A-4.9348.10
A-4.9348.10 Transfer of a portion of a right to more acreage than that portion of the right historically irrigated may result in an enlargement of the existing right which could adversely affect appropriators with later priority dates by increasing net source depletion.

A-4.9348.10 A mere allegation of salvage is insufficient to prove net depletion of the source will not increase when acreage is expanded.

A-4.9348.10
B-21.780 As increasing the acreage to which a portion of a right is appurtenant very likely will increase the amount of water consumed for irrigation, a change cannot issue absent proof that net source depletion will not increase.

A-4.9379
E-24.4894 Water right does not include the right to recapture return flows where the original appropriators did not commence recapture within a reasonable time after initiation of appropriation.

E-24.4810 Absent proof of intent to abandon, claimed rights treated as legitimate even if unused for a long time.

J-21.800 No change authorization is necessary for mere conversion from flood to sprinkler irrigation.

Final Order Date:	04/15/88 (G W/C)	**Applicant:**	Town
Case #/Type:	61978-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	12/31/85	**Examiner:**	Scott
Hearing Date:	06/08/87	**Use:**	Irrigation

A-4.9394 Where appropriated water enters septic field which may drain into another domestic water supply, conditioning permit to require compliance with health regulations is sufficient to satisfy criterion of no adverse effect.

A-16.7516 The law does not require applicant to use the water personally, only that it be used.

A-16.7521 Land description need not be exact as long as reasonably precise.

B-5.6979
E-22.480 Department's estimate of what amount of water is reasonable for a particular use is **prima facie** evidence of the maximum amount which can be applied without waste. If applicant applies for amounts greater than this estimate, he must prove the excess will not be wasted.

E-22.480
M-5.110 Prior use of diversion works is admissible if relevant to ascertain ability of works to adequately function. Whether such prior use was "illegal" is not relevant.

J-21.800 Department may grant permit before completion of statewide adjudication.

U-14.1259 Where only 20% of flow is ever simultaneously diverted from a source under existing rights, 80% of water is legally available.

Final Order Date:	04/15/88	**Applicant:**	Fairmont Hot Spgs.
Case #/Type:	60551-g76G (P)	**Regional Office:**	Helena
Application Date:	08/05/85	**Examiner:**	Compton
Hearing Date:	01/25/88	**Use:**	Irrigation/Domestic

A-4.930 Where applicant has pumped existing well as requested in the application for two years, and objector has had no trouble obtaining water from his well, evidence is sufficient to prove no adverse effect to objector's right.

[Exceptions filed; no modification of holdings.]

Final Order Date:	04/15/88 (G W/C)	**Applicant:**	Fairmont Hot Spgs.
Case #/Type:	65936-g76G (P)	**Regional Office:**	Helena
Application Date:	05/13/87	**Examiner:**	Compton
Hearing Date:	01/25/88	**Use:**	Recreation

B-5.6979 Where permit is to replace use of claimed right (which may not be verified on adjudication), permit must be conditioned to prevent use of both rights.

Final Order Date:	04/27/88 (G W/C)	**Applicant:**	Cobler
Case #/Type:	60194-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	07/12/85	**Examiner:**	Elting
Hearing Date:	07/02/87	**Use:**	Irrigation

A-4.930 Having to call for water does not constitute adverse effect per se.

A-16.7567
B-5.6979 Where place of use reduced by application amendment, flow and volume must also be reduced.

U-14.1259 The fact that more flow arrives at Kalispell than is released by FWP from Ashley Lake upstream (except in July and August) indicates that the water needs of all users in the interim are being met, and that unappropriated water is available in the source of supply except in July and August. However, evidence that objectors can never obtain sufficient water in July and August shows that there will never be a year when applicant would not be called during that period. There is thus no unappropriated water in the source during that period.

[Exceptions filed; no modification of holdings.]

Final Order Date:	05/10/88 (G W/C)	**Applicant:**	Kolbeck Ranches
Case #/Type:	56793-s76GJ (P)	**Regional Office:**	Missoula
Application Date:	08/17/84	**Examiner:**	Scott
Hearing Date:	07/08/87	**Use:**	Irrigation

B-5.6979
B-21.780
Where amounts applied far exceed Department estimates of reasonable need, applicant must present evidence justifying the excess.

B-5.6979
S-21.760
Diversion under permit for supplemental water is restricted to amount reasonably necessary less the amount diverted under the claimed right.

M-5.110
Where in the past applicant has been able to divert using a ditch because down-ditch users have not required their water, and the capacity of the ditch is insufficient to carry both the applied for water and theirs, and the circumstances of the down-ditch users are liable to change in the future necessitating their resumed use of the ditch, the means of diversion cannot be said to be adequate.

U-14.1259
Where record shows that water, formerly not called for, will most probably be legitimately called for in the future, that water must be considered appropriated (legally unavailable).

Final Order Date:	05/17/88 (D)	**Applicant:**	Hoven
Case #/Type:	64463-s43D (P)	**Regional Office:**	Billings
Application Date:	05/21/87	**Examiner:**	Rolf
Hearing Date:	02/04/88	**Use:**	Stock Water

U-14.1259
Applicant failed to show that there was ever a time when all creek water would not be needed by prior appropriator. Held, insufficient proof that unappropriated water exists in source. [Permit denied.]

Final Order Date:	05/31/88 (D)	**Applicant:**	Hadley
Case #/Type:	60662-s76G (P)	**Regional Office:**	Helena
Application Date:	11/04/85	**Examiner:**	Scott
Hearing Date:	12/11/87	**Use:**	Irrigation

A-16.7567
Department may modify requested period of appropriation so that shorter period is granted, so long as applicant's burden under 85-2-311 is met during the shortened period.

U-14.120
To comply with § 85-2-311(1)(a), MCA, applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator.

[Exceptions filed; no modification of holdings. Permit denied.]

Final Order Date:	06/01/88 (G W/C)	**Applicant:**	Dakolios
Case #/Type:	63575-s76H (P)	**Regional Office:**	Missoula
Application Date:	08/19/86	**Examiner:**	Larson
Hearing Date:	03/22/88	**Use:**	Fish Pond

U-14.1259.70
W-1.870
Applicant applied for 300 gpm up to 3 acre-feet per annum to make up for evaporation and seepage in onstream reservoir. He did not apply for nonconsumptive flow through. Although claims on source indicate all available water had been appropriated, seepage evidently returned to source (so that portion of proposed use nonconsumptive)

and examiner apparently viewed small evaporative use (consumptive) as having only **de minimus** effect on source. Held, 300 gpm up to 3 acre-feet per annum unappropriated water available. [Permit granted.]

Final Order Date:	06/20/88 (D)	**Applicant:**	Bruce
Case #/Type:	63456-s41I (P)	**Regional Office:**	Helena
Application Date:	10/02/86	**Examiner:**	Elting
Hearing Date:	02/09/88	**Use:**	Fish Pond

U-14.1259.70 Onstream fish pond will consume some water. Therefore, at a minimum, applicant must provide substantial credible evidence that unappropriated water is available for the smallest estimated consumptive use of the project, as well as for the nonconsumptive flow through. No flow data was presented. [Permit denied.]

Final Order Date:	06/22/88 (G W/C)	**Applicant:**	Hilltop Angus
Case #/Type:	55943-s41S (P)	**Regional Office:**	Lewistown
Application Date:	08/15/84	**Examiner:**	Elting
Hearing Date:	01/11/88	**Use:**	Irrigation

A-4.930
B-21.7835 No evidence to make objector's allegation of adverse effect (that applicant's diversion during high water would cause the source to dry up sooner) plausible. Applicant need not disprove.

T-5.800
U-14.1259 Objectors require stock water continuously at their point of diversion. The flow of Wolf Creek fluctuates widely. Therefore, there will never be a year when applicant would not be called. However, the mean flow of Wolf Creek is 6 cfs. Thus, if applicant is only allowed to divert at times that there are more than 6 cfs in the source, there will be some years when he will not be called for water. Held, § 85-2-311(1)(a), MCA, met if restriction imposed.

[Permit granted with conditions.]

Final Order Date:	06/23/88 (G W/C)	**Applicant:**	Hughes Ranch
Case #/Type:	23770-41F (C)	**Regional Office:**	Bozeman
Application Date:	06/12/85	**Examiner:**	Elting
Hearing Date:	03/24/88	**Use:**	Irrigation

A-4.9348.20 No intervening points of diversion between old point of diversion and new point of diversion. No evidence of adverse effect to other rights.

J-21.800 Water court does not have jurisdiction to "approve" change in point of diversion made after 1973; that is within exclusive jurisdiction of Department.

J-21.800
M-5.1129 Whether move of right from one ditch to another will require expanded easement irrelevant as outside of Department jurisdiction.

J-21.800
O-2.490 Department has jurisdiction to make findings and conclusions re objections.

O-2.490 Objections filed were sufficient to meet requirements of statute: they were timely, stated the name and address of each objector, and each listed facts tending to show one of the listed bases for objection. Motion to dismiss objection denied.

Final Order Date:	07/21/88 (G W/C)	**Applicant:**	Perkins
Case #/Type:	60567-s76G (P)	**Regional Office:**	Helena
Application Date:	08/12/85	**Examiner:**	Brasen
Hearing Date:	03/17/88	**Use:**	Irrigation

M-5.110
S-20.720
Adequacy of operation of onstream reservoir includes accountablilty for passing upstream stored water and natural flow to downstream users. This can be accomplished by ditching the natural flow around the dam or by measuring equal flows at the inlet and outlet.

S-20.720
If cannot convey stored water to place of use, may divert natural flow of stream if an equal amount of stored water is made available to rightful appropriators of natural flow. Section 85-2-413, MCA.

S-20.720
It is permissible to use the source to convey water from an onstream reservoir to a lower point of diversion. However, where the district court has determined that in travelling from onstream reservoir to downstream point of secondary diversion there is a loss of 10% of released water to evaporation and seepage, permit conditioned so that applicant must reduce his diversion at the secondary point of diversion by 10% of the amount released from the reservoir.

U-14.120
Where water to be diverted between November and April for storage, and evidence shows that water is then physically available and that in most years applicant will not be called during this period by seniors, § 85-2-311(1)(a), MCA, is satisfied.

Final Order Date:	08/18/88 (G W/C)	**Applicant:**	Ridgewood
Case #/Type:	12826-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/16/77	**Examiner:**	Elting
Hearing Date:	09/22/86	**Use:**	Domestic
Oral Argument Date:	02/23/88		

A-4.9395
Only data on record, pump test results, does not support a finding that there is any significant hydraulic connection between the fracture system that feeds applicant's well and that which feeds objectors'.

A-4.9395
Cannot grant permit for amount requested as failure to conduct test at rate requested by applicant (75 gpm) but only at 35 gpm shows only that hydraulic connection between systems is insignificant at 35 gpm.

A-4.9395
R-5.930
Winter test pump will show hydraulic connection between systems, if one exists, despite "no load" situation on groundwater. Finding of minimal connection sustained. [FO]

A-4.9395
T-5.800
Existence of certificate in application for other pumping from system complicates matters. Combined pumping may adversely affect objectors. Therefore, applicant may operate both wells simultaneously, but may only produce hereunder the extent he does not under certificate.

E-22.480
Failure to do pump test during period of maximum withdrawal by objectors does not invalidate test results; **au contraire**.

E-22.480
R-5.930
Testimony of one witness not stricken on review, as assessing the credibility of a witness is a matter within examiner's discretion. [FO]

M-5.110
Well cannot produce requested amount. Held, means of diversion

U-14.1274 inadequate.

R-5.930 New evidence inadmissible at oral argument. [FO]

R-5.930 Finding of examiner as to adverse effect held not clearly erroneous even though evidence in record indicated possible adverse effect from similar unrelated well in past. [FO]

R-5.930 Overruled examiner's proposed condition allowing use of both permit and certificate simultaneously as "improper"; rather, they must be used alternately. [FO] [?]

U-14.120 Applicant proved there is unappropriated water in source although not as much as requested.

Final Order Date:	08/23/88 (G W/C)	**Applicant:**	East Gate Water Users Assn.
Case #/Type:	57025-g41I (P)	**Regional Office:**	Helena
Application Date:	10/18/84	**Examiner:**	Scott
Hearing Date:	11/17/87	**Use:**	Municipal

A-4.930
B-21.780 Applicant showed maximum aquifer drawdown would be .12 foot. No objector alleged that such drawdown would adversely affect his right. Therefore, held no adverse effect.

I-14.900 Held, proper to allow testing under interim permit because of the peculiarly inaccessible nature of groundwater information.

U-14.1274 Where record shows that pumping of all four of applicant's wells may cause sufficient draw down in two of those wells so that water unavailable, § 85-2-311(1)(a), MCA, not met.

Final Order Date:	08/24/88 (D)	**Applicant:**	Unruh
Case #/Type:	1819-s40J (E)	**Regional Office:**	Havre
Application Date:	07/21/76	**Examiner:**	Lighthizer
Hearing Date:	05/26/88	**Use:**	Irrigation

P-5.8031 Permittee of 1974 did nothing on the project in 14 years citing financial hardship. However, 44 junior permittees had perfected. Held, no due diligence and no physical factors beyond permittee's control. [Extension denied.]

Final Order Date:	08/24/88 (G W/C)	**Applicant:**	Blair
Case #/Type:	56031-s41S (P)	**Regional Office:**	Lewistown
Application Date:	11/07/84	**Examiner:**	Elting
Hearing Date:	01/11/88	**Use:**	Irrigation

A-4.930
B-21.7835 No evidence to make objector's allegation of adverse effect (that applicant's diversion during high water would cause the source to dry up sooner) plausible. Applicant need not disprove.

A-16.7576
D-21.310 Lack of statement of requested flow rate in public notice held nonprejudicial.

T-5.800
U-14.1259 Senior appropriator Hilltop Angus Ranch must bypass 6 cfs (**see** 55943) and it uses 1.67 cfs. Further, there will never be a year when applicant is not called as the flow of Wolf Creek fluctuates widely. However, if applicant is only allowed to divert at times that there are more than 7.67 cfs in the source, there will be some years when he will not be called for water. Held, if restriction imposed, § 85-2-311(1)(a), MCA, met.

[Permit granted with conditions.]

Final Order Date:	08/24/88 (D)	**Applicant:**	Schnee/Waggoner
Case #/Type:	64912-s41J (P)	**Regional Office:**	Lewistown
Application Date:	08/29/87	**Examiner:**	Larson
Hearing Date:	05/24/88	**Use:**	Mining

B-15.690 Applicant must have a fixed and definite plan to appropriate all of the water he requests. Here, applicant satisfied that requirement for only part of requested appropriation. Application reduced to conform with present intent.

B-21.7873 Because water will flow through settling ponds and only return to source via seepage through the ground, there will probably be a significant delay in return flow. Applicant did not prove otherwise, and because such delay would distort the flow regime which downstream appropriators' rely on, applicant failed to prove no adverse effect.

E-22.408 Opinions and recommendations in letter from Department of Health and Environmental Sciences regarding water quality held inadmissible hearsay. However, notice was taken of the fact that samples were taken and analyzed.

E-22.408 Field inspection report conducted by state agency held admissible, although hearsay.

[Permit denied.]

Final Order Date:	08/26/88 (D)	**Applicant:**	Unruh
Case #/Type:	3051-s40J (E)	**Regional Office:**	Havre
Application Date:	07/14/76	**Examiner:**	Lighthizer
Hearing Date:	05/26/88	**Use:**	Irrigation

P-5.8031 Nothing done to develop appropriation in 14 years. No due diligence.

P-5.8031 Insufficient funds is not excuse for failing to proceed.

Final Order Date:	09/20/88 (D)	**Applicant:**	Lee, Joe R.
Case #/Type:	51232-g41O (P)	**Regional Office:**	Havre
Application Date:	01/12/83	**Examiner:**	Rodriguez
Hearing Date:	04/15/88	**Use:**	Irrigation

A-4.9383
B-21.780 Evidence that applicant's proposed pit well is 1.25 to 1.5 miles from objector's canal which runs through gravelly soil held sufficient to require that applicant prove that such well will not induce seepage from the ditch.

E-24.408 Request to leave record open for submission of additional evidence denied on grounds that applicant had four years to prepare his case and because the record had already been reopened once.

E-24.480
J-21.800 Department has no duty to research its records for applicant preparing case. Applicant must specifically identify records he wants reproduced.

U-14.1274 Physical presence of water at point of diversion is not by itself proof of unappropriated water.

U-14.1274 Uncontradicted evidence that aquifer may not produce requested amount show amount requested not available.

[Denied.]

Final Order Date:	09/22/88 (G W/C)	**Applicant:**	DeBruycker
Case #/Type:	G136329-41O (C) G136330-41O & G136331-41O	**Regional Office:**	Havre
Application Date:	04/01/85	**Examiner:**	Elting
Hearing Date:	07/10/86	**Use:**	Irrigation

A-4.9348.00
B-21.780
E-24.4831

Appropriators are entitled to maintenance of original stream conditions unless the appropriation can be reasonably exercised under changed conditions. In order that such determination can be made, change applicant must provide sufficient information as to historic consumption and pattern of use.

A-4.9348.00

In addition to proving change will not consume a greater volume of water than historically consumed, applicant must prove that it will not consume greater flow, if an increase in source flow depletion will adversely affect other appropriators.

A-4.9348.00

If it historically followed a certain pattern of use, applicant must show either that the pattern will not change, or that such change will not adversely affect other appropriators.

Final Order Date:	09/23/88 (G)	**Applicant:**	Dippel
Case #/Type:	28025-s76H (E)	**Regional Office:**	Missoula
Application Date:	N/A	**Examiner:**	Scott
Hearing Date:	07/01/88	**Use:**	Irrigation

P-5.8031

Although this was a close call, examiner determined that applicant finding a contractor and having plans drawn up one year, searching for another contractor the next year because the first one increased the price, and also staking off the construction site that year was sufficient to show due diligence. [Extension granted.]

Final Order Date:	10/28/88	**Applicant:**	Careless Creek
Case #/Type:	W1339988-40A (D) W1339989-40A (D) W139988-40A (C) W139989-40A (C) P50641-40A (C) 50641-40A (G)	**Regional Office:**	Lewistown
Application Date:	02/04/88	**Examiner:**	Lighthizer
Hearing Date:	07/21/88	**Use:**	Irrigation

A-4.9348.20

Where there is water at new point of diversion more often than at old point of diversion, and 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.

B-21.780
E-24.4831

Where applicant has presented duly filed claims of existing right, and objector presented no evidence refuting existence of same, the contents of said claims are accepted as the true parameters of the existing right.

(W139988 & 139989 Denied.)

Final Order Date:	11/01/88 (IO)	**Applicant:**	McBride
Case #/Type:	64545-76H (P)	**Regional Office:**	Missoula
Application Date:	12/23/86	**Examiner:**	Scott
Hearing Date:	07/29/88	**Use:**	Domestic

A-4.9395
T-5.800
U-14.1274
Because of the possibility of long term depletion of the aquifer, applicant may only appropriate therefrom if he augments the aquifer.

A-4.9395
U-14.1274
The hastening of a forseeable adverse effect (long term aquifer depletion) is in itself an adverse effect.

B-21.7835
Appropriation is from temporary controlled ground water area. Therefore, in addition to regular permit criteria, applicant must satisfy criterion set in the order establishing the T.C.G. area. (Examiner then analyzes what said criterion requires.)

E-22.408
Uncontradicted expert testimony that there will be no well interference is clear and convincing evidence.

[Final decision postponed for three years pending outcome of aquifer recharge efforts.]

Final Order Date:	11/03/88 (D)	**Applicant:**	Rasmussen
Case #/Type:	G211081-76LJ	**Regional Office:**	Kalispell
Application Date:	09/04/84	**Examiner:**	Siroky
Hearing Date:	08/25/88	**Use:**	Irrigation

E-24.4810
Where SB #76 claim filed late, there is a conclusive presumption of abandonment of the water right concerned.

E-24.4831
J-21.800
A change authorization cannot be granted where there is no water right to change.

Final Order Date:	11/04/88 (G)	**Applicant:**	Hannah
Case #/Type:	2482-s41S (E)	**Regional Office:**	Lewistown
Application Date:	06/03/74	**Examiner:**	Elting
Hearing Date:	06/27/88	**Use:**	Irrigation/Stock

B-21.780
P-5.8031
Necessity of showing due diligence was always part of showing good cause for extension. Therefore, expression of same in 1987 version of statute does not heighten permittee's burden of proof, and does not impair a vested right.

E-22.480
Objector's evidence as to water availability not proper or relevant at extension hearing.

P-5.8031
Search for a good deal on construction material not in itself due diligence. However, steady efforts to obtain financing for the project does constitute due diligence.

Final Order Date:	11/04/88 (D)	**Applicant:**	DeBruycker
Case #/Type:	58133-s41O (P)	**Regional Office:**	Havre
Application Date:	04/01/85	**Examiner:**	Elting
Hearing Date:	07/10/86	**Use:**	Irrigation
Oral Argument Date:	03/02/88		

A-4.9392
B-21.780
M-5.110
Applicant's onstream reservoir, already in place, and from which he continually pumps pursuant to other rights, captures the entire flow of the source except what overflows dam. This means of diversion

S-20.7 together with downstream objector's testimony that before the impoundment, there was flow available for their junior rights in the summer, but that now there is none, held sufficient to raise issue of adverse effect to objector's downstream junior rights due to inadministrable nature of appropriation works. Applicant's naked assertion that the alleged shortage was due to abnormally dry years held insufficient to prove no adverse effect.

T-5.800 Where a relatively complex plan of operation is necessary in order that a permit be administrable, and applicant does not provide that plan, the Department will not unilaterally impose its own plan as a condition placed on the permit. [FO] [Appealed to District Court.]

Final Order Date:	11/09/88 (G W/C)	**Applicant:**	Clarke
Case #/Type:	60893-g76D (P)	**Regional Office:**	Kalispell
Application Date:	08/22/85	**Examiner:**	Elting
Hearing Date:	10/09/87	**Use:**	Irrigation

A-4.930 Failure of senior surface appropriators to complain to applicant about a reduction in the spring which supplied them with water is not indicative of lack of adverse effect when seniors did not know about the connection between his well and the spring.

A-4.930
B-21.780 Where there is no indication in the record that objector’s means of diversion (impounding water produced by a spring) is unreasonable, and where the evidence otherwise shows that the flow of the spring may be reduced by applicant's well to a point where objectors can no longer divert, applicant must prove that such alleged effect will not occur. Here, applicant failed to make such proof.

[Exceptions filed; order modified, but no modification of holdings.]

Final Order Date:	11/22/88 (D)	**Applicant:**	Bureau of Land Management/USDI
Case #/Type:	64800-s40B (P)	**Regional Office:**	Lewistown
Application Date:	03/06/87	**Examiner:**	Jones
Hearing Date:	05/17/88	**Use:**	Fish/Stock

A-4.930
A-4.9312 Applicant proposes to install only a trickle tube for water release from its dam. However, evidence shows that without a better drainage device in applicant's dam, objector downstream would be deprived of water because applicant could not release water when it was called for. Held, dam design inability to respond to call would adversely affect objector. [Permit denied.]

Final Order Date:	12/08/88(G W/C)	**Applicant:**	Sowers
Case #/Type:	65779-s76M (P)	**Regional Office:**	Missoula
Application Date:	06/05/87	**Examiner:**	Rodriguez
Hearing Date:	08/31/88	**Use:**	Irrigation

T-5.800 Where objectors and applicant have entered into a stipulation for inclusion of a condition in any permit issued, said stipulation is binding on applicant and the condition will be included if it furthers compliance with the statutory criteria.

U-14.1274 If evidence shows that only 6 gpm are physically available, a permit may not issue for more than that, though applicant has requested more in its application.

Final Order Date:	12/12/88 (D)	**Applicant:**	Zinne Brothers
Case #/Type:	27941-s40A (E) 50642-s40A (E)	**Regional Office:**	Lewistown
Application Date:	N/A	**Examiner:**	Elting
Hearing Date:	04/22/88	**Use:**	Irrigation

A-4.930
R-5.930
Refusal to require bypass flow sustained. [FO]

E-22.480
S-21.6621
U-14.120
Prior decisions of the Department relating to the existence of unappropriated water in the source are **prima facie** proof regarding existence thereof. No collateral estoppel however, as prior findings are subject to challenge. [FO]

P-5.8031
Failure to proceed with due diligence because permittee does not wish to risk investing money in a project that he may or may not be able to utilize in the future depending on the outcome of the adjudication, and whether there is a promising assurance that there will be adequate flow, held not good cause for granting of extension.

R-5.930
Examiner's findings only reversed if clearly erroneous.

R-5.930
No new evidence allowed at review stage.

R-5.930
Finding of Fact #2 held clearly erroneous. [FO]

U-14.1259
Imposes "Musselshell" conditions. [FO]
[Extension denied.]

Final Order Date:	12/15/88 (D)	**Applicant:**	Ohs
Case #/Type:	63796-s41G (P)	**Regional Office:**	Bozeman
Application Date:	02/26/87	**Examiner:**	Rodriguez
Hearing Date:	02/11/88	**Use:**	Diversion

B-21.7835
H-9.390
L-1.790
Clear and convincing proof is that degree of proof which is more than a preponderance of evidence but less than beyond a reasonable doubt.

E-22.408
Applicant requested problem with water measurements be overlooked as objector had not pointed it out. Held, Department has duty to examine evidence independent of objector's actions. Request denied. [FO]

L-1.790
U-14.1274
Evidence showing sufficient flows to provide water to applicant at point below confluence of tributaries, when actual diversion will be made upstream of such confluence, held not clear and convincing that sufficient water physically available for appropriation.

P-21.150
Finding, which implied that FERC FONSI not dispositive of the environmental impact issue in this case, contested by applicant. Held, because application was for more water than the FONSI had contemplated, implication of finding correct. [FO]

R-5.930
Applicant moved record be reopened for receipt of evidence of flows above confluence. No showing that this evidence could not reasonably have been presented earlier. Motion denied. [FO]

U-14.1274
Even if only "adverse effect" of insufficient water physically available would be on applicant, no permit may issue because of § 85-2-311(1)(a), MCA. [FO]

Final Order Date:	12/16/88 (G W/C)	**Applicant:**	Parkening
Amended Final Order:	09/29/89		
Case #/Type:	49636-s41H (P)	**Regional Office:**	Bozeman
Application Date:	12/06/82	**Examiner:**	Elting
Hearing Date:	04/25/88	**Use:**	Diversion

A-4.9348.48
T-5.800
Proposed project is substantially nonconsumptive; however, permit must be conditioned to require measurements so as to ensure that it remains so.

A-16.7567
Although evident at hearing that applicants can divert more water than applied for, permit cannot be granted for more than applied for.

D-21.310
E-22.480
Affidavit of objector accepted in lieu of appearance; applicant allowed written cross-examination.

R-5.930
T-5.800
Final Order conditions modified by amending Final Order; this pursuant to stipulation of the parties.

U-14.120
Unappropriated water is water physically available at the point of diversion and not then needed by downstream seniors.

[Granted.]

Final Order Date:	12/16/88 (G W/C)	**Applicant:**	Hollenback
Case #/Type:	63377-s76G (P)	**Regional Office:**	Helena
Application Date:	08/15/86	**Examiner:**	Elting
Hearing Date:	02/19/88	**Use:**	Irrigation

A-16.7567
B-15.690
U-14.120
Evidence shows that unappropriated water is available during a part of the period of use. However, there is no evidence regarding whether applicants can beneficially use the water for irrigation if the period of appropriation is reduced to those months. Cannot modify.

A-16.7567
R-5.930
At oral argument, applicants stated that they could beneficially irrigate during shorter period. This evidence admitted to fill gap in hearing record. [FO]

E-22.480
E-24.480
Any nonconformance with R.C.M. 89-910, renders a notice of appropriation inadmissible as evidence. Objector's predecessor did not conform. Held, the parameters of the right must be determined from evidence of actual use of the water. (Evidence indicates objectors have 90 gpm use right.)

E-24.4810
Department did not determine that part of objector's right had been abandoned; the evidence showed that water had never been beneficially used in the summer, and there was no evidence of continuing intent to establish such summer use. Objector did not sufficiently show that he had a summer water right which could be adversely affected. [FO]

E-24.4820
J-21.800
Stock water rights are in certain cases and in this case exempt from requirements of SB #76. No voluntary filing was made. Held, water court has no jurisdiction in this matter. Certification improper. [FO]

E-24.4831
Since exempt rights are not described through the claims process, it is necessary that the Department take testimony regarding the

parameters of the objector's right in order to determine whether there will be adverse effect. [FO]

U-14.1259 Evidence shows water physically available, but that there is not sufficient water to supply objector's right and the requested amount. Section 85-2-311(1)(a) not met for full period of use.

[Proposal submitted to deny; appealed to District Court; remanded to Department for rehearing. Summer permit granted]

Final Order Date:	12/29/88 (D)	**Applicant:**	Goffena
Case #/Type:	61293-s40C (P)	**Regional Office:**	Lewistown
Application Date:	09/19/85	**Examiner:**	Scott
Hearing Date:	07/15/88	**Use:**	Irrigation

A-4.930
A-4.9394 Salinization of a creek from which water is diverted for stock use is an adverse effect to such water rights if it renders the water unpotable for stock use.

A-4.9325
E-24.4879
M-5.110 Assertion that any further appropriations from a source will adversely affect stock appropriators by depriving them of historic recharge to potholes from which stock drink held untenable. Objectors cannot require the entire flow of the stream for ease of obtaining a small percentage of its water when they can exercise their senior priority to obtain this water. Although calling the source may be relatively difficult due to the unpredictable timing and duration of flows in the creek, such difficulty is part and parcel of holding a water right in that area.

M-5.110
S-20.720 Where dam must be able to bypass the flow of the stream in order to to respond to the calls of downstream seniors, but where there is no evidence of how much flow the design of the dam will allow to pass, applicant has failed to prove the appropriation works adequate.

P-18.720 The effect of potential seep on soils is not an adverse effect to a water right and is thus irrelevant in these proceedings.

S-20.720
U-14.1259 Where water is to be stored for later use, so long as there is sufficient unappropriated volume available in the source during the period of storage to supply the proposed use, the magnitude of downstream appropriations in terms of flow rate is immaterial to the question of whether § 85-2-311(1)(a) is satisfied.

Final Order Date:	01/03/89 (G W/C)	**Applicant:**	Scharbauer, d/b/a Western Montana Sports and Fitness Center
Case #/Type:	062593-g76H (P)	**Regional Office:**	Missoula
Application Date:	05/05/86	**Examiner:**	Beck
Hearing Date:	05/25/88	**Use:**	Commercial/ Irrigation

A-4.9394 In this instance, Department of Health and Environmental Sciences' approval of waste disposal is sufficient proof of no adverse effect to water quality.

A-4.9395
B-21.780 Where objector alleged his well will be interfered with by the one to two-foot drawdown which applicant has shown may occur, but does not state why he could not reasonably exercise his water right under the changed conditions, he has not met his burden of production.

B-5.6979 Because applicant presently has a certificate of water right with sufficient volume for all contemplated commercial needs, only additional flow for those needs is granted.

B-5.6979 To ensure that the amount of water requested is put to beneficial use, permit conditioned so that total volume applied to place of use under permit is reduced by volume applied pursuant to other rights already appurtenant to that place of use.

B-21.780 Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. If objector thus meets his burden of production, then applicant must prove by substantial credible evidence that the anticipated adverse effect will not occur. If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

U-14.1259 If percolating groundwater is physically available at the well head, it is unappropriated within the meaning of the statute if there is no adverse effect to other wells in the aquifer. [Caution: Statement in proposal for decision at p. 24 that diversion of appropriated water always adversely affects prior appropriators is true only where their seniority cannot be readily exercised, as in the case of percolating groundwater.]

[Exceptions filed; no modifications to holdings.]

Final Order Date:	01/12/89 (D)	**Applicant:**	Moss
Case #/Type:	60073-s76L (P)	**Regional Office:**	Missoula
Application Date:	09/09/85	**Examiner:**	Elting
Hearing Date:	10/25/88	**Use:**	Fish Pond

A-4.9312
B-21.780
S-20.720
Where evidence shows that it is possible that alleged nonconsumptive pond use of water may well be consumptive due to significant seepage from the pond, but applicant failed to prove otherwise, "nonconsumptive" permit cannot issue as (the nonconsumptive permit's **de facto** "immunity" from calls) could adversely affect objectors.

B-21.780 Amount of information required of applicant is not necessarily proportional to the size of the project; there is a minimum amount of information required regardless of project size.

E-22.480
M-5.110
Where applicant merely indicates that "he will install whatever is required" but does not present a design and plan of operation for the appropriation works, he has not proved that the appropriation works are adequate.

E-24.4848
J-21.800
Where application denied, it is not necessary to reach jurisdictional argument raised by United States or Indians.

Final Order Date:	01/23/89 (G)	**Applicant:**	Rehbein
Case #/Type:	39787-s76M (E)	**Regional Office:**	Missoula
Application Date:	12/18/81	**Examiner:**	Scott
Hearing Date:	04/12/88	**Use:**	Irrigation/Stock

P-5.8031 Statutory requirement that there be "good cause" for granting an extension of time to perfect a new use permit means that permittee show that he has exercised due diligence toward perfecting the appropriation but has nonetheless been unable to do so. [Discussion:

Principle derived from common law substrate of Water Use Act requiring that there be due diligence to invoke relation back of priority of the appropriation to commencement/filing date.]

P-5.8031 Review of the record shows some support for applicant's statement made at oral argument that they did not know of the completion deadline. Held, although there is no due diligence, applicants' ignorance of the perfection deadline is good cause to grant an extension.

P-5.8031 Permittees failed even to commence project until one month before deadline. Their behavior held not due diligence.

[Accordingly, examiner proposed denial of extension. Proposal reversed in Final Order.]

Final Order Date:	01/24/89 (G W/C)	**Applicant:**	Evans
Case #/Type:	64600-s76H (P)	**Regional Office:**	Missoula
Application Date:	02/15/87	**Examiner:**	Beck
Hearing Date:	03/08/88	**Use:**	Irrigation
Oral Argument Date:	07/07/88		

D-21.310
E-22.480 Objector did not answer discovery requests, but questions asked were general, the issue was not raised at the hearing, and no specific prejudice was alleged at oral argument. Applicant has not demonstrated that he was prejudiced by objector's failure to make discovery. [FO]

R-5.930 Examiner's finding that unappropriated water is unavailable from May 1 to July 15 held not based on substantial credible evidence. Modified. [FO]

U-14.1259.25 Once control of water imported into a drainage has been relinquished by the importer, the corpus of the water becomes part of the drainage and is subject to priorities thereon just like water naturally part of that drainage.

U-14.1259 Applicant failed to prove there will ever be a year when he would not be called for water, and therefore failed to prove § 85-2-311(1)(a), MCA.

[Permit granted in part.]

Final Order Date:	02/21/89 (G W/C)	**Applicant:**	Montana DNRC
Case #/Type:	58294-41H (P)	**Regional Office:**	Bozeman
Application Date:	12/03/84	**Examiner:**	Scheier
Hearing Date:	01/27/88	**Use:**	Storage

E-22.480 Substantial credible evidence will convince reasonable persons, and they will not differ as to whether it establishes the prevailing party's case.

O-2.490 Objection based on cost apportionment of project held improper; dismissed.

O-2.490 Objections of parties are governed by agreements and stipulations among them.

U-14.120 The Water Use Act does not require that unappropriated water be available every year for a permit to issue, but only in some years. [FO]

U-14.1259 Simply because claimed water rights exceed the yield of the drainage does not mean that there is no unappropriated water in the drainage, because of such factors as return flows, timing, and patterns of use, there may be unappropriated water. [FO]

Final Order Date:	03/13/89 (G W/C)	**Applicant:**	U.S. Fish and Wildlife Service
Case #/Type:	G190495-41A (C)	**Regional Office:**	Helena
Application Date:	04/14/88	**Examiner:**	Scott
Hearing Date:	10/18/88	**Use:**	Wildlife Habitat

A-4.9348
A-4.9348.48
E-24.4810
Where an appropriator reduces the consumptivity of his water use for for a period of 30 years, then wishes to resume same consumptivity as originally used, and there is no evidence of intent to abandon the consumptive portion of the original right, a return to original consumptivity does not constitute an increase in burden on the source.

A-4.9348.48
E-24.4810
Where appropriation has been operated with reduced consumptivity for less than 40 years, no presumption of intent to abandon former consumptivity arises.

Final Order Date:	03/21/89 (D)	**Applicant:**	Twite
Case #/Type:	57517-g76L (P)	**Regional Office:**	Kalispell
Application Date:	08/24/85	**Examiner:**	Elting
Hearing Date:	03/13/86	**Use:**	Irrigation

A-4.930 Alleged that appropriation would reduce artesian pressure in objector's wells. Without deciding whether such reduction is adverse effect, held that any reduction which may occur would be **de minimus**; thus, there is no adverse effect regardless.

I-14.900
U-14.1274
Because well had not yet been drilled, no information in record as to whether water physically available at the proposed point of diversion. Held, applicant should be granted interim permit to drill well for testing purposes in order to be allowed to prove unappropriated water criterion, as all other criteria proved and no adverse effect to objectors likely.

[Applicant failed to drill well; proposal amended to deny.]

Final Order Date:	03/22/89 (G W/C)	**Applicant:**	Ed Murphy Ranches
Case #/Type:	W19282-s41E (C) W19284-s41E	**Regional Office:**	Helena
Application Date:	10/17/84	**Examiner:**	Scott
Hearing Date:	03/24/88	**Use:**	Diversion

A-4.9348.20
A-4.9392
Where a point of diversion is moved from a tributary to a point on the main stem above the tributary confluence, the moved water right must be subordinated to other water rights with points of diversion on main stem above tributary confluence.

A-4.9348.20 Moving point of diversion upstream does not **ipso facto** constitute adverse effect, but depends on the facts of the case.

A-4.9373 Absent information which establishes that an irrigation water right has historically been utilized according to a certain pattern, the Department will presume that there is no historic pattern of use within the period of use claimed. (Modifying the rule stated in **Ryen**, G120401-41H, Interlocutory Order, p. 22.) Sustained in Final Order.

A-16.7567 When amendment of application results in reduction of the requested place of use, but does not change the legal description set forth in the public notice, amendment may be accepted at hearing.

M-5.110 Ditch adequacy means physical adequacy of the ditch, not whether applicant may legally use the ditch to conduct more water than he currently conducts (FO).

Final Order Date:	04/11/89 (G)	**Applicant:**	City of Belgrade
Case #/Type:	24875-g41H (E)	**Regional Office:**	Bozeman
Application Date:	11/08/82	**Examiner:**	Scott
Hearing Date:	01/24/89	**Use:**	Diversion

D.21.290 Grant of previous extension is **prima facie** evidence of reasonable diligence on part of the applicant prior to that extension.

J-21.800 Department does not have jurisdiction to reconsider issuance of original permit, or to modify same in an extension proceeding.

Final Order Date:	04/11/89 (G W/C)	**Applicant:**	Ligon
Case #/Type:	P065887-s76K (P)	**Regional Office:**	Missoula
Application Date:	07/23/87	**Examiner:**	Reynolds
Hearing Date:	07/26/88	**Use:**	Reservoir

A-16.7567 Where applicant only applied for the water that was going to be consumed and not for that which would be returned to the stream, permit could not be granted for return flow amount even if there will be insufficient water to adequately irrigate the full acreage.

Final Order Date:	04/17/89 (G W/C)	**Applicant:**	Casagrande
Case #/Type:	64464-g43E (P)	**Regional Office:**	Billings
Application Date:	05/21/87	**Examiner:**	Kerbel
Hearing Date:	03/07/89	**Use:**	Irrigation
Oral Argument Date:	03/07/89		

A-4.930
A-4.9395 Evidence shows potential for drawdown of objector's wells over long term; however, applicant's stated intent is to divert for irrigation for only one or two years until ground cover is established. Held, no adverse effect.

A-16.7567 Although applicant has stated that after ground cover is established by irrigation, he intends to use the water for a waterfowl pond, he did not apply for that use, and it cannot be granted at this juncture. He must make separate application.

A-16.7576
D-21.310
J-21.800 Department is not required to give individual notice to all appropriators in area of source if records do not provide reason to believe the effects of the project will extend that far.

D-21.310
J-21.800 Prehearing meeting with field manager is purely discretionary. Parties not prejudiced by failure to hold meeting.

E-22.408 "Objections" to documents in Department file, based not on admissibility, but rather consisting of arguments on the issues, held not proper objections to evidence. [FO]

I-14.900
U-14.1274 No test pumping has been done, and there is no evidence of the productive capacity of the aquifer in the record. Therefore, § 85-2-311(1)(a), MCA, not met. However, because groundwater is such that

an applicant can only satisfy his burden of proof by actually pumping, grant of an interim permit is proper.

J-21.800 Time periods specified in statute for Department action on application are directory rather than jurisdictional. Failure to act within them does not trigger a mandatory duty either to deny or grant a permit.

J-21.800
S-21.660 Application for permit cannot be denied for violation of statute precluding diversion of water without a permit.

S-21.660 Applicant provided enough evidence to avoid summary judgment at end of presentation of his case.

[Interim permit issued.]

Final Order Date:	04/18/89 REVOKED	**Applicant:**	Loomis/Edenfield
Case #/Type:	28224-s41I (R)	**Regional Office:**	Helena
Application Date:	04/25/80	**Examiner:**	Elting
Hearing Date:	11/29/88	**Use:**	Mining
Oral Argument Date:	03/03/89		

A-4.9394
J-21.800
P-5.8021 Permit not developed because of Department of Health's denial of direct discharge permit. However, DNRC cannot second-guess original fact finder and do as applicant proposes, **i.e.**, simply eliminate direct piping of return flow condition so that permit can be developed.

P-5.8032
R-5.930 Department must revoke permit if permit conditions have not been met, even when noncompliance results from a conflict with regulations of another state agency, when the permit conditions have been determined to be necessary in order for the permit to meet the statutory criteria for issuance. However, if sufficient good cause is shown, the Department may grant the permittee the option of requesting a hearing with the original objectors in order to provide substantial credible evidence that the permit criteria may be met without the permit condition(s) which conflict with other state regulations.

R-5.390 Department recognizes that permittee is at an impasse caused by conflicting requirements of another state agency. Accordingly, the original permit may be revised pursuant to applicant's request to reconvene original permit hearing for receipt of further evidence (original objectors to be notified).

R-5.9379 At reconvened hearing, applicant may only present evidence which was not obtainable at the time of the original hearing.

[Permittee failed to request hearing; permit revoked.]

Final Order Date:	04/27/89 (G W/C)	**Applicant:**	Fagan
Case #/Type:	G65713-76N (C)	**Regional Office:**	Kalispell
Application Date:	05/26/87	**Examiner:**	Elting
Hearing Date:	01/25/89	**Use:**	Domestic

A-4.930 Where spring is not hydrologically related to another spring, diversion from first spring cannot adversely affect appropriations from second spring.

A-4.930 Where appropriator already has right to divert water from a source, and it the very existence of this right which "adversely affects" objectors, a change in such right cannot be barred simply on the

basis of this preexistent "adverse effect". Rather the review is limited to adverse effects which may be caused **by the proposed change**.

A-16.750
E-22.480
E-24.480

Exemption of domestic uses from record keeping requirements does not mean that the legislature intended that domestic uses be exempt from from 85-2-402.

A-16.750
E-24.480

Filing of statement of claim does not exempt applicant from necessity of obtaining change authorization prior to making change in right.

B-5.6979

Although a permit cannot be issued for more water than can be beneficially used (85-2-312(1), MCA) there is no comparable prohibition where an existing right is to be changed to a new use. However, even assuming that there is an implicit analogous prohibition re changes, the existence of other water rights utilized for the same use does not necessarily mean that applicant cannot beneficially use all of the water right he proposes to change.

E-24.480

Where there is evidence in the record indicating that applicant owns the water right to be changed, applicant has met its threshold requirement and the Department may act on the request, even if no final determination has been rendered by a court of competent jurisdiction.

E-24.480
J-21.800

Determination of ownership of water right properly in district court.

E-24.4820

Certification statute appears to preclude certification to the Water Court of issues of existence or extent of right exempted by statute from the adjudication process.

E-24.4820
J-21.800

Stipulation between parties to certify not binding on Department.

E-24.4831

Failure to file a certificate of transfer with the Department does not invalidate the underlying water right or its conveyance.

J-21.800

An appropriator cannot be compelled to forgo the use of one water right simply because he has another right available for that use.

M-5.110

Means of diversion are adequate, even if pipeline to be used is subject to breaks, so long as applicant will operate same to prevent breaks.

M-5.110
W-1.870

Running small amount of water in pipe in winter to prevent freezing, a usual and customary practice in the area, is probably not wasteful, and is adequate to prevent freezing.

M-5.1129

Existing easement not required to find means of diversion adequate.

P-18.720

Conditioning construction of pipeline to prevent property damage to objectors is improper as authorization cannot be denied on basis of adverse effect to property other than water rights.

Final Order Date:	05/04/89 (D)	**Applicant:**	Dunks/McCauley
Case #/Type:	G41585-s41E (C)	**Regional Office:**	Helena
Application Date:	02/20/87	**Examiner:**	Scott
Hearing Date:	01/06/88	**Use:**	Diversion
Oral Argument Date:	10/12/88		

A-4.9348.20 There are several tributaries which enter the source between the old point of diversion and the new point of diversion. Therefore, applicant, in moving his point of diversion downstream, would be able to use his senior priority date to obtain water which was previously unavailable to him upstream, **i.e.**, he could enlarge his appropriation at the expense of junior appropriators. Held, this is adverse effect to juniors.

A-4.9348.20
T-5.800 No workable plan for precluding **de facto** enlargement of right due to move of point of diversion was presented. Held, absent conditions, change authorization would adversely affect juniors.

A-4.9348.20
B-21.780 The Department is not requiring proof to an absolute certainty; however, because it is inherently difficult to prove no adverse effect resulting from moving a point of diversion 15 miles downstream when there are numerous intervening appropriators and tributaries, the burden in this case is heavy. [FO]

A-4.9348.48 In weighing adverse effect due to stream loss, examiner properly focused on the percentage stream loss at low flows (which was greater than at higher flows). [FO]

A-4.9379 Reduction of return flow does not necessarily constitute adverse effect; it is a question of fact. Held, here it would be adverse effect.

A-4.9379 Historically, 50% of diverted flow quickly returned to source. Held, as long as diversion of that 50% is prevented, there will be no adverse effect due to loss of return flow.

A-4.9348.20
A-4.9379 Evidence shows that there is 15% stream loss between old point of diversion and new point of diversion downstream. Held, of the 50% left to applicant, 15% must remain in the source at new point of diversion to make up for stream loss.

E-24.4820 Department has no duty to certify issue of abandonment to Water Court.

E-24.4820 The Department will only certify an SB #76 claim if the contested case cannot be argued without doing so.

E-24.4831 A stipulation between a claimant and the Department filed with the Water Court that the amount stated in the original SB #76 claim is excessive, and stating a new amount, is regarded as an amendment to the claim for purposes of quantifying a right in this proceeding.

E-24.4831 In Department proceedings, an (amended) SB #76 claim is unassailable proof of its content. [Note: Interpretation that claim is unassailable, adopted in initial reaction to **United States v. Dept. of Natural Resources & Conservation**, Montana 1st Judicial District, June 15, 1987, effected reversal of previous Department holdings. It has since been modified.]

[Authorization denied.]

Final Order Date:	05/08/89 (G W/C)	**Applicant:**	Keim/Krueger
Case #/Type:	G129039-76D (C)	**Regional Office:**	Kalispell
Application Date:	12/10/87	**Examiner:**	Elting
Hearing Date:	02/27/89	**Use:**	Diversion

A-4.930 Extra flow in ditch not adverse effect to objectors where it appears the additional water will provide extra head for their pipeline, and where ditch large enough to simultaneously accommodate applicant's senior right and objector's junior right in their entirety.

A-4.930 No adverse effect to users on source where change in point of diversion will not change the flow of water available downstream.

A-4.930 No adverse effect where evidence in the record shows that alleged adverse effects have already been ameliorated or can be by imposition of proper terms and conditions.

A-4.9348.00 Where there is a dispute over ownership of a water right, an increase in burden on source due to dual use of the right by each claimant, after a change of place of use is made by applicant, can be eliminated by appropriate conditioning of the change authorization.

A-4.9394 No evidence to suggest proposed use of water will impact water quality in source where diversion small, there is little return flow, and only a short time of contact with soil of similar pH and saline levels as creek.

E-24.480
J-21.800 The Department has no jurisdiction to decide a dispute between the parties as to how much water was transferred from objector to applicant as part of a property deal; however, it may determine from the evidence presented whether applicant has colorable title to the water, and proceed based on that, subjecting any change authorization to later defeasance.

M-5.110 Ditch adequate where can be made large enough to carry extra water by cleaning and dirtwork.

M-5.1129 Whether party presently has easement not relevant to determination of adequate means of diversion.

S-20.110 Where late objectors, but for a department oversight, would have received individual notice, same may be granted status of parties.

Final Order Date:	05/25/89 (G)	**Applicant:**	Ohs
Case #/Type:	P49605-s41G (E)	**Regional Office:**	Bozeman
Application Date:	09/20/88	**Examiner:**	Kerbel
Hearing Date:	02/17/89	**Use:**	Hydropower

P-5.8031 Actively pursuing licensing requirements from different agencies and seeking revenues to construct project is due diligence. [Extension granted.]

Final Order Date:	05/25/89 (G)	**Applicant:**	Ohs
Case #/Type:	53070-s41G (E)	**Regional Office:**	Bozeman
Application Date:	11/28/88	**Examiner:**	Kerbel
Hearing Date:	02/17/89	**Use:**	Hydropower

E-22.2480
P-5.8031 The granting of a previous extension is **prima facie** evidence of due diligence on the part of the applicant prior to that extension.

Final Order Date:	06/09/89 (G)	**Applicant:**	First Madison Geo.
Case #/Type:	42665-g41F (E)	**Regional Office:**	Bozeman
Application Date:	07/22/88	**Examiner:**	Scott
Hearing Date:	None	**Use:**	Industrial

P-5.8031 Due diligence toward effecting a permitted appropriation with changed purpose of use is good cause for granting extension of time,

even if formal approval of such change has not been given, providing application for such change has been filed and approval is ultimately received.

S-21.660 Where no issue of fact has been raised in an objection, dismissal of objection is not proper where **bona fide** legal issue raised. Rather, a proposal for summary determination should issue.

[Extension granted.]

Final Order Date:	06/16/89 (G W/C)	**Applicant:**	Johnson, Sadie
Case #/Type:	65175-g76G (P)	**Regional Office:**	Helena
Application Date:	02/13/87	**Examiner:**	Cross
Hearing Date:	06/15/88	**Use:**	Irrigation
Oral Argument Date:	03/03/89		

M-5.110 Uncertainties created by a Superfund designation do not make the applicant's means of diversion inadequate.

U-14.1259 Water may be unappropriated even if a senior user has claim to it, if there is evidence that the senior right holder does not use the water at all times.

Final Order Date:	06/30/89 (D)	**Applicant:**	Sheridan County/ City of Plentywood
Case #/Type:	57448-s40R (P)	**Regional Office:**	Glasgow
Application Date:	03/12/85	**Examiner:**	Scott
Hearing Date:	09/24/86	**Use:**	Recreation

A-16.750
A-16.7516 Where applicant fails to state when water will first be appropriated, either expressly or by implication, and statements made in the application actually equivocate as to whether water will be used at all, the application is deficient under § 85-2-310(4), MCA, and may be returned.

A-16.750
A-16.7516 Proper filing of the application with documentation, as required under § 85-2-310(4), MCA, is **prima facie** evidence of the existence of **bona fide** intent at the time of filing.

A-16.750
A-16.7516 In order to obtain the priority date of the date of filing, applicant must have **bona fide** intent as of that date.

E-24.4848
S-20.110 The Fort Peck - Montana Compact imposes no moratorium on new appropriations; however, the Tribe does have standing to object on other grounds.

J-21.800
P-18.720 Department has no jurisdiction to deny permit based on adverse effect to property rights which are not water rights.

S-20.720
U-14.1274
W-1.870 Where volume shown physically available is 605 acre-feet, evaporation is 327 acre-feet, and seepage loss is unknown, § 85-2-311(1)(a), MCA, is not met for nonconsumptive recreational use, for it cannot be determined if the reservoir will ever even fill.

T-5.800 To impose conditions on a permit based on a stipulation between the parties, said conditions must be relevant and necessary to fulfillment of criteria listed in 85-2-311.

U-14.1274 Where volume shown physically available is insufficient to supply requested consumptive uses, § 85-2-311(1)(a), MCA, is not met for such uses.

Final Order Date:	07/27/89 G)	**Applicant:**	Christley
Case #/Type:	G(W)110476-76H(E)	**Regional Office:**	Missoula
Application Date:	10/23/87	**Examiner:**	Brasen
Hearing Date:	03/08/89	**Use:**	Irrigation

P-5.8031 Due diligence requirement as set forth in Application (Permit) 39787 by **Rehbein** is not binding for extension requests for change application; good cause is the only requirement.

Final Order Date:	08/24/89 (G W/C)	**Applicant:**	Cannon
Case #/Type:	67646-s76H (P)	**Regional Office:**	Missoula
Application Date:	03/25/88	**Examiner:**	Compton
Hearing Date:	02/28/89	**Use:**	Domestic

A-4.930 Possible adverse effects to appropriators on the "main" stream source must be addressed if raised by objectors, even where the proposed appropriation is from a tributary stream.

W-1.870 Waste of water due to alleged unreasonable means of diversion by senior right holders must be proven by applicant.

Final Order Date:	09/15/89 (G)	**Applicant:**	Watt
Case #/Type:	52803-41I (E) 54549-41I (E)	**Regional Office:**	Helena
Application Date:	N/A	**Examiner:**	Scott
Hearing Date:	05/10/89	**Use:**	Irrigation

D-21.290 Applicant failed to demonstrate due diligence; however, closure of area by governor and applicant's extended illness are good cause to grant an extension so long as these are not part of a continuing pattern of similar excuses.

P-5.8031 Although not due diligence, illness may be good cause to grant extension, providing it is not part of a continuing pattern of similar requests for extension.

[Extension granted.]

Final Order Date:	09/15/89 (G)	**Applicant:**	Golden Star Mining
Case #/Type:	59179-s41D (E)	**Regional Office:**	Helena
Application Date:	11/07/88	**Examiner:**	Compton
Hearing Date:	05/19/89	**Use:**	Mining

P-5.8031 Due diligence can be exercised by party other than applicant.

U-19.300 Use of water for testing purposes can be construed as demonstrating diligence toward completion of permitted project.

Final Order Date:	09/15/89 (G W/C)	**Applicant:**	Burns
Case #/Type:	67217-43B (P)	**Regional Office:**	Billings
Application Date:	04/13/88	**Examiner:**	Lighthizer
Hearing Date:	03/28/89	**Use:**	Irrigation

A-4.930 Where "tributary" disappears into a fault, and district court has held "tributary" did not contribute to decreed stream, there can be no adverse effect to users on decreed stream from appropriation of tributary.

Final Order Date:	09/19/89 (D)	**Applicant:**	Knutson
Case #/Type:	G155812-43A (C)	**Regional Office:**	Bozeman
Application Date:	08/17/82	**Examiner:**	Elting
Hearing Date:	8/29/88	**Use:**	Irrigation
Oral Argument Date:	06/19/89		

A-4.930
A-4.9348
Nonspecific testimony that extra water needed will be water salvaged through "better management" is insufficient to prove there will be no increase in source depletion, and hence is insufficient to prove no adverse effect to other appropriators.

A-4.930
A-4.9348.10
A-4.9379
Where applicant has applied to double his acreage under a given water right, even if he will not increase his flow rate, there is a high potential for increased length of diversion and/or reduction of historic return flows, and thereby increased diverted volume.

B-21.780
Section 85-2-402, MCA (1985), setting forth expanded criteria which applicant must prove are met, applies retroactively to any application pending with the Department on July 1, 1985.

B-21.780
Burden of proof in a change proceeding has been on applicant since 1973, notwithstanding the fact that it was not specifically set forth in § 85-2-402 prior to 1985. [Discussed.]

W-1.870
Appropriators of waste water have no vested right to its continued generation.

Final Order Date:	10/10/89 MODIFIED	**Applicant:**	Marks
Case #/Type:	6673-C41I (R)	**Regional Office:**	Helena
Application Date:	N/A	**Examiner:**	Griffing
Hearing Date:	08/22/89	**Use:**	Irrigation

L-1.940
P-5.8021
Statute and **Montana Power Co. v. Carey** allow Department to impose completion date and conditions on change authorization.

P-5.8021
P-5.8031
Certainly since revision of § 85-2-312(3), MCA, in 1987, Department cannot grant appropriator extension of time to complete authorized change in revocation/modification proceedings.

[Appropriator made only some of the changes authorized; authorization modified.]

Final Order Date:	10/13/89 (G W/C)	**Applicant:**	Meadow Creek Golf Course
Case #/Type:	G128984-s76D (C)	**Regional Office:**	Kalispell
Application Date:	10/25/88	**Examiner:**	Lighthizer
Hearing Date:	05/16/89	**Use:**	Recreational

A-4.9348.20
A-4.9392
Where a point of diversion is moved from a tributary to a point on the main stem above the tributary confluence, the moved water right must be subordinated to other water rights with points of diversion on main stem above tributary confluence. Applicant may only divert as much water at the new point of diversion as is simultaneously available at the old point of diversion.

E-22.480
E-24.4810
Section 85-2-404(4), MCA, specifically exempts claims that have not been adjudicated from subsections (1) and (2) which presume abandonment after 10 years of nonuse.

Final Order Date:	10/18/89 (G W/C)	**Applicant:**	Brookside Estates
Case #/Type:	G55348-76M (C) G99591-76M (C)	**Regional Office:**	Missoula
Application Date:	05/28/87	**Examiner:**	Scott
Hearing Date:	01/20/89	**Use:**	Irrigation/ Recreation

A-4.9392
A-4.9394
B-21.780

Where objector makes a plausible case that its domestic water right could be adversely affected by degradation of water quality due to proposed use, and applicant meets this evidence with a plan to preclude such adverse effect, permit may be conditioned to ensure that the plan is followed.

B-5.6910

Aesthetic use is a beneficial use of water. [Discussed.]

J-21.800

Examiner does not have jurisdiction in hearing on permit application to determine if the prior issuance of different permit was proper.

[Permit granted subject to conditions. Certain measurement requirements which had not been proposed were adopted pursuant to assertions in objector's exception.]

Final Order Date:	10/18/89 (D)	**Applicant:**	Fee/Carlson
Case #/Type:	68695-s76G (P)	**Regional Office:**	Helena
Application Date:	07/18/88	**Examiner:**	Scott
Hearing Date:	06/06/89	**Use:**	Mining

A-4.9325
U-14.1259

Where applicant wishes to recirculate diverted water to provide enough for mine during low water periods, applicant must prove that source disruption caused by delayed return will not result in an unreasonable number of legitimate calls every year during low water periods.

U-14.1259

Testimony that water disappears under creek bed downstream of proposed point of diversion does not of itself show that water cannot be legitimately called for, as water may resurface downstream; therefore, it is not proof that water is legally available.

Final Order Date:	10/18/89 (D)	**Applicant:**	Wright Ranch, Inc.
Case #/Type:	G192529-40A (C)	**Regional Office:**	Lewistown
Application Date:	06/14/88	**Examiner:**	Rolf
Hearing Date:	07/06/89	**Use:**	Irrigation

A-4.9348.20

When evidence shows there is more water at new point of diversion than at old point of diversion, but there is no evidence to show how applicant would limit the diversion at the new point of diversion to that available at old point of diversion, junior appropriators could be adversely affected, and authorization must be denied.

Final Order Date:	10/19/89 (G W/C)	**Applicant:**	Worf
Case #/Type:	G111165-01-76H(C) G151753-01-76H(C)	**Regional Office:**	Missoula
Application Date:	08/26/88	**Examiner:**	Scott
Hearing Date:	04/28/89	**Use:**	Irrigation

A-4.9348.10

Return flow equivalents, **i.e.**, water once returned to source but left therein after conversion from flood to sprinkler irrigation; may not be diverted to provide water for expanding acreage.

A-4.9348.10 Expansion of acreage allowed, even though salvage not quantified where acreage is expanded by same percentage as salvage, **i.e.**, where 25% of water diversion was once lost, but is now salvaged and only 50% of water diversion originally reached fields, acreage may be expanded by 50%.

A-4.9348.48
B-21.780 Objectors bear burden of production re existence of subsurface return flows.

A-4.9392 Flow meter must be placed before openings in pipeline to ensure proper measurement and administration of the rights.

Final Order Date:	11/06/89 (G)	**Applicant:**	Vaira
Case #/Type:	G025010-s40P (E)	**Regional Office:**	Glasgow
Application Date:	N/A	**Examiner:**	Larson
Hearing Date:	07/11/89	**Use:**	Irrigation

P-5.8031 Soil analysis was performed, plans and specifications drawn up, a firm commitment from FmHA to finance the project has been obtained. A change in the project was authorized in 1985; however, drought conditions over the past eight years, and loss of the plans a year and a half ago hampered the project. Held, good cause exists to grant extension. [Extension granted.]

Final Order Date:	11/06/89 (G W/C)	**Applicant:**	Silver Eagle Mining
Case #/Type:	69141-76G (P)	**Regional Office:**	Helena
Application Date:	08/15/88	**Examiner:**	Griffing
Hearing Date:	09/07/89	**Use:**	Mining

A-4.9394
E-14.930 Because objector did not attempt to show otherwise, precautions taken to prevent contamination of source considered adequate for purposes of showing lack of adverse effect to objector.

M-5.110 Collection of snowmelt and rain in lined ponds considered adequate means of diversion.

Final Order Date:	11/15/89 (D)	**Applicant:**	Royston
Case #/Type:	101960-41S (C) 101967-41S (C)	**Regional Office:**	Lewistown
Application Date:	06/22/87	**Examiner:**	Scott
Hearing Date:	09/30/88	**Use:**	Irrigation

A-4.930
A-4.9348 Burden on source may not increase if it would adversely affect other source users.

A-4.9348
A-4.9348.48 The burden on the source, the depletion of the source due to the exercise of a water right, is calculated both in terms of total annual depletion (volume), and maximum instantaneous depletion (flow). "Maximum instantaneous depletion" is the rate of diversion minus the rate of return flow; "total annual depletion" is the total volume diverted in a dry year minus total volume returned.

A-4.9379
B-21.7875 Where irrigation occurs adjacent to the source, return flow both on the surface and subsurface, may be inferred.

M-5.110 Where irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during nonhigh water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates, it cannot be concluded that the means of diversion and operation are adequate.

APPEALED TO DISTRICT COURT. DEPARTMENT DECISION UPHELD.
APPEALED TO MONTANA SUPREME COURT. DECISION UPHELD.

Final Order Date:	12/18/89 (G W/C)	**Applicant:**	Tietz
Case #/Type:	150741-41H (C)	**Regional Office:**	Bozeman
Application Date:	05/01/85	**Examiner:**	Scott
Hearing Date:	10/20/88	**Use:**	Irrigation

A-4.9348.20 If proposal is to change point of diversion only, then how much water is used on land is irrelevant in determining adverse effect or beneficial use as these will not be changed. Amount used is relevant only to adequacy of new diversion works.

E-24.4831 Whether claim of existing right reflects beneficial use of entire amount claimed not an issue in this proceeding. [FO]

E-24.4831 Volume of water appurtenant to a subdivided portion of the original tract is the volume historically necessary to irrigate that portion.

J-21.800
M-5.1129 Examiner's conclusion that "it is possible that in future Dusenberry and/or other parties may legitimately conduct more water through ditch" does not mean that the Department has made any determination whatsoever regarding applicant's legal right to use the ditch. [FO]

R-5.930 None of examiner's findings are clearly erroneous; therefore none were overturned. [FO]

Final Order Date:	01/05/90 (G W/C)	**Applicant:**	Shervin
Case #/Type:	22047-g41E (E)	**Regional Office:**	Helena
Application Date:	N/A	**Examiner:**	Kerbel
Hearing Date:	06/21/89	**Use:**	Irrigation

(See also 22047-41E (P) under Kyler.)

A-16.7516
P-5.8031 Section 85-2-310(4)(c)(iii), MCA (1987) requiring a detailed project plan with time line to demonstrate **bona fide** intent does not apply in extension proceeding, as the permit was issued before statute effective date, as the permit is not of sufficient size to trigger statute, and as this is an extension request on a permit already issued.

E-22.480
P-5.8031 Most of the work on the project which had been done by the time of the hearing was done during the period of the temporary extension. Held, such work may be considered in determining applicant's due diligence.

E-22.480
P-5.8031 Evidence of work done on project after completion deadline but during temporary extension of Department jurisdiction for purposes of determination of whether extension should be granted, admissible.

E-22.480
P-5.8031 Grant of previous extension is **prima facie** evidence of due diligence prior to that extension.

E-24.4810
P-5.8021 Permit which has not been perfected is not a water right and cannot be "abandoned". Accordingly, § 85-2-404, MCA, establishing **prima facie** presumption of abandonment after ten years nonuse of appropriation right does not apply. Failure to perfect may, however, result in revocation of the permit.

P-5.8031 Reasonable diligence is the steady good faith effort toward perfecting a permit.

P-5.8031 Due diligence in pursuing completion of one project, which is independent of a second project for which a different permit has been issued and for which extension is requested, held not good cause to extend second permit.

P-5.8031 Although extended search for a "good deal" on equipment is not due diligence, obtaining actual bids for specific irrigation systems to determine whether or not permittee can afford the project is not shopping for a good deal.

[Proposal to grant extension.]

Final Order Date:	01/08/90 (IR-D) (ST-G W/C)	**Applicant:**	Worth
Case #/Type:	65689-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	07/16/87	**Examiner:**	Rodriguez
Hearing Date:	08/08/89	**Use:**	Stock/Irrigation

A-4.930 Objector with no water right cannot be adversely affected.

A-16.7516 Applicant was "unsure" of the proposed irrigation use. Testified at the hearing of not being quite sure what he would do. Held no bona fide intent.

Final Order Date:	01/10/90 (D)	**Applicant:**	DeBrestian
Case #/Type:	70272-76H (P)	**Regional Office:**	Missoula
Application Date:	11/22/88	**Examiner:**	Compton
Hearing Date:	10/17/89	**Use:**	Irrigation

E-22.480
E-24.4831 Amended claims are **prima facie** evidence of their content.

U-14.1259 Objector claims all water in ditch it uses for irrigation. Applicant asserts that the ditch also "drains" water from old road bed, **i.e.**, that it gains water which is unappropriated as objector not entitled to gain. Applicant failed to prove gain. Therefore, held unappropriated water not shown to exist (as all other water in ditch appropriated by objector).

DENIED.

Final Order Date:	01/23/90(G W/C)	**Applicant:**	Greathouse
Case #/Type:	65739-76H (P)	**Regional Office:**	Helena
Application Date:	05/19/87	**Examiner:**	Scott
Hearing Date:	07/14/89	**Use:**	Irrigation

P-18.720 Property damage, other than water rights, not a basis for denial of permit.

Final Order Date:	02/02/90 (G W/C)	**Applicant:**	Otness
Notice of Remand:	11/07/89		
Case #/Type:	54693-g41O (P)	**Regional Office:**	Havre
Application Date:	04/17/84	**Examiner:**	Scott
Hearing Date:	04/14/88	**Use:**	Irrigation
Oral Argument Date:	05/16/89		

A-4.930
U-14.1259.25 Surface appropriators from McCormick Coulee cannot be adversely affected by appropriation of subsurface water developed and added to the surface source by applicant as they never had the use of such water.

E-24.480
S-15.920
W-1.870

A water right can be established in waste water, but the waste appropriator cannot compel the continued generation of the waste unless its deprivation is malicious or arbitrary.

E-24.480
U-14.1259.00
W-1.870

As it is in the interest of the county to have the highway drained by tiles, rather than by maintaining drain ditch, it cannot be said that the cessation of generation of water in the county ditch is malicious or arbitrary. Therefore, waste appropriator cannot compel continuance of waste.

E-24.4831
U-14.1259

Even assuming applicant's estimate of McCormick Coulee flow was correct, claims of existing right already on source exceed amount of Coulee water. Because applicant did not show that the claims were exaggerated or not used to the full extent, he failed to prove any of the natural flow of the Coulee was unappropriated.

E-24.4831
W-1.870

Where drain ditch installed by county to drain under highway, and water is removed from that drain ditch by private appropriator for irrigation, that appropriator has made a waste appropriation, and he cannot compel the county to continue generation of the waste.

J-21.800

The Department has no jurisdiction regarding the existence of a tile drain system; it can neither sanction its use, nor compel its removal. However, it can deny issuance of a permit to use that water if the diversion does not comply with the requirements of § 85-2-311, MCA.

[Proposal held that applicant was only applying to appropriate developed water, and would have granted only such surface water as applicant proved was developed by him. Upon oral argument, it was determined that applicant had actually applied for any unappropriated water in the Coulee, developed or undeveloped. Case remanded for determination of whether applicant proved that any of the nondeveloped water in Coulee was unappropriated. Upon remand, examiner determined that applicant had failed to prove at the initial hearing that any unappropriated water existed in McCormick Coulee other than water applicant had developed.]

Final Order Date:	02/05/90 (G W/C)	**Applicant:**	Allred
Case #/Type:	15928-76H (C)	**Regional Office:**	Missoula
Application Date:	07/20/87	**Examiner:**	Scott
Hearing Date:	11/30/88	**Use:**	Irrigation

A-4.9348.20
E-24.4831

Where a single appropriation is subdivided by subdivision of the land to which it is appurtenant, and where no express division of the water is made, the subdividees take the carriage water portion of the right as tenants in common and a co-tenant may not change the point of diversion of his share of the carriage water without the consent of the other co-tenants (if removed of a share of the carriage water, would adversely affect another co-tenant.)

A-4.9379
B-21.780
E-24.4831
W-1.870

Where irrigation does not occur immediately adjacent to the source, and where objector on source alleges reliance on subsurface return flow from such irrigation, in order to place a burden of proof regarding that issue on applicant, objector must produce some evidence tending to show that seepage from such irrigation returns to the source.

E-24.4831
W-1.870

An objector's right to groundwater does not include the right to a continuous of aquifer augmentation by seepage from irrigation which was accomplished using water from a source other than groundwater.

B-21.780 Objector has burden of producing facts sufficient to raise allegation of adverse effect to a level of plausibility.

Final Order Date:	05/07/90 (G)	**Applicant:**	Starner
Case #/Type:	64988-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	12/15/86	**Examiner:**	Scott
Hearing Date:	09/08/89	**Use:**	Irrigation

J-21.800 State has jurisdiction to grant permits to appropriate excess water on Flathead Reservation. [Memo]

Final Order Date:	05/07/90 (P4D DATE)	**Applicant:**	Ciotti
Case #/Type:	66459-76L (P)	**Regional Office:**	Kalispell
Application Date:	08/04/87	**Examiner:**	Scott
Hearing Date:	05/19/89	**Use:**	Domestic

A-4.930
B-21.780 Objector not specific about how the appropriation would “impair” instream fishery flows on project irrigation rights. Held, did not meet burden of production.

E-24.4848
R-5.850 Assuming arguendo that instream fishery flows are “reserved” within meaning of § 85-2-311(1)(e), MCA, because applicant can be called to cease appropriating, there will be no unreasonable interference with fishery reservations.

J-21.800 State has jurisdiction to grant permits to appropriate excess waters on Flathead Reservation. [Memo]

U-14.120 [**Cites Hadley** test.]

U-14.120 Water physically available, diversion can occur in most years throughout period of appropriation without call. Held, unappropriated water exists.

Application withdrawn 12/14/92.

Final Order Date:	05/07/90 (P4D Date)	**Applicant:**	Richardson (Formerly Flemings)
Case #/Type:	63574-s76L (P)	**Regional Office:**	Missoula
Application Date:	08/19/86	**Examiner:**	Elting
Hearing Date:	09/22/88	**Use:**	Irrigation/Stock

A-4.9325
A-4.9383
B-21.780 Objectors allege water from Kitty Girl Creek "eventually reaches Finley Creek, but provided no information which shows that water does go subsurface, or data to establish a hydrologic connection. Regardless, there is no evidence that Finley Creek appropriator would be adversely affected, as 50% of irrigation return goes subsurface and would get to Finley anyway. Held, effect on Finley objector **de minimus**, if any.

A-16.7516 No present intent to use stock water; therefore, requested stock water cannot be granted.

B-5.6979 Requested volume excessive.

J-21.800 State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation. [Memo.]

T-5.800 Permit conditioned so applied for irrigation flow rate and volume cannot be exceeded.

U-14.1259.00 Applicant can utilize the requested amount of water throughout period of appropriation without being called, because senior user's calls downstream would be futile since released water would not reach them regardless.

U-14.1274 Requested flow available throughout period in most years.

Application withdrawn 01/25/93.

Final Order Date:	05/11/90 (G W/C)	**Applicant:**	Red Lodge Country Club Estates
Case #/Type:	62454-g43D (P) 62455-g43D	**Regional Office:**	Billings
Application Date:	07/25/86	**Examiner:**	Rolf
Hearing Date:	08/15/88	**Use:**	Recreational

62454

A-4.930
B-21.780 Where evidence in record that operation of well could drawdown aquifer and may reduce the flow of springs from which prior appropriations have been made, and applicant has not shown that this drawdown would not adversely affect these appropriations, applicant has failed to prove there will be no adverse effect.

A-4.9348.20 There is adverse effect where well would induce seepage from ditches and ponds utilized by other appropriators.

62455

A-4.930
W-1.870 Where evidence in record shows possibility of well inducing seepage from pond which is fed by ditches which convey surface water pursuant to another of applicant's rights, and applicant could simply divert more surface water pursuant to this senior right to replenish the pond, there is sufficient evidence of possible adverse effect to the water rights of junior surface appropriators in the record to require proof that such scenario will not occur.

Final Order Date:	06/01/90 (G W/C)	**Applicant:**	Hildreth
Case #/Type:	71133-g41B (P)	**Regional Office:**	Helena
Application Date:	04/04/89	**Examiner:**	Rodriguez
Hearing Date:	08/29/89	**Use:**	Domestic

A-4.9394 Environmental Protection Act standards for water quality adopted; held no adverse effect as maximum predicted nitrate concentration due to septic tank discharge is less than EPA standard.

A-4.9395 Facts show no adverse effect due to well interference.

A-4.9395 Evidence shows proposed appropriation could reduce water level in slough from which objector diverts. Held, this not adverse effect because the slough is the functional equivalent of a well penetrating only the very top of an aquifer which may well reasonably have to be deepened. In other words, the slough is the **de facto** means of diversion from the aquifer and it is not a protectable means of diversion.

Final Order Date:	06/27/90 (D)	**Applicant:**	Keim/Krueger
Case #/Type:	67324-s76D (P)	**Regional Office:**	Kalispell
Application Date:	12/10/87	**Examiner:**	Elting
Hearing Date:	02/27/89	**Use:**	Fish Pond

[**See also** related holdings in G129039]

S-21.760 Irrigation right cannot to be used to supplement fish pond absent change authorization.

U-14.1274 Where applicants have agreed to permit conditions which require that their diversion be shut off during low flow events, and there is no evidence that sufficient water to maintain adequate fish environment is otherwise physically available, 85-2-311(1)(a) is not met.

Final Order Date:	07/10/90 (G)	**Applicant:**	Gunderson
Case #/Type:	P62352-43BJ (E)	**Regional Office:**	Billings
Application Date:	12/01/89	**Examiner:**	Lighthizer
Hearing Date:	05/31/90	**Use:**	Flow through fish pond

P-5.800 Applicant purchased property after the Permit had been issued for a year and a half with little progress toward project completion.

P-5.8031 Illness is good cause to grant an extension of time to complete project. Shortly after purchase, Applicant became ill and required several surgeries. Since Applicant planned to oversee the excavation and do the rest of the work himself, he could not reasonably be expected to complete project during his illness.

Some preliminary progress had been made; meeting with parties essential to the success of the project and contacting contractors for estimates on the excavation work.

Extension granted.

Final Order Date:	07/11/90 (G)	**Applicant:**	Rasmussen
Case #/Type:	62946-s76LJ (E)	**Regional Office:**	Kalispell
Application Date:	11/08/89	**Examiner:**	Stults
Hearing Date:	05/31/90	**Use:**	Fish and Wildlife, Stock

O-2.490
S-20.110 Department and Examiner have discretion to determine whether objections are valid. Objections not addressing criteria at issue [§85-2-312 (3)], i.e., assertions that permit should not have been issued and that permittee intends to exceed limitations of permit, found to be invalid.

P-5.8031 Natural phenomenon, i.e., glacial erratics and frigid weather, are reasonable justification for delay and therefore good cause for extension in light of diligent efforts towards completion.

Final Order Date:	07/24/90 (D)	**Applicant:**	Lockie
Case #/Type:	13539-01-s42KJ (E)	**Regional Office:**	Miles City
Application Date:	11/14/89	**Examiner:**	Stults
Hearing Date:	05/17/90	**Use:**	Irrigation

P-5.8031 Granting of a previous extension is **prima facie** evidence of reasonable diligence on the part of the Applicant. **Cites Belgrade**.

P-5.8031 Placing proposed place of use into a set-aside program, e.g., CRP, is not good cause for extension if doing so was a voluntary action, that is, alternative actions, if chosen, would not have excluded further efforts toward completion of the proposed project.

A-16.7516 Placing proposed place of use into CRP and requesting an extension

P-5.8031 of time to complete appropriation borders on a request for future use. Granting such an extension would bifurcate the permit into two appropriations under one priority date. This cannot be allowed because all waters, unless appropriated, are subject to appropriation by others.

Final Order Date:	07/26/90 (G)	**Applicant:**	Pospisil
Case #/Type:	53426-41S (E) G10442-41S (E)	**Regional Office:**	Lewistown
Application Date:	N/A	**Examiner:**	Lighthizer
Hearing Date:	01/11/90	**Use:**	Irrigation

P-5.8031 Objector did not appear at hearing. Objection dismissed. Applicant had the land prepared and dam repaired. The project would have been completed except the dam washed out again. Applicant showed diligence toward completion. Extension granted.

Final Order Date:	07/26/90 (G W/C)	**Applicant:**	Stewart
Case #/Type:	71967-41B (P)	**Regional Office:**	Helena
Application Date:	06/27/89	**Examiner:**	Lighthizer
Hearing Date:	03/15/90	**Use:**	Irrigation

A-4.9383 Even though there is a connection between the groundwater and surface water, Applicant provided substantial credible evidence of no adverse effect.

Final Order Date:	08/28/90 (G)	**Applicant:**	Regional Enterprises
Case #/Type:	36362-g76LJ (E)	**Regional Office:**	Kalispell
Application Date:	04/27/83	**Examiner:**	Reynolds
Hearing Date:	06/19/89	**Use:**	Domestic/Commercial

P-5.8031 Where construction of the project has not commenced in four years, and permittee states he is waiting for financial conditions to improve, no due diligence.

J-21.800 Department failed to notify an objector of the hearing date. Hearing held as scheduled and extension denied. Applicant filed exceptions to proposed order and requested oral argument. Application remanded to hearing unit for rehearing.

Objector was notified of the second hearing but did not appear. The second Examiner found due diligence and granted the extension of time.

P-5.8031 Even though no work had been done on the ground, Applicant had made considerable progress by obtaining bids from drillers, submitting plans to Department of Health and receiving approval of said plans, performing market studies and obtaining a developer.

Final Order Date:	09/11/90 (G W/C)	**Applicant:**	Wiediger
Case #/Type:	P068427-76H (P)	**Regional Office:**	Missoula
Application Date:	06/29/88	**Examiner:**	Cross
Hearing Date:	04/11/89	**Use:**	Fish/Stock

A-4.9383 Evidence shows diversion by applicant of seepage from ditch will not induce additional seepage. Thus, no adverse effect.

E-22.480 Testimony of expert that additional seepage would occur outweighed by first-hand testimony to the contrary.

E-24.4894
U-14.1259.00
W-1.870

Seepage from ditch beyond control of initial appropriator. Therefore it is waste and subject to appropriation by another.

M-5.110

Applicant failed to prove means of diversion adequate for use as fishery.

Final Order Date:	09/17/90 (G W/C)	**Applicant:**	Petersen Livestock
Case #/Type:	70584-g41B (P)	**Regional Office:**	Helena
Application Date:	12/14/88	**Examiner:**	Stults
Hearing Date:	11/15/89	**Use:**	Irrigation

A-4.9348.00
A-4.9383
A-4.9392
B-21.780
L-1.940

Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. The laws providing a mechanism for pursuing issue of cumulative effects are §§ 85-2-319, or 85-2 506 and 507, MCA.

A-4.930
B-21.780

Objector provided no evidence that incipient or hastened depletion of the ground water source will occur. Applicant has no burden to disprove adverse effects from future projects, or to disprove speculative allegations. **See** Meadow Lake, 55749-g76LJ, and Allred, G15928-76H.

E-24.4820
J-21.800

If Applicant does not elect to execute a temp. water service contract with BuRec and no adjudicative determinations are required, then Agreement between MPC, BuRec & DNRC does not preclude DNRC from issuing permit.

Final Order Date:	10/02/90 (G W/C)	**Applicant:**	Thompson Falls, Town of
Case #/Type:	G024078-76N (C)	**Regional Office:**	Kalispell
Application Date:	06/20/89	**Examiner:**	Stults
Hearing Date:	N/A	**Use:**	Municipal

(Settled by Stipulation)

T-5.800

Change authorization made subject to conditions of a 1981 written agreement between permittee and objector. Agreement had already been part of permit.

E-24.4879
M-5.110
T-5.800

Change authorization subject to condition that Permittee shall provide a bypass through diversion dam to remain open at least two turns of the valve to accommodate year-round use by objector for domestic, stock, and subsurface recharge. Based on prior (1981) written agreement between parties.

Final Order Date:	10/09/90 (G W/C)	**Applicant:**	Shining Mountains Owners Assoc.
Case #/Type:	G(W)31227-01-41F(C)	**Regional Office:**	Bozeman
Application Date:	04/06/89	**Examiner:**	Elting
Hearing Date:	03/30/90	**Use:**	Irrigation

B-21.78

Applicant's initial burden of production in a change hearing is discharged by providing an Application, Statement of Claim for the underlying water right, and the testimony of witnesses. Objectors then have burden of producing information by offering plausible argument that proposed change will adversely affect their water rights. Objectors failed to meet that burden.

J-21.80 Effect on property rights not relevant.

[GRANTED]

Final Order Date:	10/10/90 (G W/C)	**Applicant:**	Crisafulli
Case #/Type:	63997-g42M (P)	**Regional Office:**	Glasgow
Application Date:	01/30/87	**Examiner:**	Stults
Hearing Date:	07/24/90	**Use:**	Irrigation

A-4.930
A-4.9394
B-21.780
E-22.48
Objectors provided many events as implications of adverse effect, but no evidence to substantiate a causal relationship between the events and applicant's activities under the Interim Permit. For instance, the evidence of adverse effect on water quality was one objector's unsupported allegation of an impending algae bloom.

A-4.9392
B-21.780
Upon applicant's discharge of burden to produce substantial credible evidence on the issue of adverse effect, objectors must go forward by producing certain information stating, with particularity, how they anticipate the proposed use will change conditions of water occurrence or how it will affect their rights, and allege why they will not be able to reasonably exercise their right under the changed conditions. **See Houston: 60117-g76L**.

A-4.9392
B-21.780
E-22.480
Lack of evidence of effort on the part of objectors to exercise their seniority by activating a known mechanism for revoking or modifying applicant's Interim Permit raises doubts about alleged adverse effects.

A-16.7567
M-5.110
Amendment of means of diversion from three manifold wells to a single well and downward amendment of flow rate and volume are acceptable without notification of persons not parties to the proceedings.

A-4.9383
T-5.800
Since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage. Permit conditioned to reflect this.

B-21.780
U-14.1259.00
U-14.1274
Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion in the amount applied for at the times it is proposed to be put to use. (Based on 1989 amendment of 85-2-311(1)(a) as discussed in Department policy memorandum titled "Summary Report: Clark Fork Basin Water Use" dated 4/24/90.)

Final Order Date:	10/12/90 (G W/C)	**Applicant:**	Winter Sports, Inc.
Case #/Type:	70511-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	12/27/88	**Examiner:**	Stults
Hearing Date:	04/18/90	**Use:**	Commercial

A-4.9321
A-4.9348.00
B-21.780
Objectors failed to meet their burden of producing evidence that, contrary to applicant's evidence, shortages of water had occurred with a high degree of frequency, and that objectors were required to exercise their water rights by calling for water.

A-4.9348.00
I-14.900
Because it would be impossible to perceive the change in stream flow at an objector's point of diversion attributable to starting and stopping of applicant's diversion, operating the proposed system

under an interim permit would not provide a valid test for availability of unappropriated water or for adverse effect.

A-16.7567
M-5.110
S-20.720

Amendments to reduce place of use, expand the period of use from storage, change means of diversion from dam to a pipeline, and change reservoir location from on-stream to off-stream (under specific conditions) do not expand the parameters of the diversion from the source and are, therefore, acceptable without notification of persons not parties to the proceedings.

B-21.780
U-14.1259.00
U-14.1274

Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion in the amount applied for at the times it is proposed to be put to use. (Based on 1989 amendment of 85-2-311(1)(a) as discussed in Department policy memorandum titled "Summary Report: Clark Fork Basin Water Use" dated 4/24/90.)

T-5.800

Applicant, on its own initiative, represented that the project would be designed and operated according to a specific plan they developed and imposed upon themselves; therefore, the elements of this plan must be included as conditions of the permit.

Final Order Date:	10/17/90 MODIFIED	**Applicant:**	Durocher
Case #/Type:	68514-s41M (P)	**Regional Office:**	Havre
Application Date:	10/04/88	**Examiner:**	Rodriguez
Hearing Date:	03/23/89	**Use:**	Stock

[Proceeding under § 85-2-306(3), MCA, revocation/modification of stock water permit.]

A-4.930

Where potential for future adverse impact exists because dam cannot pass water until water level reaches one foot below crest of dam, the permit must be modified to allow for bypass of flows necessary to senior appropriators. (Final Order reversed Conclusion of Law 9 & 10. This nullifies the first issue of the Summary.)

A-4.930
J-21.800
P-18.720

Department cannot prevent a water user from enjoying his right based on allegations of possible exercise in a tortious manner.

E-22.480
J-21.800

Opinion of a nonexpert who has had occasion to observe dam is admissible in relation to determining the safety of the dam, although it may not be accorded as much weight as expert testimony. However, safety of the dam is not an issue in this proceeding.

E-22.480
S-15.920

Department determination that Scoffin Creek is intermittent stream correct based on evidence available.

E-24.4879
M-5.1188

Subirrigation is an unreasonable and thus unprotectable means of diversion.

J-21.800
P-18.720

Department hearing is not the forum for objections based on adverse impact to other rights besides water rights.

APPEALED TO DISTRICT COURT. DEPARTMENT DECISION UPHELD.

Final Order Date:	11/02/90 (G W/C)	**Applicant:**	Vescovi Polled Herefords
Case #/Type:	61414-40A (P) 61415-40A (P) 68191-40A (P)	**Regional Office:**	Lewistown

Application Date:	05/28/86 05/28/86 07/01/88	**Examiner:**	Lighthizer
Hearing Date:	05/23/90	**Use:**	Irrigation

B-21.780 Applications **61414** and **61415** - Applicant unable to meet 85-2-311(1)(A). Study showed water unavailable for two months of proposed period of use. Applicant did not indicate during hearing that he would accept truncated period of use. **[DENIED]**

Application **68191** - Appropriating in off-season to fill off-stream reservoir for use when there are no unappropriated waters. **[GRANTED]**

Final Order Date:	11/07/90 (D)	**Applicant:**	Crumpled Horn
Case #/Type:	54694-g41O (P)	**Regional Office:**	Havre
Application Date:	04/26/84	**Examiner:**	Griffing
Hearing Date:	10/24/89	**Use:**	Irrigation/Stock

A-16.750
B-5.6979 Cannot grant a permit for "all" the water in a source “after Otness has used it". Too vague to administer; cannot determine reasonableness of amount requested.

O-2.490
S-21.6621
U-14.120 Objectors to application not estopped from objecting because a decision has been issued in another case concerning existence of unappropriated waters in the same source, when parties and issues not the same.

S-21.6621 Applicant averred that the Department had already determined in **In re Otness (54693)** that there was unappropriated water in McCormick Coulee. Held, that there was no final order out in Otness, and further that even if there were, the findings and conclusions therein would not be binding in this proceeding because collateral estoppel does not apply as not all the parties and issues are the same.

U-14.1259 Only evidence regarding availability of unappropriated natural flow of McCormick Coulee are flows and claims, and the claims to that water far exceed the flow. Held, evidence does not show that any of natural flow is unappropriated water.

U-14.1259.25 Crumpled Horn did not develop any water; therefore, it cannot circumvent prior appropriations on McCormick Coulee absent some clear and enforceable agreement with Otness, the actual developer of water.

U-14.1259.25
W-1.870 Once water leaves the control of the developer, it becomes waste and is subject to appropriation as such. However, once it joins a natural water course and commingles with natural waters, it becomes part thereof and is subject to new appropriation only if there is water available after the senior rights have been satisfied.

D-21.310 Time periods specified in statute for Department actions on applications are directory rather than jurisdictional. (Final Order).

Final Order Date:	11/08/90 (G W/C)	**Applicant:**	Johnson
Case #/Type:	074154-g41B (P)	**Regional Office:**	Helena
Application Date:	03/16/90	**Examiner:**	Lighthizer
Hearing Date:	08/30/90	**Use:**	Irrigation

S-15.920 Groundwater over-appropriation in the absence of long-term records cannot be interpreted from low stream flows and declines in the

shallow water table when those observations were taken during a drought period.

[GRANTED]

Final Order Date:	11/09/90 (D)	**Applicant:**	Heppenheimer
Case #/Type:	72443-41A (P)	**Regional Office:**	Helena
Application Date:	08/21/89	**Examiner:**	Lighthizer
Hearing Date:	04/25/90	**Use:**	Fire Protection

J-21.800
L-1.940
M-5.1129

A permit is not required for emergency fire protection. Ditch rights and easements are not requisite to granting a permit. Water rights and ditch rights are not synonymous. Whether applicant has an easement to construct or use ditch not relevant to determine proposed diversion is adequate.

Final Order Date:	11/14/90 (G W/C)	**Applicant:**	Hanson
Case #/Type:	G45422-76M (C)	**Regional Office:**	Missoula
Application Date:	03/22/88	**Examiner:**	Stults
Hearing Date:	03/09/90	**Use:**	Irrigation

S-20.110
S-21.660

Denied Applicants' Motion to Dismiss on grounds of prior approval, ratification, and acceptance. Statements made by potentially affected party prior to notice of application for change do not estop them from objecting. Statutory system established by Water Use Act, allowing the filing and hearing of timely and valid objections, cannot be circumvented.

A-4.930
J-21.800

Department does not have jurisdiction to consider adverse effects to private contracts. There is nothing in § 85-2-402 that can be construed to authorize denial due to adverse effects on interests other than water rights.

A-4.9379

Reduction of return flows by conversion from flood to sprinkler is not adverse effect. Right holder can change flow of waste so long as not with malice or through negligence. Furthermore, Applicants can change from flood to sprinkler without Department approval. However, an appropriator does not have the right to consume, to the injury of subsequent appropriators, amounts formerly returned to the source. [FO]

A-4.9373
E-24.4831

Downstream junior appropriator has vested interest in stream conditions implicit in the exercise of his water right. To give effect to junior's vested right, attention must be paid to disruptions in pattern of historic use. Therefore, Applicants must "fill in" the general outline of their right, even if previously outlined in a court decree.

E-24.4831
T-5.800

To prevent adversely affecting Objector, Applicants' diversion must be limited to the well-established pattern of historical use, i.e., alternating weeks.

R-5.930
S-20.110

Objector's Exceptions state that the Proposed Order is consistent with law and would alleviate adverse impacts to Objector. The Department is not required to consider exceptions from parties that are not adversely affected by a proposal for decision. ARM 36.12.229(1). Because the Department will be adopting the Proposal as written, Objector will not be adversely affected and the Exceptions are moot. [FO]

[FO appealed to District Court in Missoula. Court remanded for further findings on adverse effect and suggested the Department

replace the existing conditions with appropriate conditions amicable to both parties. Department issued Addendum to Final Order giving additional explanation of the conditions imposed by the Final Order and explaining that suggestion of the Court could not be carried out within the statutory confines of the Water Use Act. Authorization issued with limits and conditions imposed in the Final Order.]

Final Order Date:	11/15/90 (D)	**Applicant:**	Fee/Carlson
Case #/Type:	72662-s76G (P)	**Regional Office:**	Helena
Application Date:	10/26/89	**Examiner:**	Lighthizer
Hearing Date:	05/09/90	**Use:**	Mining

U-14.1274 Applicants failed to prove that, at least in some years, sufficient unappropriated water would be physically available at the point of diversion to supply their needs throughout the period of diversion.

A-4.9325 Applicants asserted nonconsumptive use, yet were unable to provide proof water would be returned to source without significant delay so that the downstream conditions would suffer little or no disruption.

J-21.800 Proposal did not adversely affect objector, therefore objector's exceptions were not properly before the Department. Section 36.12.229(1) ARM. **[FO]**

S-21.6621 If an application is denied, nothing in the Water Use Act precludes submission of a new application for the same appropriation as long as it is bona fide, is complete and correct, and if the elements of the application or other circumstances framing the issues in the matter are different.

Final Order Date:	11/27/90 (G W/C)	**Applicant:**	Meadow Lake County Water & Sewer District
Case #/Type:	71015-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	02/24/89	**Examiner:**	Stults
Hearing Date:	05/23&24/90	**Use:**	Irrigation

B-5.690 Irrigation of a golf course is a beneficial use of water.

B-5.690 Use of water for domestic purposes does not rank higher than use for irrigation of a golf course. The Montana legislature has not established a preference system for ranking water rights according to purpose. To the contrary, Montana courts have long and consistently held that "first in time, first in right," in other words, priority of appropriation confers superiority of right, and without reference to the character of the use.

B-5.6979 Sodding with typical turf grass and irrigating the entire play area are both reasonable elements of the construction and operation of a golf course. The existence of more water efficient alternatives to the proposed use does not necessitate the denial of the permit.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

J-21.800 Applicant represented to Department and Objectors that well would be

M-5.110
T-5.800

completed to divert from a minimum depth. As this representation was relied upon in analyzing lithological influences relative to the potential for adverse effects, this design element must be included as a condition of the permit. This condition falls within the Department's conditioning authority because it ensures that the water appropriated will be that which was proved to be available without adverse effect.

J-21.800
T-5.800

The Department cannot impose a condition upon anyone other than the permittee as only the permittee is required to satisfy the permit criteria. The Water Use Act only allows the Department to issue a permit with terms and conditions necessary to satisfy the permitting criteria. As the monitoring plan proposed by the applicant involves the participation of the objectors, it cannot be imposed as a whole through conditions on the permit. Only those parts relating to the criteria and the applicant can be adopted as conditions on the permit.

Final Order Date:	12/16/90 (G W/C) 05/13/90 [FO - On Remand]	**Applicant:**	Hollenback
Case #/Type:	63377-s76G (P)	**Regional Office:**	Helena
Application Date:	08/15/86	**Examiner:**	Elting Siroky [OA & On Remand]
Hearing Date:	02/19/88 07/28/88 [OA] 11/29/89 [On Remand]	**Use:**	Irrigation

A-4.930
O-2.490
T-5.800
U-14.120

To assure no adverse effect, the permit shall be conditioned to require applicant to prepare a plan each season, after consulatation with objector, of the planned schedule of water use that will not interfere with objector's senior stock water right.

A-4.9321
E-24.4831
U-14.120

Given the varied pattern of historic stock water use by the the objector's predecessor and applicant's admission that he does not need full-service irrigation through his requested period of use, it is reasonable to conclude that there may be some water available for applicant when objectors are not using it for stock. Held, subject to call of objectors when they need the source for stock water, applicant shall be entitled to appropriate water from the source. This maximizes the use of Montana's waters, pursuant to § 85-2-101(3).

E-22.480
E-24.4831

A Notice of Appropriation may not serve as prima facie evidence of an existing water right if there was any nonconformance with the requisites in R.C.M. 89-810 (1947), e.g., excavation or construction was not initiated with 40 days of posting or the filing document was not completed with the facts and specificity required in R.C.M. 89-810 (1947). Cites **Holmstrom v. Newlan**. Nevertheless, in this case proof of a use right was produced.

E-22.480
E-24.4831
R-5.930

Proposal for Decision concludes objector never perfected water right for stock use during summer months. Exceptions filed on this finding by objector. Final order upholds finding in Proposal as clearly based on the facts presented at the evidentiary hearing. Objector filed for judicial review. Court orders that additional evidence be received concerning the summer use of the stock water right, finding that there is substantial uncertainty in the testimony of objector's witness, and therefore several issues were not fully explained by the evidence. Evidence of some summer use by objector's predecessors is produced at the hearing on remand.

[Permit issued with conditions]

Final Order Date:	01/03/91 (G W/C)	**Applicant:**	Aseltine
Case #/Type:	70817-s43Q (P)	**Regional Office:**	Billings
Application Date:	04/05/89	**Examiner:**	Lighthizer
Hearing Date:	10/11/89	**Use:**	Irrigation

E-24.4894
U-14.1259
W-1.870

Generally, an owner of a right to use water may collect and reuse it it leaves his possession, but, after leaving his possession, it becomes waste and is subject to appropriation by another. **Rock Creek Ditch of Flume Co. v. Miller**, 17 P.2d 1074.

W-1.870

Waste water right only good as against junior appropriation if same user cannot compel generator of waste to continue generating it.

GRANTED

Final Order Date:	02/07/91 (G W/C)	**Applicant:**	Murray
Case #/Type:	73404-76M (P)	**Regional Office:**	Missoula
Application Date:	01/17/90	**Examiner:**	Lighthizer
Hearing Date:	11/27/90	**Use:**	Commercial

E-24.4879

Objectors having to partially dam source to raise water level to flow into headgate located high above creek bottom is not an adverse effect.

A-4.9321

Having to call a junior appropriator for water is not an adverse effect.

A-4.9383
B-21.780
U-14.1259

Although there may be a connection between Applicant's source and Objector's source, it must remain speculative, without data from Applicant's actual use, whether the waters intended to be used are part of the surface flows. If it is determined through Applicant's use that a connection exists. There was no evidence in record that the water is appropriated. Held no adverse effect.

[GRANTED]

Final Order Date:	03/04/91 (G W/C)	**Applicant:**	Blair
Case #/Type:	68173-s41S (P) 68174-s41S (P)	**Regional Office:**	Lewistown
Application Date:	07/01/88	**Examiner:**	Griffing Lighthizer (OA)
Hearing Date:	09/12/89 01/30/91 (OA)	**Use:**	Irrigation/Stock

E-24.4879
T-5.800

Whether stock water users entitled to natural flow for “recharging” of stream bed and flushing out of alkali. Held, bypass of 6 cfs during heavy stock water use and 2 cfs in winter sufficiently provided for stock water rights.

M-5.110

Whether plans of dam were sufficiently specific to show adequacy of diversion when SCS was later to prepare plans. Held, plans adequate as long as dam built to SCS specifications and reviewed by Department and all parties.

M-5.11

Held, even though Applicant did not present detailed plans at hearing, the means of diversion construction and operation were adequate if constructed according to SCS specification upon approval of plan drawn or approved by SCS.

P-5.800 Compliance problems with previously issued permits have no relevance in a hearing for a new application.

T-5.800
U-14.1259 Appropriator must bypass 6 cfs at all times and 7.67 when senior Hilltop is appropriating. There are no unappropriated waters in source during July and August. Applicant may not divert during this period.

GRANTED WITH CONDITIONS. APPEALED TO DISTRICT COURT. CASE DISMISSED.

Final Order Date:	03/05/91 (D)	**Applicant:**	T-L Irrigation
Case #/Type:	G31227-41F (C)	**Regional Office:**	Bozeman
Application Date:	01/05/89	**Examiner:**	Elting Siroky (OA)
Hearing Date:	03/29/90 12/14/90 (OA)	**Use:**	

D-21.310 Applicant's position was that 85-2-308 may not be applied to change applications. Held, since 85-2-308 is the only code which sets forth the right of objection and is cross referenced to the change criteria, Objection procedure is intended to apply to changes. To hold otherwise would deprive potentially affected persons of access to administrative process.

S-10.110 An objector cannot be excluded because he did not word his objection with sufficient specifity or the relevancy of his concerns is not apparent until Dept. has been able to obtain fuller information. The objection process provides a door by which any person filing an objection may enter the process.

E-24.4831 The Dept. will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.

E-24.4831 The Dept. has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if criteria of 85-2-402 have been met.

J-21.800
E-24.4810 A water right which allegedly was abandoned prior to 1973 clearly is within the jurisdiction of the water court. A water right abandoned after the issuance of a final decree is clearly within the jurisdiction of the Department.

J-21.800 Protective covenants such as real property covenants, contractual obligation, and breach of fiduciary duties belong in the district court forum. The Dept. does not have jurisdiction on ownership issues.

O-21.800 The testimony of a life long resident of the area and an irrigator with great experience with water conditions on source is entitled to great weight. Expert witnesses' testimonies not sufficient to counterbalance testimony of actual users. **Cites Wordan v. Alexander.**

A-4.9373 An appropriator who has developed irrigation practices based on a senior appropriator's historic pattern of use has a vested right to maintenance of the stream conditions which existed at the time of their arrival on the source. A senior appropriator cannot change the pattern of use to the detriment of junior appropriators. **Cites In re Bozeman 20736-41H; In re Bozeman 20737-41H; In re Bladholm 9782**.

B-21.780 A Statement of Claim does not provide any information as to how much of the diverted water was consumed pursuant to the historic use of the historic pattern of use within the outside parameters of the claimed period of diversion. Therefore when Objectors allege the proposed change will increase the demands on the stream or will adversely affect their prior rights by altering the stream conditions, Applicant must provide evidence which allows the impact to be assessed by comparing effects caused by proposed use.

A-4.9373 Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

(Denied)
(SEE ALSO Summary for Combs Cattle Co.)

Final Order Date:	03/25/91 (D)	**Applicant:**	Combs Cattle Co.
Case #/Type:	G31227-02-41F (C)	**Regional Office:**	Bozeman
Application Date:	03/13/89	**Examiner:**	Elting Siroky (OA)
Hearing Date:	03/29/90 12/14/90 (OA)	**Use:**	

S-10.110 An objector cannot be excluded because he did not word his objection with sufficient specifity or the relevancy of his concerns is not apparent until Dept. has been able to obtain fuller information. The objection process provides a door by which any person filing an objection may enter the process.

E-24.4831 The Dept. will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.

E-24.4831 The Dept. has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if criteria of 85-2-402 have been met.

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J-21.800
E-24.4810 A water right which allegedly was abandoned prior to 1973 clearly is within the jurisdiction of the water court. A water right abandoned after the issuance of a final decree is clearly within the jurisdiction of the Department.

J-21.800 Protective covenants such as real property covenants, contractual obligation, and breach of fiduciary duties belong in the district court forum. The Dept. does not have jurisdiction on ownership issues.

O-21.800 The testimony of a life long resident of the area and an irrigator with great experience with water conditions on source is entitled to great weight. Expert witnesses' testimonies not sufficient to counterbalance testimony of actual users. **Cites Wordan v. Alexander.**

A-4.9373 An appropriator who has developed irrigation practices based on a senior appropriator's historic pattern of use has a vested right to maintenance of the stream conditions which existed at the time of their arrival on the source. A senior appropriator cannot change the pattern of use to the detriment of junior appropriators. **Cites In re Bozeman 20736-41H; In re Bozeman 20737-41H; In re Bladholm 9782**.

B-21.780 A Statement of Claim does not provide any information as to how much of the diverted water was consumed pursuant to the historic use of the historic pattern of use within the outside parameters of the claimed period of diversion. Therefore when Objectors allege the proposed change will increase the demands on the stream or will adversely affect their prior rights by altering the stream conditions, Applicant must provide evidence which allows the impact to be assessed by comparing effects caused by proposed use.

A-4.9373 Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

(Denied)

(SEE ALSO Summary for T-L Irrigation)

Final Order Date:	03/25/91 (G W/C)	**Applicant:**	Zarnowski
Case #/Type:	67795-s76D (P)	**Regional Office:**	Kalispell
Application Date:	03/15/88	**Examiner:**	Scott Lighthizer (OA)
Hearing Date:	04/14/89 03/06/91 (OA)	**Use:**	Stock

A-4.930 Objector with no water right cannot be adversely affected.

A-4.930 Diversion of water which has already been rightfully reduced to possession by a prior appropriator will adversely affect his water right. Permit must exclude that possibility.

A-4.9321 Having to call for water more often not in itself adverse effect.

M-5.1129 Question of applicant's legal entitlement to cross and/or use objector's property not relevant to adequacy of means of diversion.

S-15.920
S-20.720
U-14.1259.00 Water in onstream reservoir consists of water reduced to possession already (impounded), water destined for downstream reservoir is is unappropriated water. Applicant may not divert the first at all, may not divert the second after he has been called, but may divert the third.

U-14.120 [**Cites Hadley** test.]

U-14.1259 Senior appropriator has called for water only once in 13 years of applicant's operation of a larger diversion under other right. Held, water legally available.

Final Order Date:	04/04/91 (G W/C)	**Applicant:**	Unified Industries/ City of Pinesdale
Case #/Type:	69638-s76H (P) 69659-s76H (P)	**Regional Office:**	Missoula
Application Date:	10/04/88 10/14/88	**Examiner:**	Stults
Hearing Date:	08/17/90	**Use:**	Irrigation

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from

that operation serves to satisfy the criteria for issuance of a permit.

B-5.6979
B-5.690
S-15.920
Applicant is not bound to use alternative sources to which they have water rights, and is not precluded from establishing a new appropriation establishing a new appropriation for the same purpose from an additional source.

M-5.110
Nothing in statutes, rules, case law, or Department precedent requires Department supervision of the construction of diversion devices.

A-4.9392
M-5.110
Contention that, since system can divert more than permitted, operation of the diversion and conveyance systems will not be adequate because permit issued to applicant would be impossible to administer is not within scope of whether criterion on adequacy of diversion system has been met. Goes to issue of possible unenforcability. Other than proving the system is capable of controlling the amount of water it diverts, showing a permit can be enforced is not a criterion for issuance.

Final Order Date:	04/12/91 (D)	**Applicant:**	Pitsch
Case #/Type:	61333-s40A (P)	**Regional Office:**	Lewistown
Application Date:	12/11/85	**Examiner:**	Stults
Hearing Date:	10/18/90	**Use:**	Irrigation

E-22.480
M-5.110
Merely indicating that whatever is needed will be installed, without submitting plans, is not sufficient to prove appropriation works will be adequate. **Cites M.G. Moss, 60073-s76L**.

E-22.480
M-5.110
A commitment by applicant to construct project in accordance with SCS design could serve to meet applicant's burden of proof. **Cites Blair, 69173-s41S**.

E-24.4879
M-5.110
It is not responsibility of applicant to ensure that diversion works of others are adequate and will be operated in accordance with the priority system on the source. Applicant only has responsibility for own system.

E-24.4879
M-5.110
S-20.720
Where a dam must be able to bypass the flow of the stream to respond to calls of downstream seniors, applicant must show how much the design of the dam will let pass. **Cites Goffena, 61293-s40C**.

B-21.780
D-21.310
S-21.660
Since applicant is required to show by substantial credible evidence that all criteria have been met and applicant failed to show 311(1)(c) had been met, no finding is necessary on the other criteria. **Cites Carney, 53221-s40O**. Denying application at this point does not determine that proposed appropriation could not be granted given sufficient evidence on the 311(1)(c).

Final Order Date:	04/12/91 (G)	**Applicant:**	Wilkinson
Case #/Type:	G042151-76N (E)	**Regional Office:**	Kalispell
Application Date:	12/13/84	**Examiner:**	McLane
Hearing Date:	05/10/89	**Use:**	Hydropower

P-5.8031
Although physical construction has not commenced, Permittee has clearly been active in legal, administrative and engineering aspects of project clearly showing good faith and due diligence.

Final Order Date:	04/16/91 (D)	**Applicant:**	BLM
Case #/Type:	72399-s41D (P)	**Regional Office:**	Helena
Application Date:	08/01/89	**Examiner:**	Stults
Hearing Date:	10/16/90	**Use:**	Stock

A-4.930
E-24.4810
E-24.4831
J-21.800

The Department cannot consider late claims to be interests which may be adversely affected by a proposed appropriation of water.

B-5.6979
B-5.690
S-15.920

Applicant is not bound to use alternative sources to which they have water rights, and is not precluded from establishing a new appropriation for the same purpose from an additional source.

E-24.4879
M-5.110

85-2-311(1)(c) means applicant must show the proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control such that it can be regulated in accordance with the system of priority on the source.

J-21.800

The Department does not have jurisdiction to decide land ownership disputes.

B-21.780
E-22.480

Since both parties characterize ownership of the place of use as a matter in dispute, documentation supports this, and no resolution by a court of competent jurisdiction or consent of objector is evident, applicant has not met criterion in § 85-2-311(1)(f). (Proposal for Decision)

B-21.780
E-22.480

Given the ambiguity of the evidence on ownership of the place of use and the limited scope of the Department's jurisdiction, the only conclusion that can be reached is that the criterion has not been met. Conclusion of Law not modified.

R-5.930

Because Proposal adopted that denies permit, objectors will not be adversely affected. Therefore, while they remain part of record, objectors' exceptions not addressed in Final Order. **Cites Hanson, G45422-76M**. [FO]

Final Order Date:	05/22/91 (G W/C)	**Applicant:**	Cross
Case #/Type:	72498-g76L (P)	**Regional Office:**	Kalispell
Application Date:	08/25/89	**Examiner:**	Lighthizer
Hearing Date:	03/07/91	**Use:**	Irrigation

A-4.9395

Although artesian flow and shallow wells are reasonable means of diversion, they are not protectable. Objector had in the past pumped from his source when it did not flow showing he could reasonably exercise his right when the artesian pressure was reduced.

A-4.9395

To hold that an appropriator is entitled to maintain shallow wells and artesian pressure against subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier.

Final Order Date:	06/03/91 (G W/C)	**Applicant:**	Anderson
Case #/Type:	74297-s76M (P) G(W)012684-s76M (C)	**Regional Office:**	Missoula

Application Date:	05/02/90 (P) & (C)	**Examiner:**	Lighthizer
Hearing Date:	04/04/91	**Use:**	Recreation

B-5.690 A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature until the permittee actually applies the water allowed by the permit to beneficial use. **Cites Monforton 24921**.

GRANTED WITH CONDITIONS

Final Order Date:	06/03/91 (D)	**Applicant:**	Guthneck
Case #/Type:	74785-s76M (P)	**Regional Office:**	Missoula
Application Date:	05/22/90	**Examiner:**	Lighthizer
Hearing Date:	04/04/91	**Use:**	Stock/Domestic

A-16.750 Priority dates, which are assigned by the date and time the applications are received by the Department, decide the outcome when two separate parties on the same source apply for a permit. The applicant in this case completed and signed the application materials before a notary on May 1, 1990. However, application was not received by the Department until May 22, 1990. In the interim, the other applicant filed his application with the Department on May 5, 1990. Applicant in this case argued intent to appropriate before opposition. The date of intent means nothing. Section 85-2-401(2).

DENIED

Final Order Date:	06/21/91 (D)	**Applicant:**	Gray
Case #/Type:	64965-s76L (P)	**Regional Office:**	Kalispell
Application Date:	12/02/86	**Examiner:**	Elting
Hearing Date:	10/26/88	**Use:**	Irrigation

A-4.930
B-21.310
E-24.4831
E-24.4834
E-24.4848
I-14.870
No evidence to suggest that objector's water rights would be adversely affected. No evidence that Bureau of Reclamation has any protectable water right for instream flow which could be adversely affected. BuRec has no claims on file for instream rights, and a Northwest Power Planning Council agreement does not establish a water right. Flathead Irrigation Project failed to show why their rights could not be reasonably exercised under whatever changed water conditions might be caused by applicant's appropriation. A general allusion to tribal fishing rights does not provide sufficient information for a finding of adverse effect because the amount of water needed to sustain the fishery has not be quantified.

E-24.4834 Bureau of Reclamation claim for 3500 cfs minimum instream flow between Hungry Horse Dam and Flathead Lake for fish and wildlife not recognized.

J-21.800 State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation. [Memo With P4D]

B-21.780
U-14.1259.00
U-14.1274
Applicant failed to provide substantial credible evidence there are unappropriated waters. **Cites Hadley** for test for unappropriated waters. Water physically available but applicant failed to prove water present was not needed downstream to fulfill senior water uses. Flow data on needs of senior users that applicant provided is not probative, therefore applicant has failed to meet his burden of proof.

F-5.250 Objector USDI filed exception to proposal asserting that DNRC lacks

J-21.800 jurisdiction over water on the Flathead Reservation. Since the application is being denied the issue of jurisdiction is moot as to this application. [FO]

Final Order Date:	06/21/91 (G/WC)	**Applicant:**	Johnson
Case #/Type:	71925-41B (P)	**Regional Office:**	Helena
Application Date:	06/06/89	**Examiner:**	Lighthizer
Hearing Date:	08/29/90	**Use:**	Irrigation

A-4.9383
A-4.930 Groundwater and surface water are interconnected, but expert witnesses agree the loss of baseflow accretion to the Beaverhead River would be imperceptible. Mere diminution does not create adverse effect. **Cites Hunt**.

E-14.930
M-5.110 If applicant modifies well construction to allow surface waters to enter the casing, the well construction would be in violation of 85-2-505, MCA. Permit conditioned to prohibit such modification. [P4D]

D-21.310
O-2.490
R-5.930 Untimely exceptions stricken. Written arguments in lieu of oral arguments accepted but not given any weight because scope of oral argument hearing limited to scope of timely exceptions. [FO]

E-14.930
E-22.480
M-5.110
R-5.930 Record contains no evidence related to contamination of groundwater, therefore the conclusion reached and condition imposed by hearing examiner without basis in the record. Conclusion and condition modified. [FO]

B-5.690
E-14.930
T-5.800 Conditions modified and additional conditions imposed to ensure that all surface water put into the well casing is pumped back out. This This ensures that none of the surface water goes toward aquifer recharge instead of for its legally authorized purpose.

Final Order Date:	06/24/91 (G/WC)	**Applicant:**	McHugh Mobile Home Park
Case #/Type:	74661-g41I (P)	**Regional Office:**	Helena
Application Date:	06/06/90	**Examiner:**	Stults
Hearing Date:	04/30/91	**Use:**	Domestic

S-21.760
T-5.800 A condition must be placed on this permit to identify the redundancy of this permit with a claimed existing water right belonging to the owner of the well (not the permittee) through which water will be appropriated under this permit, and to prevent the use of this permit beyond the stated intent, i.e., as a substitute for any part of the existing right not recognized by the Montana Water Courts.

Final Order Date:	06/25/91 (G/WC)	**Applicant:**	Henry
Case #/Type:	74814-s76H (P)	**Regional Office:**	Missoula
Application Date:	05/30/90	**Examiner:**	Lighthizer
Hearing Date:	04/30/91	**Use:**	Wildlife

M-5.1129 Application for a flow-through wildlife pond on a ditch. Held granting a permit does not give an appropriator an easement or ditch right.

A-4.930 Application to appropriate water from Kootenai Creek to be transported via the ditch would actually add water to the ditch for senior right owners. Held no adverse effect.

Final Order Date:	06/26/91 (W) IO 10/03/89	**Applicant:**	Gardiner-Park

Case #/Type:	63865-g43B (P)	**Regional Office:**	Bozeman
Application Date:	05/15/87	**Examiner:**	Kerbel
Hearing Date:	07/21/89	**Use:**	Municipal

A-4.9392 Permit conditioned to compel submission of workable plans for diversion which will not result in an unreasonable number of calls on permittee.

A-4.9392
U-14.1259 Where water is physically available, but is legally available only at certain times throughout the period of appropriation, applicant must, in order to prove the availability of unappropriated water, demonstrate a workable plan whereby water will cease to be diverted without the necessity for an unreasonable number of "calls" by prior appropriators.

U-14.1259 Water is legally available if prior appropriators would not have to make an unreasonable number of "calls" on the permittee to obtain their water.

Final Order Date:	07/26/91 (D)	**Applicant:**	Crop Hail Mgmt.
Case #/Type:	62935-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	04/25/86	**Examiner:**	Elting
Hearing Date:	08/11/88	**Use:**	Irrigation/ Recreation

U-14.1259.00
U-14.1274
B-21.780 Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses.

S-20.110
O-2.490 One who is not a party to a proceeding cannot file exceptions to Proposal. The Department is not required to consider exceptions from one who is not adversely affected by the Proposal. Here, because application was denied, objector was not adversely affected by the decision. [FO]

Final Order Date:	07/31/91 (G/WC)	**Applicant:**	Carr
Case #/Type:	75997-g76L (P)	**Regional Office:**	Kalispell
Application Date:	10/15/90	**Examiner:**	Lighthizer
Hearing Date:	05/22/91	**Use:**	Irrigation

A-4.9395 Although artesian flow is a reasonable means of diversion, it is not a protectable means of diversion.

B-5.6979 Beneficial use is the base, limit and measure of the appropriative right. When an appropriator uses many sources to irrigate a single parcel of land, the total amount of water appropriated from the combined sources is limited to the amount that can be beneficially used. **Cites Toohey v. Campbell, Featherman v. Hennessey, Worden v. Alexander**.

A-4.930 The supposition that future wells might cause an adverse effect is not sufficient to deny an application.

Final Order Date:	08/15/91 (G W/C)	**Applicant:**	Peterson
Case #/Type:	76714-76M (P)	**Regional Office:**	Missoula
Application Date:	01/04/91	**Examiner:**	Lighthizer
Hearing Date:	05/30/91	**Use:**	Mining

J-21.800 The Department does not have jurisdiction to decide mining claim ownership disputes.

B-21.780
E-22.480
Both parties produced evidence of authorization from USFS to enter onto the place of use for mining. Section 85-2-311 (f) does not require exclusive possessory interest in the place of use.

B-21.780
Applicant was able to provide substantial credible evidence the criteria for issuance of a permit had been met since Objectors' entire case was built on the possessory interest question.

Final Order Date:	08/19/91 (G W/C)	**Applicant:**	Gray/Rhea-Gray
Case #/Type:	75685-s76H (P)	**Regional Office:**	Missoula
Application Date:	08/24/90	**Examiner:**	Lighthizer
Hearing Date:	06/19/91	**Use:**	Fish-Wildlife/Lawn & Garden/Stock

E-22.480
M-5.110
Prior use of diversion works is admissible if relevant to ascertain ability of works to adequately function, whether such prior use was "illegal" or not.

U-14.120
To comply with Section 85-2-311, applicant must prove that at least in some years, sufficient water will be available at the POD to supply the amount requested throughout the period of appropriation and that at least in some years, no legitimate calls for water will be made on him.

O-2.490
Objectors modified stipulation before signing. Applicant did not sign modified stipulation; therefore stipulation not binding.

A-4.930
Objector with no water right cannot be adversely affected.

S-15.920
An appropriator cannot be compelled to forego his use of a water right just for the benefit of other appropriators on the source simply because he has another source available to him.

Final Order Date:	08/30/91 (G)	**Applicant:**	So. Tribs. Milk River
Case #/Type:	Basin Closure	**Regional Office:**	Havre
Application Date:	04/26/91	**Examiner:**	Stults
Hearing Date:	06/18/91	**Use:**	All, with exceptions

A-16.7567
D-21.310
A proposal to close a drainage basin cannot be extended beyond its original published scope and then adopted without further notice and opportunity for presentation of evidence.

E-24.480
A basinwide adjudication of existing water rights within the drainage basin need not be completed before Department takes final action on a proposal to close sources in the basin. Mont. Code Ann. § 85-2-309(3) (1989).

J-21.800
L-1.940
The Department need not find, prior to proposing a closure or taking final action on such a proposal, that the statutory criteria for obtaining a new permit to appropriate water would be incapable of providing the same level of protection to existing water rights.

Final Order Date:	09/26/91 (D)	**Applicant:**	Finlayson
Case #/Type:	75737-s76H (P)	**Regional Office:**	Missoula
Application Date:	09/25/90	**Examiner:**	Lighthizer
Hearing Date:	07/24/91	**Use:**	Irrigation

B-21.780
U-14.1259.00
Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion

U-14.1274 in the amount applied for at the times it is proposed to be put to use. (Based on 1989 amendment of 85-2-311(1)(a) as discussed in Department policy memorandum titled "Summary Report: Clark Fork Basin Water use" dated 4/24/90.)

W-1.870 Once waste water and seepage joins a natural water course and commingle with natural waters, it becomes a part thereof and is subject to new appropriation only if there is water available after the senior rights have been satisfied. Cites Popham v. Holoran.

Final Order Date:	10/10/91 (D)	**Applicant:**	Brandt
Case #/Type:	77118-s43Q (P)	**Regional Office:**	Billings
Application Date:	02/19/91	**Examiner:**	Lighthizer
Hearing Date:	07/31/91	**Use:**	Irrigation

B-21.780 Since applicant is required to show by substantial credible evidence all criteria set forth in § 85-2-311 have been met and applicant failed to demonstrate 311(1)(c) had been met, no finding is necessary on other criteria. Cites Carney, 53221-s40O and Pitsch 61333-s40A. Denying application at this point does not determine that the proposed appropriation could not be granted given sufficient evidence on 311(1)(c).

Final Order Date:	10/10/91 (G W/C)	**Applicant:**	Kreiman
Case #/Type:	77494-s42M (P)	**Regional Office:**	Glasgow
Application Date:	02/25/91	**Examiner:**	Lighthizer
Hearing Date:	07/30/91	**Use:**	Irrigation

U-14.120 To fulfill § 85-2-311(1)(a) all that need be shown is there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is administrable.

U-14.1259 Simply because claimed water rights exceed the yield of the drainage does not mean there are no unappropriated water in the drainage.

Final Order Date:	10/17/91 (G w/C)	**Applicant:**	Beitl
Case #/Type:	75396-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	07/20/90	**Examiner:**	Stults
Hearing Date:	08/08/91	**Use:**	Domestic

L-1.940 The statutes controlling the application are those in effect at the time of filing.

S-15.920 Under controlling law and given the evidence in the record, source applied for is surface water because the diversion structure will be collecting water beneath the surface of the land which is part of the surface water of Walker Creek.

B-5.690
M-5.110
S-20.720 [Implicit in holding that diversion works are adequate and proposed appropriation constitutes beneficial use is a finding that storage to ensure a supply of water for diversion through a downstream infiltration gallery is a beneficial use.]

Final Order Date:	10/23/91 (G w/C)	**Applicant:**	Mont. Dept. of Fish, Wildlife & Parks
Case #/Type:	G(P)3049-01-s76D (C)	**Regional Office:**	Kalispell
Application Date:	08/05/87	**Examiner:**	Beck Stults (OA)
Hearing Date:	10/19/88 04/16/91 (OA)	**Use:**	Irrigation

[Heard jointly with G(P)3049-00-s76D by Glen P. & Rose J. Wood]

A-4.9348.10
E-24.4831
The limit of a water right is the extent to which it was perfected within the time permitted.

L-1.940
O-23.690
T-5.800
Hearing Examiner must not accept the terms of an agreement that is part of an ownership transfer without determining whether the terms are within the criteria and provisions of Title 85, Chapter 2, MCA. Proposal for Decision not changed to match parties' settlement agreement outlining their terms for transfer of the portion of the water right that is the basis for change application. (FO)

E-24.4831
M-5.110
O-23.690
T-5.800
Because the proposed change and ownership transfer indicate an undivided interest in the use of the flow, a restriction must be must be placed on the change authorization to ensure the permitted flow and volume are not exceeded. (FO)

Final Order Date:	10/23/91 (G w/C)	**Applicant:**	Wood
Case #/Type:	G(P)3049-00-s76D (C)	**Regional Office:**	Kalispell
Application Date:	07/24/87	**Examiner:**	Beck Stults (OA)
Hearing Date:	10/19/88 04/16/91 (OA)	**Use:**	Irrigation

[Heard jointly with G(P)3049-01-s76D by MT Dept. of Fish, Wildlife & Parks.]

A-4.9348.10
E-24.4831
The data contained in the Department's verification of a completed permit is the basis from which a change in diversion or use has to be made. (P4D)

A-4.9348.10
If the proposed method of irrigation on one expanded area of use would be the same as the method used on the perfected acreage, then that expansion can only be allowed if another area is reduced. (P4D & FO)

A-4.9348.00
A-4.9348.10
An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. (FO)

E-24.4831
M-5.110
O-23.690
T-5.800
Because the proposed change and ownership transfer indicate an undivided interest in the use of the flow, a restriction must be placed on the change authorization to ensure the permitted flow and volume are not exceeded. (FO)

Final Order Date:	11/18/91 (IR-G W/C) (ST-D)	**Applicant:**	Galbraith
Case #/Type:	70402-s76H (P)	**Regional Office:**	Missoula
Application Date:	02/21/89	**Examiner:**	Lighthizer
Hearing Date:	08/07/91	**Use:**	Irrigation/Stock

A-4.9348.48
T-5.800
Proposed project will not appropriate water from Reeser Ditch. Said ditch will be used as carrier of waste water appropriated from hatchery; however, permit must be conditioned to require measuring devices to ensure that it remains so.

E-24.480
S-15.920
W-1.870
A waste appropriator cannot compel the continued generation of the waste unless its deprivation is malicious or arbitrary. Applicant would appropriate waste water from an existing fish hatchery and would not divert additional water from the source.

A-4.9321 Objector expressed an aversion to calling a junior appropriator for water. The appropriative system by its nature contemplates the supply may be less than demand. First in time, first in right would never operate if no call were ever made. Cites MPC v. State ex rel Carey.

A-4.9392 Stock water portion of application denied as unadministrable. Use of measuring devices allow administration of flow-through fish pond. Livestock, on the other hand, will drink from Reeser Ditch whether water is waste from hatchery or objectors' decreed water from Skalkaho.

Final Order Date:	12/06/91 (G w/C)	**Applicant:**	Thayer
Case #/Type:	G(W)114754-s43D ©	**Regional Office:**	Billings
Application Date:	09/29/89	**Examiner:**	Lighthizer
		O/A Examiner:	Stults
Hearing Date:	09/05/90 06/11/91 OA	**Use:**	Irrigation

O-2.490 Objectors "illegal" use of water not at issue. [P4D]

B-21.780
M-5.110 Applicant failed to provide substantial credible evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant failed to provide specifications of proposed ditches, dam, and did not even mention headgates or other control structures. Applicant failed to describe operation, whether the water would be diverted all season or just when needed. [P4D]

B-21.780
M-5.110 Applicant must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. [FO]

B-21.780
M-5.110
T--5.800 Although Department may place conditions on authorizations to ensure they meet statutory criteria, it cannot summarily devise a design for construction and impose it on the Applicant, plus the Objector and all others on the stream, as adequate for regulation in conformance with priorities on source. It is the duty of Applicant to show such devices will be in place to control and limit water diverted from source within the limits of her water right, and that after commingling with other waters, secondary diversions are proportional to the original amount diverted. [FO]

A-4.9348.00 Applicant's proposal will cause an increased burden of 8 miners inches. Any depletion of a stream constitutes a new appropriation which cannot be accomplished under a change of appropriation water right. [P4D]

A-4.9348.00
A-4.9379
E-24.4894
U-14.1259.25 Objector's subsequent use of return flows from Applicant’s imported water is a windfall Objector could enjoy only so long as Applicant continues activity that augmented the natural flows. Objector cannot compel Applicant to continue activity solely for Objector's benefit. [FO]

A-4.9379
E-24.4831
E-24.4894
U-14.1259.25 The exclusive use of imported water (water which would not in the natural course of events be available in the source, but which is in addition to natural flows through the action of man) belongs to the person whose labors have created the additional water. [FO]

[F.O. originally denied change. Appealed to District Court, remanded to Dept. for further negotiations, settled and change was granted with conditions.]

Final Order Date:	12/13/91 (D)	**Applicant:**	Hedrich/Straugh/ Ringer
Case #/Type:	G(W)028708-41I (C)	**Regional Office:**	Lewistown
Application Date:	03/26/91	**Examiner:**	Lighthizer
Hearing Date:	10/17/91	**Use:**	Irrigation

A-4.9348.10 There is nothing in the statutes to forbid a change that increases the acres irrigated as long as the flow rate and volume of water are not increased and there is no increased burden on the source of supply. **Cites Grether**.

A-4.9348 Any change authorization resulting in a greater use than that existing before the change is equivalent to the issuance of a new water right.

B-21.780 Applicants must make a **prima facie** showing of the existence of a water right to be changed.

E-23.4831
J-21.800 Although it lacks jurisdiction to adjudicate a water right, the Department must be able to ascertain with reasonable certainty the scope of an existing right in order that it may determine whether a change can be authorized.

E-22.480 Although the filing of a Statement of Claim is **prima facie** proof of its content, evidence at the hearing held sufficient to overcome the claim.

E-24.4831 A water right is defined by actual beneficial use, not amount claimed or even decreed.

A-4.9373 Applicants failed to meet their burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

Final Order Date:	01/16/92 (G)	**Applicant:**	Estate of Lena Ryen
Case #/Type:	P49632-41H (E) G(W)120401-41H G(W)120403-41H	**Regional Office:**	Bozeman
Application Date:	10/30/90	**Examiner:**	Stults
Hearing Date:	10/22/91	**Use:**	Power Generation

M-5.110
P-5.800 Alleged infeasibility of project overcome by evidence in record. Furthermore, no evidence in record indicates any delays were caused by infeasibility. Therefore, an extension of time not precluded by infeasibility of project.

P-5.8031 Events beyond the control of Applicant are reasonable justification for delay, and delay so justified is good cause for granting an extension of time when accompanied by due diligence. Cites Tortoreti; Vaira; Gunderson; and Rasmussen.

O-2.490
S-20.110 Sec. 85-2-312(3) and 85-2-308 both allow for persons with interests that may be affected to file objections and be parties. Applicant did not show parties have no interests, therefore objections cannot be dismissed for lack of standing.

O-2.490 Objections cannot be dismissed as deficient because they contain

S-20.110 statements of facts that objectors believe show lack of diligence. Ruling, October 16, 1991.

O-2.490
S-20.110 Section 85-2-312(3), which says, "The department shall hold a a hearing . . ." grants objectors the right to support their allegations by argument, however brief; and, if need be, by proof, however informal. Therefore, their objections, being properly filed cannot be dismissed without opportunity for a hearing.

Final Order Date:	01/21/92 (G W/C)	**Applicant:**	Jensen
Case #/Type:	70420-g76M (P)	**Regional Office:**	Missoula
Application Date:	03/13/89	**Examiner:**	Lighthizer
Hearing Date:	09/19/91	**Use:**	Irrigation

A-4.930
B-21.780 There is no evidence that Objectors' prior right would be adversely affected. Objectors failed to go forward and produce information that contrary to Applicant's evidence, the pressure head would be reduced to a point where Objectors would not be able to exercise their water rights.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first operated "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit.

Final Order Date:	01/21/92 (G W/C)	**Applicant:**	Simons
Case #/Type:	70454-g76M (P)	**Regional Office:**	Missoula
Application Date:	04/20/89	**Examiner:**	Lighthizer
Hearing Date:	09/19/91	**Use:**	Irrigation

A-4.930
B-21.780 There is no evidence that Objectors' prior right would be adversely affected. Objectors failed to go forward and produce information that contrary to Applicant's evidence, the pressure head would be reduced to a point where Objectors would not be able to exercise their water rights.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first operated "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit.

Final Order Date:	02/20/92 (G W/C)	**Applicant:**	Meadow Lake Development Corporation
Case #/Type:	74002-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	02/23/90	**Examiner:**	Stults
Hearing Date:	08/07/91	**Use:**	Irrigation

A-4.9394
M-5.110
T-5.800 Other than proving the system is capable of controlling the amount water it diverts, showing a permit can be enforced is not a criterion for issuance. Noncompliance with conditions placed on previously granted appropriations is not grounds for denial of a proposed appropriation.

A-16.7567
S-20.720
T-5.800 An expansion of the period of use of stored water does not imply an increase in the burden on the source beyond what was identified in the notices because the impact on the source is confined to the initial diversion away from the natural channel into the sealed

storage pond. Therefore, the application may be modified after public notice to expand the period of use of the stored water.

B-21.780
M-5.110
S-20.720
T-5.800

Applicant needed to prove that the off-stream reservoir, when complete, would be adequately constructed to prevent seepage. Applicant provided that proof by accepting the condition requiring Applicant to prevent seepage through a specified means of designing and constructing the pond that gives a high likelihood of success toward meeting that requirement.

S-20.720
T-5.800

Conditions added to permit requiring construction plans from a professional engineer be submitted to department and objectors; that objectors' comments be considered by department in reviewing plans; that the engineer supervise construction and initial operation to verify plans successfully stop seepage; and that department confirm after construction that seepage has been prevented.

Final Order Date:	04/01/92 (G W/C)	**Applicant:**	Starkel/Koester
Case #/Type:	G(W)008323-g76L ©	**Regional Office:**	Kalispell
Application Date:	03/21/91	**Examiner:**	Lighthizer
Hearing Date:	02/18/92	**Use:**	Irrigation

A-4.9395
E.22.4879

A water right does not give an appropriator the right to install a pump which reaches such a shallow depth into the available water supply that a shortage would occur even though diversion by others did not deplete the source below where there would be an adequate supply for the appropriator's lawful demand. **Cites McAlister, Hunt, MacMillan, Hildreth, Cross, and Carr.**

E-24.4879
M-5.110

Objectors' prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

E-24.4879

Artesian flow is not a protectable means of diversion.

A-4.9395

The mere possibility that objectors' water pressure might be reduced is insufficient to constitute adverse effect.

A-4.9348
B-21.780
E-24.4831

Appropriators are entitled to maintenance of original conditions unless the appropriation can be reasonably exercised under the changed conditions.

E-24.4831

The Department has the authority to make administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding of criteria of 85-2-402 have been met.

A-4.9348.10

There is nothing in the statutes to forbid a change that increases the acreage irrigated as long as the flow rate and volume of water are not increased and there is no increased burden on the source of supply. **Cites Grether.**

E-22.480

Although the filing of a Statement of Claim is **prima facie** evidence of its content, evidence at the hearing held sufficient to overcome the claim.

E-24.4831

A water right is defined by actual beneficial use, not amount claimed or even decreed.

A-4.9348
A-4.9395

Objectors are concerned with the future of the aquifer and the effect of wells flowing without control. Applicants have no burden

B-21.780 to disprove potential adverse effects which may be caused by possible future appropriations of groundwater in the area, or to disprove adverse effects that may be caused by uncontrolled flowing wells owned by other persons.

J-21.800
S-21.660 Applicant has used water on acreage not included in original water right without an Authorization to Change. Held, criminal sanctions may apply, however, there is not statutory authority to deny Authorization on such grounds.

Final Order Date:	04/20/92 (D)	**Applicant:**	Pitsch
Case #/Type:	77335-s40A (P)	**Regional Office:**	Lewistown
Application Date:	04/10/91	**Examiner:**	Lighthizer
Hearing Date:	02/25/92	**Use:**	Irrigation/Stock

B-21.780
M-5.110 Applicants must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source.

B-21.780
D-21.310
S-21.660 Since applicant is required to show by substantial credible evidence all criteria have been met and applicant failed to show 311(1)(c) had been met, no finding is necessary on other criteria. Cites Carney and Pitsch.

Final Order Date:	04/22/92 (D)	**Applicant:**	Roberts
Case #/Type:	77304-s40C (P)	**Regional Office:**	Lewistown
Application Date:	02/21/91	**Examiner:**	Stults
Hearing Date:	01/08/92	**Use:**	Irrigation

B-5.6979
B-21.780
S-21.760 The proposed volume exceeds the maximum that could be used without waste under the proposal as stated by applicants which includes supplemental water from canal company. Evidence in the record is insufficient to determine the amount that would be beneficially used. Therefore, applicants have not proven that the proposed appropriation would be a beneficial use.

B-21.780
E-22.480
U-14.1274 General USGS stream flow records provided by applicants and area-wide water availability projections by the department are not sufficient to overcome the collective testimony of objectors that water availability in the immediate vicinity of the proposed appropriation is critically low during the proposed period of use in almost all years. Without substantial credible evidence showing with specificity that water is available in the amount requested at the proposed point of diversion, the criterion has not been met.

B-21.780
D-21.310
S-21.660 Since applicants must show that all the criteria are met and have failed to meet two, no finding is necessary as to the remaining criteria. Cites Carney (53221) & Pitsch (61333).

Final Order Date:	05/05/92 (D)	**Applicant:**	Diehl
Case #/Type:	77547-g41I (P)	**Regional Office:**	Helena
Application Date:	03/05/91	**Examiner:**	Stults
Hearing Date:	No hearing	**Use:**	Irrigation

A-16.7521
D-21.310 Applicant failed to appear at hearing. Application dismissed. File remanded to Processing Unit.

Final Order Date:	06/01/92 (G W/C)	**Applicant:**	Stone Container
Case #/Type:	G(W)118495-76M (C)	**Regional Office:**	Missoula
Application Date:	11/05/90	**Examiner:**	Lighthizer
Hearing Date:	12/04/91	**Use:**	Industrial

E-24.4810 Without proof of intent to abandon, claimed water rights treated as legitimate even if not used for several years.

J-21.800 Only the water court has the authority to declare a claimed water right abandoned until a final decree has been issued.

E-24.4831
M-5.1188 Subirrigation is recognized as a valid right. The limit of such rights is the volume of water necessary to produce a comparable crop utilizing a conventional irrigation system.

E-24.4879 Objector does not have a right to continuance of the existing subirrigation so long as the right could be reasonably exercised by conventional diversion.

A-4.9395
B-21.780 Applicant who provided evidence that a lower groundwater level would not cause adverse effect to the objectors has met his burden of proof. Objectors who produced no evidence that the lower groundwater level would adversely affect them have not met their burden to go forward.

A-4.9395
M-5.110 To hold that an appropriator is entitled to maintain, against subsequent appropriators, a certain water level in a slough that barely penetrates an aquifer would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier.

M-5.110
A-4.9348.20 There is nothing in the statutes that limits the distance a water right may be moved.

Final Order Date:	06/16/92 (D)	**Applicant:**	Bemis
Case #/Type:	78941-s76H (P)	**Regional Office:**	Missoula
Application Date:	08/28/91	**Examiner:**	Lighthizer
Hearing Date:	04/21/92	**Use:**	Irrigation

W-1.870 Waste water loses its character when it reaches a natural channel and flows in that channel with regularity from year to year. It then becomes part of the natural flow in the channel. **Cites Popham v. Holoron; Application 64600-s76H by Evans; Application 75737-s76H by Finlayson.**

Final Order Date:	06/18/92 (G W/C)	**Applicant:**	Hirst
Case #/Type:	79155-g43Q (P)	**Regional Office:**	Billings
Application Date:	08/27/91	**Examiner:**	Stults
Hearing Date:	04/14/92	**Use:**	Lawn & Garden

A-4.9348.00
A-16.7567
B-5.6979
T-5.800 Because the area of the place of use for lawn and garden purposes identified on the application and notice is greater than the actual acreage of lawn and garden within the legal land description of the place of use, and because the amount of acreage of lawn and garden within the place of use description can be expanded and such an expansion could result in an increase in the amount of water diverted, the permitted acreage in the place of use was reduced to the area of the existing lawn and garden use.

A-4.9348.00 Amending an application after public notice to add a small, lined

A-16.7567
S-20.720

reservoir for storing water after it has been diverted and prior to use does not imply an increase in the burden on the source beyond what was identified in the notices because the impact on the source is confined to the initial act of diversion.

A-16.7567
L-1.940

The Department may modify an application if it prepares a statement of its opinion and reasons therefore.

Final Order Date:	06/30/92 (D)	**Applicant:**	Krueger
Case #/Type:	G(W)96362-41K (C)	**Regional Office:**	Helena
Application Date:	07/14/88	**Examiner:**	Stults
Hearing Date:	10/10/91	**Use:**	Irrigation

B-21.780
M-5.110

Applicant must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Cites Pinesdale and Thayer.

B-21.780
D-21.310
S-21.660

Since applicant is required to show by substantial credible evidence all criteria have been met and applicant failed to show 402(b) had been met, no finding is necessary on other criteria. Cites Carney and Pitsch.

M-5.110

The proposed system relies on a crude system of natural conveyance involving running water across open ground where it would fan out in a sheet between the end of a ditch and a drainageway which in theory then collects the flow. Such a proposed system cannot be considered adequate under the Pinesdale/Thayer rule.

APPEALED TO DISTRICT COURT. DNRC DECISION UPHELD.

Final Order Date:	07/09/92 (G W/C)	**Applicant:**	Van Dyke
Case #/Type:	70919-s41H (P)	**Regional Office:**	Bozeman
Application Date:	05/05/89	**Examiner:**	Lighthizer
Hearing Date:	05/21/92	**Use:**	Fish Pond

A-4.9348.48

Legal requirement for a use to be nonconsumptive was met, i.e., that there will be little or no diminution in supply and that the water be returned to the source sufficiently quickly that little or no disruption will occur in stream conditions below the point of return.

A-4.930

"Opening the flood gates" argument that future similar appropriations will threaten prior appropriators, is not relevant. Future appropriators must also go through permit process. **Cites Griff and Loomis/Edenfield.**

E-22.480
J-21.800

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first constructed "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit. **Cites Frost and Town**.

A-4.930
E-24.4810
E-24.4831

The Department cannot consider late claims to be interests which may be adversely affected by a proposed appropriation of water.

A-4.930

Objector with no water right cannot be adversely affected.

Final Order Date:	07/09/92 (G W/C)	**Applicant:**	Baldwin
Case #/Type:	77204-s76H (P)	**Regional Office:**	Missoula
Application Date:	02/07/91	**Examiner:**	Lighthizer
Hearing Date:	06/02/92	**Use:**	Irrigation/Stock

E-22.480
S-15.920
U-14.1274

Applicant failed to show water was available in the amount requested during the proposed period of appropriation. The amount requested was measured at times outside the proposed period of appropriation. Permit granted for the amount measured within the months of the proposed period of appropriation.

Final Order Date:	07/29/92 (D)	**Applicant:**	McBride
Case #/Type:	64545-g76H (P)	**Regional Office:**	Missoula
Application Date:	12/23/86	**Examiner:**	Scott (P4D) Stults (FO)
Hearing Date:	07/29/88	**Use:**	Domestic/Irrigation

A-4.930
B-21.780

Application is subject to 85-2-508, therefore, applicant must prove by preponderance of substantial credible evidence proposed appropriation will not adversely affect other appropriators by aquifer depletion. (P4D)

A-4.930
S-15.920

The hastening of a foreseeable adverse effect in itself constitutes an adverse effect. Present aquifer conditions show declining storage, therefore proposed appropriation will hasten onslaught of adverse effects of storage depletion. (P4D)

A-4.930
I-14.900
T-5.800

Because adverse effect could be eliminated with aquifer recharge augmentation, and because all other criteria have been met, the Department, in an Interlocutory Order, grants applicant three years to perform aquifer recharge augmentation equal to appropriated volume. (P4D)

I-14.900
T-5.800

If aquifer recharge augmentation efforts are successful, as evaluated by Department, permit will be granted with condition that Applicant only divert to extent of augmentation. (P4D)

D-21.310
I-14.900
T-5.800

Applicant failed to fulfill requirements of Interlocutory Order, therefore permit denied. (FO)

Final Order Date:	07/30/92 (G W/C)	**Applicant:**	Big Stone Colony
Case #/Type:	78511-g41QJ (P)	**Regional Office:**	Lewistown
Application Date:	06/25/91	**Examiner:**	Lighthizer
Hearing Date:	03/17/92	**Use:**	Irrigation

A-4.9395

To hold that an appropriator is entitled to maintain wells that penetrate only the top of an aquifer against subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. **Cites Colorado Springs v. Bender, Alamosa-La Jara v. Gould, Wayman v. Murray City Corp., Doherty v. Pratt, McAllister, Hildreth, and MacMillan.**

E-22.480
J-21.800

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first operated "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit. **Cites Frost and Town.**

J-21.800
T-5.800

A Hearing Examiner has no authority in a water right application hearing to order the Department to maintain a well monitoring program. A permit may be conditioned, restricted, or limited so the **Applicant** is required to take certain actions to prevent an adverse effect to prior appropriators, to make his means of appropriation, construction, and operation adequate, or to take some action which will satisfy the 311 criteria.

L-1.940

In Montana, there is no priority of use. Montana's water law is based upon the Prior Appropriation Doctrine; it matters not what the use is as long as the use is beneficial.
APPEALED TO DISTRICT COURT. DNRC DECISION UPHELD.

Final Order Date:	08/04/92 (G W/C)	**Applicant:**	Valgamore
Case #/Type:	79178-s43B (P)	**Regional Office:**	Billings
Application Date:	09/18/91	**Examiner:**	Stults
Hearing Date:	04/15/92	**Use:**	Irrigation

A-4.930
I-14.870
R-5.850
U-14.1259.00

The record contains no evidence or contention that the water being applied for is reserved water or that it is other than unappropriated water. It is the intent of the applicant to appropriate high or "flood" waters. Furthermore, it is reasonable to assume that return flows will be a large percentage of the volume of water diverted and will return relatively quickly. Finally, the proposed appropriation will be callable by owners of reserved water rights. Therefore, the proposed use will not unreasonably interfere with planned uses for which water has been reserved. **Cites Lockwood, 54172-s43Q.**

E-22.480
T-5.800
U-14.1274

Evidence that water has been available after June once every 26 years does not substantiate unappropriated water is reasonably available for an open ditch flood irrigation system without storage. Application denied as to proposed period of appropriation after June of each year.

M-5.110
T-5.800

The Department may issue a permit subject to limitations and restrictions necessary for the permit to be in conformance with the statutory criteria. Because Applicant's diversion works are capable of diverting more water than the combined amounts of Applicant's two water rights, a condition must be placed on the permit requiring a measuring device on the diversion works to insure that the amount of water diverted does not exceed Applicant's water rights.

Final Order Date:	09/16/92 (Rev.)	**Applicant:**	Potts
Case #/Type:	14538-g41H (R)	**Regional Office:**	Bozeman
Application Date:	08/01/79	**Examiner:**	Stults
Hearing Date:	None	**Use:**	Irrigation

D-21.310

Informal conference procedure used as an attempt to avoid revocation hearing.

D-21.310
S-21.6625

Permittee was ordered to file Notice of Intent to Appear at Show Cause Hearing. Permittee failed to comply with Order, therefore hearing was vacated and Final Order was entered.

J-21.800

Department has the power to revoke a permit.

J-21.800
P-5.8021

Department has authority to inspect permitted appropriations to determine whether completed in accordance with permit.

B-21.780
P-5.800

Permittee's failure to show that water has been appropriated and put to beneficial use is sufficient grounds for Department to revoke a permit.

Final Order Date:	09/19/92 (G W/C)	**Applicant:**	Locatelli
Case #/Type:	78425-s76H (P)	**Regional Office:**	Missoula
Application Date:	07/11/91	**Examiner:**	Lighthizer
Hearing Date:	07/07/92	**Use:**	Lawn & Garden

S-15.920
E-22.480

Objector contended proposed source was part of its ditch system and that Applicant had no right to divert from that source. Site visit after hearing proved otherwise.

A-4.930

Objector's point of diversion upstream from Applicant's proposed point of diversion. Held no adverse effect.

M-5.110
E-22.480

Evidence that Applicant's proposed means of diversion and operation was so minimal that it was barely substantial or credible. Proposed appropriation so small Applicant need not provide an elaborate detailed plan for his means of diversion and operation.

Granted with conditions.

Final Order Date:	09/29/92 (D)	**Applicant:**	Harris
Case #/Type:	79625-s76F (P)	**Regional Office:**	Missoula
Application Date:	10/16/91	**Examiner:**	Lighthizer
Hearing Date:	07/23/92	**Use:**	Irrigation

E-22.480

The fact that a beaver once constructed a dam near the proposed point of diversion is not substantial credible evidence of an adequate means of diversion.

B-21.780
D-21.310
S-21.660

Since Applicants are required to show by substantial credible evidence that all criteria have been met and Applicants failed to show 311(1)(C) had been met, no finding is necessary on other criteria. **Cites Carney and Pitsch**.

DENIED

Final Order Date:	09/29/92 (G W/C)	**Applicant:**	King
Case #/Type:	73904-s76M (P) 74242-s76M (P)	**Regional Office:**	Missoula
Application Date:	02/14/90 03/27/90	**Examiner:**	Lighthizer
Hearing Date:	06/24/92	**Use:**	Dom/Irrig/Stock

U-14.120

While water may be physically available at all times for power generation, there would be times Applicant would dewater the reach of stream between the intake and the discharge points of the power plant if water were diverted for hydropower. However, all that need be shown is that there is sufficient water in at least some periods for his appropriation. **Cites Allred; Kreiman.**

A-4.930

Having to call for water is not an adverse effect. The appropriative system by its very nature contemplates that the supply is less that the rights on a stream. That is the foundation for the rule of which appropriator is to forego exercise of its rights in those times of shortage. "First in time, first in right" would never operate if no call were ever made. **Cites MPC v. State ex rel. Carey.**

J-21.800 The Department is not bound by an agreement between the Applicant and Lolo National Forest. Only those portions of the agreement relating to fulfillment of the statutory criteria may be included in permit conditions.

GRANTED WITH CONDITIONS.

Final Order Date:	10/06/92 (D ALL)	**Applicant:**	Gordon Cattle Co.
Case #/Type:	G(P)000960-s40J © G(W)114281-s40J (C) 71680-s40J (P)	**Regional Office:**	Havre
Application Date:	03/01/91 01/11/90 01/11/90	**Examiner:**	Lighthizer
Hearing Date:	03/10/92	**Use:**	Irrigation/Stock

A-4.930
B-21.780
E-22.480
U-14.120
Applicant and Objectors reached an agreement to settle objections after the hearing was held. Regardless, Department must review record to determine whether the criteria for issuance of a permit and change were met. Held the criteria was not met for permit application nor for the change applications.

A-4.9348.10
U-14.120
Applicant must prove by measurements and/or other documentation to support the net depletion theory such as delivery and conveyance efficiencies or standards and guidelines established by Federal and State agencies that amount of water claimed to be salvaged is truly salvaged before Department can issue an authorization to change for expanded acreage. **Cites G136329, G136330, and G136331 by DeBruycker.**

U-14.1259
Although stream dries up between Applicant and Objectors, the water appropriated by the Applicant could be used to recharge the bed of the stream so that water would reach the Objectors. Thus, Applicant's assertion that water he wishes to appropriate would not make it to Objectors anyway is unfounded. **Cites 19535 by Campbell.**

Final Order Date:	10/26/92 (G W/C)	**Applicant:**	Montana, State of Dept. of Education Fac. Serv. Dept.
Case #/Type:	78402-g76M (P)	**Regional Office:**	Missoula
Application Date:	06/29/91	**Examiner:**	Stults
Hearing Date:	09/10/92	**Use:**	Institutional & Irrigation

A-4.9312
A-16.750
M-5.110
The Department must not issue a permit for more water than a project will beneficially use, but may issue a permit for less that the amount of water requested. The maximum amount that can be used is less than the amount requested, therefore the permit must be limited to the lesser amount.

A-4.9394
E-14.930
T-5.110
System must comply with 85-2-505. Therefore, conditions imposed to require testing to ensure that system does not contaminate or pollute groundwater.

A-16.7516
M-5.110
A permit cannot be issued for speculative proposals. Applicant has failed to show a bona fide intent to develop and use all points of diversion requested, therefore permit must be limited to the lesser number of points of diversion.

A-4.9312
M-5.110
Project will be completed over a long period of time with 23 diversion wells and 23 injection wells. Project must be completed

T-5.880 in substantial accordance with the design capacities and other evidence Applicant provided to prove the project would meet the statutory criteria for issuance of the permit. Therefore, conditions imposed requiring that the actual flow rate and volume of each well be certified to the Department after the completion of each of the four phases of the project.

A-16.7576
M-5.110
T-5.800
U-14.1259.70
Proposed appropriation is alleged and publicly noticed as being partly nonconsumptive. Therefore, conditions imposed to require testing for nonconsumptivity of project, i.e., the effectiveness of injection wells.

B-5.690 The specific institutional use, heating and cooling of buildings is a beneficial use of water. The amount proposed for appropriation is reasonable.

B-5.6979
S-21.760
T-5.800
Appropriations must not exceed amount necessary for beneficial use. Therefore, conditions and limits imposed defining conjunctive and supplemental uses.

GRANTED WITH CONDITIONS.

Final Order Date:	10/29/92 (D)	**Applicant:**	Stellick
Case #/Type:	77283-s76H (P)	**Regional Office:**	Missoula
Application Date:	04/08/91	**Examiner:**	Lighthizer
		O/A Examiner:	Siroky
Hearing Date:	04/02/92	**Use:**	Fish Pond
O/A Hearing:	08/27/92		

A-4.9348
E-22.480
S-20.72
Applicants asserted nonconsumptive surface water use; however did not provide method to determine the ground water level in proposed pond, thus unable to determine if surface water would be stored.

B-21.780
M-5.110
Applicants must show the proposed system can be operated reasonably and efficiently without waste to allow the control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source.

B-21.780
D-21.310
S-21.660
Since Applicants are required to show by substantial credible evidence that all criteria have been met and Applicants failed to show 311(1)(c) had been met, no finding is necessary on other criteria. **Cites Carney and Pitsch.**

DENIED

Final Order Date:	11/05/92 *	**Applicant:**	Takle
Case #/Type:	G(W)111151-76H (C) (G w/C) 76691-s76H (P) (D) 76692-s76H (P) (D) 72842-s76H (P) (D) 76070-s76H (P) (D)	**Regional Office:**	Missoula
Application Date:	11/03/89 & 11/13/90	**Examiner:**	Lighthizer
		O/A Examiner:	Siroky
Hearing Date:	01/16/92	**Use:**	Irrigation/Stock
Oral Argument Date:	08/27/92		

J-21.800 On a decreed stream, the costs of distributing the water are set by the commissioner's report and the court. The Department has no jurisdiction to require applicants to pay the entire cost incurred by the water commissioner while admeasuring and distributing decreed waters.

S-15.920 The definition of groundwater at the time these applications were filed was, ". . . any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." Mont. Code Ann. § 85-2-102(10) (1989).

S-15.920 Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary.

B-5.6979 The amount of stock water requested in each of the four Applications was .15 acre-feet of water per year. Applicants propose to keep four to six horses that would drink directly from the source. The total stock water use from all the ponds would be .146 of an acre-foot of water per year rather than .15 of an acre-foot of water per year from each pond. Held not waste if stock drink directly from the stream; however, if Applicant diverted .6 of an acre-foot of water for four to six horses, it would be more than the amount that could be beneficially used.

S-15.920
W-1.870 A water right can be established in waste wter from upgradient irrigation. Waste water not part of the decree.

A-4.930 Perhaps the adverse effect of the proposed appropriations would not be apparent immediately as indicated by the evidence, but any water taken upstream in a water-short source will be felt downstream as a shortage of water.

E-24.480
S-15.920
U-14.1259.00 If, in fact, there is water available after the eighth right is shut shut off, it should be admeasured and distributed by the Water Commissioner to satisfy the decreed rights rather than attempt to create a permitted right on a source that cannot now support the demand by decreed water rights.

W-1.870 Seepage water along a stream belongs to the stream and its appropriators. **Cites Woodward v. Perkins. [FINAL ORDER]**

APPEALED TO DISTRICT COURT. COURT UPHELD DNRC DECISION.

* The final decision for these applications is indicated next to the application numbers above.

Final Order Date:	11/17/92 (Gw/C)	**Applicant:**	Sund
Case #/Type:	78884-g76H (P)	**Regional Office:**	Missoula
Application Date:	08/06/91	**Examiner:**	Stults
Hearing Date:	09/30/92	**Use:**	Irrigation

A-4.9348.00
A-4.9383
A-4.9392
B-21.780
L-1.940 Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. The law which provides a mechanism for pursuing issue of cumulative effects is § 85-2-319, or § 85-2-506 and 507, MCA.

A-4.930
W-1.870 Reducing recharge to aquifer by ceasing deliveries of contract water is not an adverse effect because it would be discontinuing a practice that is exclusively under applicants' control. Other appropriators' benefit from such recharge is a windfall they enjoy only as long as the practice is continued, they cannot compel the activity solely for their benefit. [Dicta]

E-22.480
J-21.800

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

L-1.940
T-5.800

The condition stating the process for modification or revocation of the permit is simply an expression of existing law and is not unique to the circumstances of an individual application or permit. Therefore no error would result from omitting it from a permit.

Final Order Date:	11/23/92 (G)	**Applicant:**	Unified Industries
Case #/Type:	G(W)015930-76H (C)	**Regional Office:**	Missoula
Application Date:	11-02-90	**Examiner:**	Stults
		O/A Examiner:	Lighthizer
Hearing Date:	11/07/91	**Use:**	Municipal
O/A Date:	08/12/92		

A-16.7576
D-21.310

The published notice was correct, but it cannot be shown that the individual notices were correct and it appears they may not have been. No prejudice has been expressed or is apparent, however. Without an expressed or apparent harm, there is no need to readvertise.

A-16.7567
A-16.7576
D-21.310

An amendment that decreases the amount of water to be changed does not imply an increased burden on the source which would cause prejudice, but rather the opposite, and therefore need not be advertised.

B-5.690
E-24.480

Nothing in the statutes prohibits changing the purpose of a previously decreed water right. In fact many irrigation water rights have been changed to municipal use, including previously decreed water rights.

A-4.9373
E-24.480

The period of use of a water right being changed is limited to the period of use of the historic purpose.

A-4.9348.10
B-5.690

The place of use for municipal purposes can extend to entire area within city limits because the establishment of a municipal water delivery system area is the type of project designed for gradual development. Furthermore, the establishment of fire hydrants in the undeveloped area is a manifestation of announced intent which can serve as the definition of the extent of the beneficial use. This does not, however, allow for expansion of the amount of water which can be appropriated under the subject water right.

A-4.9392
T-5.800

In order for the water right to be administrable by the water commissioner, the system must be constructed so that all water diverted is measured. The system cannot allow water to bypass the measuring devices.

A-4.9321
M-5.110

An increase in the expense of employing a water commissioner does not constitute adverse effect.

E-24.4831
E-22.480

Measure of water right is quantity of water put to beneficial use over reasonable period of time. Here, Applicant wants quantity calculated on constant use of 20 MI, 24 hours a day, over period of 214 days when evidence in the record is that full service irrigation was available only one-quarter of time.

J-21.800
E-24.4831

Department has authority to make preliminary administrative determinations of scope and parameters of underlying right to extent necessary to fulfill its statutory duties of deciding if criteria in 85-2-402 have been met.

J-21.800
E-22.480
R-5.93

Department may reopen record to receive additional evidence by affidavit when evidence in record is minimal and unclear.

Final Order Date:	11/30/92 (G)	**Applicant:**	Nelson
Case #/Type:	80964-76H (P)	**Regional Office:**	Missoula
Application Date:	02/25/92	**Examiner:**	Lighthizer
Hearing Date:	09/22/92	**Use:**	Irrigation

U-14.1259
W-1.870

Once the water leaves the possession of the original appropriator, it becomes waste and is subject to appropriation by another. **Cites Perkins and Rock Creek Ditch.**

W-1.870

Waste water right only good as against junior appropriation if same user cannot compel generator of waste to continue generating it.

GRANTED.

Final Order Date:	12/04/92 (D)	**Applicant:**	Janney
Case #/Type:	76161-s76G (P)	**Regional Office:**	Helena
Application Date:	09/24/90	**Examiner:**	Stults
Hearing Date:	07/25/91	**Use:**	Stock

A-4.9312
A-16.7516
B-5.690

The proposed stock water use is not a new appropriation but a change to an existing right. Therefore the amount identified as a new appropriation for stock cannot be granted and must be subtracted from the proposed appropriation.

A-4.9312
A-16.7576
D-21.310
O-2.490

The change criteria are a subset of the criteria for issuance of a permit. Changes may be considered in a proceeding publicly noticed as a permit application so long as other appropriators are not prejudiced, regardless of whether they are a party or non-party. If the proposed change suggests an increase in the burden on the source beyond that identified in the public notice, that would cause prejudice. The potential for increased burden inherent in the changes was not apparent in the public notice, therefore, the change cannot be considered.

Final Order Date:	12/08/92 (G w/C)	**Applicant:**	Magellan Resources
Case #/Type:	G(W)96235-76GJ (C)	**Regional Office:**	Helena
Application Date:	10/19/90	**Examiner:**	Stults
Hearing Date:	05/11/92	**Use:**	Mining

A-4.930
B-5.690
L-1.940

"Proposed use" in 85-2-402(a) means the specific action that an applicant proposes to perform with the water, including the inherent attributes of the action, such as its location, timing, condition, and how consumptive the activity is.

A-4.930
B-21.780
E-14.930
J-21.800

Applicant does not have to prove that the past, ongoing, and future exploratory drilling program will not adversely affect other water rights. Such mining activities are regulated by Dept.of State Lands. Applicant must prove only that the specific proposed use of the water, the lubrication of drilling apparatus, will not adversely affect them.

A-4.9348
E-24.4831
J-21.800

A change must not create a greater demand on the source than existed under the previous use of the water right. The extent of the subject water right is less than the amount applied for, and only a portion of the claimed water right. This is not an adjudication of the water right. Should the final determination of the Water Court confirm the claimed amount, the authorization would be subject to reinterpretation. Furthermore the utility of the underlying right is not altered by an authorization to change.

A-4.9394
E-24.4879

Water quality is an attribute of a water right that is protectable from adverse effect. The Department may not authorize a change which results in a degradation of water quality such that other appropriators are unable to reasonably exercise their water rights.

B-5.690

Lubricating the drilling apparatus for exploratory drilling is a beneficial use of water.

B-21.780
S-21.660

Motion for Direct Verdict denied. Sufficient showing to proceed.

E-24.4831
J-21.800
O-23.6994

Department has authority to make and must make a threshold determination on the existence and extent of the water right an applicant proposes to change. The Department may make a preliminary determination as to Applicant's ownership interest in the subject water right.

O-23.690
S-20.720

The buyer of property under a contract for deed can seek to change the water right. Ownership of water right transfers under a contract for deed. A contract for deed vests the entire equitable and beneficial interest of the land in the buyer.

E-22.480
J-21.800

A temporary preliminary decree is neither a final decree nor a final immutable statement of a water right. Mont. Code Ann. § 85-2-231, *et.seq.* In change proceedings, a temporary preliminary decree may provide evidence of existing rights but does not dictate the Department's decision. **Cites MacDonald v. State and Hollenback**. [Final Order]

APPEALED TO DISTRICT COURT. DNRC DECISION AFFIRMED.

Final Order Date:	12/15/92 (D)	**Applicant:**	Hollenback
Case #/Type:	68033-s76G (P)	**Regional Office:**	Helena
Application Date:	05/13/88	**Examiner:**	Stults
Hearing Date:	10/20/92	**Use:**	Irrigation

A-16.750
E-22.480
L-1.940
U-14.120

Even though the statutes controlling an application are those in effect at the time the application was filed, §§ 85-2-311(1)(a) and (4) apply to the present application. Section 85-2-311(4) simply made explicit concepts that were inherent but unstated in prior statutory language, and § 85-2-311(1)(a) corrected a semantic impasse identified by the courts which virtually halted the issuance of new water rights. Because of their nature, they should be applied to applications received prior to their effective date.

A-16.7516
B-5.690

Applicant has shown a lack of bona fide intent to appropriate a portion of the proposed flow rate, therefore no permit can be issued for it.

U-14.1274

A single occurrence cannot be the basis for a finding that unappropriated water is reasonably available during the proposed period of use.

P-5.800
T-5.800

The Department may modify a water use permit if the permit is not being followed. Applicant failed to show, however, the condition on an existing permit could not be complied with or that circumstances had changed such that the decision of the Department with regard to the condition would be different now than when originally issued, hence, insufficient reason exists to modify the existing permit.

Final Order Date:	01/05/93 (G)	**Applicant:**	Hougen/Kraft
Case #/Type:	G36995-ss41H (R)	**Regional Office:**	Bozeman
Application Date:	05/15/81	**Examiner:**	Stults
Hearing Date:	None	**Use:**	Irrigation

D-21.310
J-21.800
S-21.660

Show cause hearing on whether Department's Proposal should be adopted was vacated because no party filed the required notice of intent to appear. Final Order issued adopting Proposal.

E-24.480
J-21.800
L-1.940

Regardless of actions by the Montana Water Court, authorization of a post-July 1, 1973, change must be granted or denied by the department. The statutes provide no other process for authorizing such a change, therefore such a change cannot be authorized by its appearance on a water right abstract in a Water Court decree.

J-21.800
L-1.940

Statute controlling severing and selling a water right was repealed in 1985; thereafter § 85-2-402 became controlling over such applications.

Final Order Date:	01/22/93 (Remand)	**Applicant:**	United States Fish & Wildlife Service
Case #/Type:	64044-s40Q (P)	**Regional Office:**	Glasgow
Application Date:	04/09/1987	**Examiner:**	Stults
Hearing Date:	None (settled)	**Use:**	Fish & Wildlife

J-21.800
T-5.800

Private parties, though a privately stipulated agreement, cannot agree to an action that binds the Department to act, if the Department is not signatory to the agreement. Only the Department has authority to place conditions on permits and it is within the Department's discretion to determine what conditions should be placed on a permit.

J-21.800
T-5.800

The Department recognizes the power of the Tribes and the federal government to enter into binding agreements and has construed the Stipulated Agreement to be such. Therefore, the Stipulated Agreement between the USFWS and the Tribes is accepted.

Final Order Date:	03/08/93 (G w/C)	**Applicant:**	City of Pinesdale/ Unified Industries
Case #/Type:	74310-s76H (P) 74311-s76H (P)	**Regional Office:**	Missoula
Application Date:	03/23/90	**Examiner:**	Stults
		O/A Examiner:	Lighthizer
Hearing Date:	11/06/91	**Use:**	Municipal
O/A Date:	01/12/93		

A-4.930
B-21.780
L-1.940

Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects from other existing or possible future projects. Mechanism for pursuing issue of cumulative effects is 85-2-319, or 85-2-506 and 507.

A-4.930

The effect of the proposed appropriation would be immeasurable and,

E-24.4879	hence, would not alter ability of prior appropriators to reasonably exercise their water rights. Therefore, no adverse effect. [P4D]
A-4.930 **L-1.940** **S-15.920**	There is no distinction in Montana law between surface and ground water in the operation of the priority system and of adverse effect. The only distinction between surface and ground water is our ability to understand the factual circumstances, and that is always improving.
A-4.9321 **E-24.4879** **U-14.1259.00**	After June of every year there is a call on the source. The additional stress a new appropriation would place on this already over-appropriated stream is an effect which must be considered adverse. [FO]
A-4.9321 **S-15.920** **T-5.800**	The subsurface supply of a stream, flowing through the bed of the stream, is as much a part of the stream as surface flow, and is subject to the same rules. The underflow includes water moving in lateral extensions of water bearing material in each side of the surface channel. Therefore, permit would be subject to call and to control by water commissioner.
A-4.9394 **M-5.110**	Contention operation of the diversion system will not be adequate because permit would be impossible to administer is not within scope of whether criterion has been met. Goes to issue of possible enforceability. Other than proving system is capable of controlling the amount of water it diverts, showing a permit can be enforced is not a criterion for issuance.
B-5.6979 **S-21.760** **T-5.800**	Several water rights must not be combined to appropriate more water than can be beneficially used. Therefore, permit must identify this limitation on the supplemental nature of applicant's water rights.
B-21.780 **M-5.110**	Applicant must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control such that it can be regulated in accordance with the system of priority on the source.
E-22.480 **E-24.480** **S-15.920** **U-14.1259.00**	Comparing the total of claimed water rights to flows in a small drainage has probative value toward determining whether unappropriated water is available. [FO]
E-22.480 **J-21.800**	Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.
M-5.110	Nothing in statute, rule, or precedent requires Department supervision of construction of diversion devices.
0-23.6975	City has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use by its city or inhabitants.
U-14.1259.00	When water is under constant call to satisfy senior rights, unappropriated water is not available. [FO]

U-14.1259.00 In July, the source is under constant call. All water in source is dedicated to fulfilling existing water rights. No amount of water, no matter how small, is available for new appropriations. [P4D]

APPEALED TO DISTRICT COURT BY APPLICANT. APPLICANT THEN MOVED TO HAVE THE CASE DISMISSED. DEPT. CONCURRED.

Final Order Date:	03/19/93 (D)	**Applicant:**	Dodson
Case #/Type:	G(W)194810-43B (C)	**Regional Office:**	Bozeman
Application Date:	05/21/90	**Examiner:**	Lighthizer
Hearing Date:	01/21/93	**Use:**	Domestic

E-42.4831 Where predecessor had initiated a new use in addition to existing use in 1975 and failed to apply for a Beneficial Water Use Permit. Held no right existed to be changed.

Final Order Date:	03/22/93 (Remand to Processing)	**Applicant:**	Atlantic Richfield Company
Case #/Type:	82956-s76G (P)	**Regional Office:**	Helena
Application Date:	08/18/92	**Examiner:**	Stults
Hearing Date:	None	**Use:**	Fish and Wildlife

B-21.780
D-21.310
E-22.480
O-2.490
Expressions of opposition were limited to adverse effects and water availability. Objector did not take advantage of opportunity to file prehearing statement. Department has indicated it has no concerns of its own. Therefore, it is proper to grant applicant's motion in limine. Cites Garrison, 43104-s76D, and Parker, 12893-g76GJ. [Ruling on Motion in Limine, March 5, 1993.]

B-21.780
D-21.310
E-22.480
S-21.660
U-14.1259.00
Even though Department made a determination on water availability in the past, such a determination only forms a rebuttable presumption. Cites Zinne, 50642-s40A. Subsequent applications and objectors can bring forward evidence or arguments why a prior determination should not apply in the present. [Ruling on Motion for Summary Judgement, March 5, 1993.]

D-21.310
E-22.480
O-2.490
S-21.660
Even if Objector were prohibited from offering undisclosed evidence, they may still testify. Cites East Helena, 62231-g41I. [Ruling on Motion for Summary Judgement, March 5, 1993.]

D-21.310
L-1.940
O-2.490
S-21.660
The statutes governing process emphasize opportunity for access by potentially-affected persons, including the right to be heard. Cites Ryen, P49632-41H. Applicant's motion for summary judgement denied. [Ruling on Motion for Summary Judgement, March 5, 1993.]

[OBJECTIONS WITHDRAWN]

Final Order Date:	03/31/93 (D)	**Applicant:**	Bemis
Case #/Type:	78964-s76H (P)	**Regional Office:**	Missoula
Application Date:	12/31/91	**Examiner:**	Lighthizer
Hearing Date:	12/17/92	**Use:**	Irrigation

W-1.870 Waste water loses its character when it reaches a natural channel and flows in that channel with regularity from year to year. It then becomes part of the natural flow in the channel. **Cites Popham v. Holoron**.

W-1.870 A flow rate of 1.62 cfs is excessive for 17 acres. Held flow rate in excess of 17 gpm wasteful and not a beneficial use of water.

Final Order Date:	04/21/93 (G w/C)	**Applicant:**	City of East Helena
Interlocutory Order:	04/23/90		
Case #/Type:	70576-41I (P) 70577-41I (P)	**Regional Office:**	Helena
Application Date:	12/12/88	**Examiner:**	Lighthizer
Hearing Date:	03/12/90	**Use:**	Municipal

U-14.1274 Where Applicant sought to appropriate groundwater without knowing the quantity of available groundwater.

A-4.9383
B-21.780
U-14.1259

Objector contended the source was surface water. There was no evidence of record as to how much of the appropriated water was surface water and how much was groundwater. Expert witness was unable to determine the amounts.

Although there may be a connection between Applicant's source and objector's, it must remain speculative absent data from Applicant's actual water use, whether the appropriation of the waters would adversely affect the objectors.

Interim Permits issued.

Record reopened after expiration of interim permits to hear additional evidence collected under interim permits concerning adverse effect and water availability.

A-4.930 Mere diminution of water supply is not necessarily adverse effect to objectors. Cites **Allred**.

S-15.920 Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary. Cites **Kyler, Boone, Hunt, Mikesell, Tangen Ranch, and Allred.**

U-14.120 To fulfill § 85-2-311(1)(a), MCA, all that need be shown is that there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is in fact administrable.

Final Order Date:	05/20/93 (G w/C)	**Applicant:**	Kostick
Case #/Type:	80154-s76H (P)	**Regional Office:**	Missoula
Application Date:	01/10/92	**Examiner:**	Lighthizer
Hearing Date:	04/02/93	**Use:**	Domestic/Stock/ Lawn & Garden

M-5.110
E-22.480

Applicants' intent to reconstruct a portion of Upper Ross Ditch so it will be adequate serves as evidence the means of diversion, construction, and operation are adequate.

Final Order Date:	05/20/93 (D)	**Applicant:**	Stucker
Case #/Type:	81412-s76H (P)	**Regional Office:**	Missoula
Application Date:	04/09/92	**Examiner:**	Lighthizer
Hearing Date:	03/30/93	**Use:**	Irrigation

U-14.1259.00
U-14.1274
S-15.920

Applicant measured water flowing in a ditch which collects water from other sources instead of the source to provide evidence of water availability. Held the source must be measured.

DENIED.

Final Order Date:	05/20/93 (D)	**Applicant:**	Tintzman
Case #/Type:	80175-s76H (P)	**Regional Office:**	Missoula
Application Date:	01/22/92	**Examiner:**	Stults
Hearing Date:	03/26/93	**Use:**	Fish & Wildlife

A-4.930
E-24.480
S-15.920

Prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled. Cites Loyning (118 Mont.); Granite Ditch (204 Mont.); Beaverhead Canal (34 Mont.).

A-4.9321

Where seniors would have to call for water every time they wish to divert, there is an adverse effect to seniors. Cites Ridgeway (53498); Frederick (58432); Blair (33710).

U-14.1259.00

For period source is routinely and annually under constant call or water commissioner routinely and annually shuts off juniors, all water physically present in source is en route to satisfy seniors and is appropriated, if it would reach seniors. Hence, no unappropriated water available. Cites Unified Industries (74310); Winter Sports (70511).

B-21.780
D-21.310
E-22.480
S-21.660
U-14.1259.00

Prior determination by department on availability of unappropriated water in source forms a presumption relative to subsequent application. Nevertheless, subsequent applicant or objectors has the right to produce evidence or arguments to prove prior determination should not apply in present. Cites Zinne (50642); Atlantic Richfield (82956).

B-21.780
E-22.480
U-14.1274

One occurrence of flow is not sufficient proof water is available to satisfy a new appropriation, and cannot be basis for finding unappropriated water is reasonably available during proposed period of use. Cites Hollenback (68033); Roberts (77304).

Final Order Date:	06/22/93 (D)	**Applicant:**	Schields
Case #/Type:	81391-s76H (P)	**Regional Office:**	Missoula
Application Date:	03/31/92	**Examiner:**	Lighthizer
Hearing Date:	04/22/93	**Use:**	Domestic/Fish Pond

M-5.110
W-1.870
B-5.6979

Diversion works must be reasonably efficient, but there is no requirement of absolute efficiency. Held approximately 10% efficiency not reasonable. Could not conclude water is not wasted. **Cites Allen v. Petrick, State exrel. Crowley v. District Court, Worden v. Alexander.**

B-5.690
A-16.750

Applicants not interested in stocking fish and would be unable to procure fish pond license; proposed fish pond not a beneficial use.

M-5.110
U-14.1259.70

Pond not nonconsumptive. Primary reason for pond construction was to recharge well. Water lost through seepage and make-up water necessary after prior water rights are exercised allowing level in pond to decline.

A-4.9321
U-14.120

Entire drainage under constant call after mid-July. Held no unappropriated water throughout the proposed period of use.

A-4.930

Sedimentation not an adverse effect unless sedimentation so great as to prevent reasonable exercise of water right.

Final Order Date:	06/25/93 (G w/C)	**Applicant:**	Simmons
Case #/Type:	82173-s76M (P)	**Regional Office:**	Missoula
Application Date:	07/15/92	**Examiner:**	Lighthizer
Hearing Date:	05/11/93	**Use:**	Irrigation

A-16.750
B-5.6934
J-21.800
P-5.800

Department cannot issue permit unless water is to be put to beneficial use. Confining water to a small area to eliminate marshy area and minimize mosquito population is not a beneficial use; therefore, no permit is needed.

A-16.7567

Amendments to reduce place of use and eliminate fish and wildlife use do not expand the parameters of the diversion from the source and are, therefore, acceptable without notification of persons not parties to the proceedings.

Final Order Date:	07/16/93 (D)	**Applicant:**	Martin/Ewing
Case #/Type:	81855-s41H (P)	**Regional Office:**	Bozeman
Application Date:	07/29/92	**Examiner:**	Stults
Hearing Date:	04/21/93	**Use:**	Fish & Wildlife Fire Protection

B-5.690

Fire protection is a beneficial use. Cites 32798-s76G by Harpole; 39887-s76D by West Kootenai.

B-5.690
B-5.6934
B-21.780

To be beneficial, use must benefit appropriator, other persons or public. Applicants failed to prove proposed use for wildlife would benefit themselves, other persons, or the public. Therefore, as to wildlife, the criterion was not met.

B-5.6979
B-21.780

Applicants must prove amount of water is not wasteful. Applicants did not establish amount requested is reasonable and does not constitute waste. Therefore, as to fire protection, criterion was not met.

E-22.480
S-15.920
U-14.1274

Estimates of flow cannot be considered credible or substantial enough to find estimated flow equals the actual flow. In light of evidence of chronic shortages in source, and without substantial credible evidence showing with specificity that water is available, the criterion is not met. Cites 68033-s76G by Hollenback; 77304-s40C by Roberts; 80175-s76H by Tintzman.

E-22.480
U-14.1259.70
W-1.870

Applicants' theory about return of seepage is feasible, but not to a lack of substantial credible evidence it cannot be concluded seepage would return to source. The proposed project must be considered consumptive. Applicants did not prove unappropriated water available to compensate for seepage.

U-14.1259.25
U-14.1274
W-1.870

Applicants proved the project, by recovering water lost to transpiration, offset the effects of evaporation. Thus, unappropriated water is available for portion of consumptivity attributable to evaporation.

Final Order Date:	07/27/93 (D)	**Applicant:**	Blackburn/Theodor
Case #/Type:	80590-s42K (P)	**Regional Office:**	Miles City
Application Date:	03/05/92	**Examiner:**	Lighthizer
Hearing Date:	03/25/93	**Use:**	Fish and Wildlife

E-24.4894
U-14.1259

An owner of a right to use water may collect and recapture it before it leaves his possession. Irrigation company cleaned ditch which

W-1.870 stopped flow through wetland area that Applicants sought to appropriate. Flow is captured in a drain ditch and routed to irrigation company's canal for reuse. **Cites Ide and Rock Creek Ditch and Flume Co.**

O-2.490
S-20.110 A person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3). As members of the irrigation company, the objectors' property and interests could have been adversely affected by the proposed project.

A-16.750
S-15.920
U-14.120 The application was for surface water; but no surface now entering pond. Groundwater may be entering pond, but application not for for groundwater use. Applicants have not proven water available in the actual source of supply. [FO]

Final Order Date:	08/13/93 (G w/C)	**Applicant:**	Larson Creek Water Users Association
Case #/Type:	G(W)43186-76H (C)	**Regional Office:**	Missoula
Application Date:	02/14/92	**Examiner:**	Lighthizer
Hearing Date:	05/03/93	**Use:**	Irrigation

E-24.4831
J-21.800 Department has authority to make and must make threshold determination on existence and extent of water right applicant proposes to change. **Cites Bozeman and Lichtenberg, Bladholm, T-L Irrigation, and Combs.**

E-24.4810
E-24.4831
E-22.480 Aside from allegations of abandonment, objectors did not provide evidence of abandonment. Applicant provided exhibits confirming water right in use large part of time since use was established. Applicant's underlying water right accepted as claimed.

B-5.690
U-14.120 Whether sufficient unappropriated water for applicant's intended intended purposes immaterial. Department will not make economic decisions for applicant. **Cites Monforton; Pettapiece.**

E-24.480 There is nothing in decree to prevent changing means of conveyance as long as no change in point of diversion, place of use, place of storage, or purpose of use.

Final Order Date:	08/16/93 (D)	**Applicant:**	K. Hanson
Case #/Type:	81705-g76F (P)	**Regional Office:**	Missoula
Application Date:	05/15/92	**Examiner:**	Lighthizer
Hearing Date:	05/17/93	**Use:**	Irrigation/Stock

U-14.120 To comply with § 85-2-311(1)(a), MCA, applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator.

A-4.9383
L-1.940
S-15.920 There is no distinction in Montana between surface water and ground water in the operation of law. The only distinction is our ability to understand the factual circumstances which are improving with the development of increasingly sophisticated data collection techniques and with the amount of data collected.

A-4.930
E-24.480 Prior appropriators of waters of a stream gain the right to natural flows of all tributaries in so far as the flows are necessary for

S-15.920 their entitlements.

A-4.930
E-24.480
S-15.920
Feeder springs that naturally form a part of the flows of a stream belong to that stream as a part of its source of supply.

A-4.930
A-4.9383
S-15.920
The waters of a tributary may not be diverted to the injury of prior appropriators. The groundwater flowing at the proposed point of diversion has been specifically established as tributary to the surface flows relied upon by prior appropriators, therefore it may not be diverted to their injury.

Final Order Date:	09/08/93 (D)	**Applicant:**	Pitsch
Case #/Type:	80761-s40A (P)	**Regional Office:**	Lewistown
Application Date:	03/20/92	**Examiner:**	Stults
Hearing Date:	04/08/93	**Use:**	Irrigation

A-16.750
L-1.940
S-21.6621
A decision under the Water Use Act is not a resolution of a controversy between litigants over a claim or demand; it determines whether a person receives an entitlement. Any person may apply for a permit. A single decision in the permitting process on one application cannot stop future applications from being filed on the same source.

L-1.940
S-21.6621
Through the basin closure mechanism, the Water Use Act provides for finality and for protection against repeated determinations of settled issues.

A-16.750
S-21.6621
An applicant in a second application must show something is new or different about the circumstances accompanying the second application.

A-4.9394
E-14.930
O-2.490
An applicant is required to prove the criteria in (1)(g) through (i) only if a valid objection is filed. A valid objection must contain substantial credible information establishing said criteria may not be met. For (1)(h), only DHES or a local water quality district may file a valid objection. No such valid objections were filed therefore, applicant not required to prove criteria in (1)(h) and (I).

E-22.480
U-14.120
Evidence provided by applicant not substantial enough to overcome collective, uncontradicted testimony of objectors. Therefore, it cannot be concluded unappropriated water is available. Cites 77304-s40C by Roberts.

B-21.780
E-22.480
U-14.120
Evidence provided in this case and in the previous case enough substance and precision to conclude there is a preponderance supporting a conclusion unappropriated water is or is not available; 311(1)(a) not met.

APPEALED TO DISTRICT COURT.

Final Order Date:	12/08/93 (G w/C)	**Applicant:**	Leatzow
Case #/Type:	75070-s76L (P)	**Regional Office:**	Kalispell
Application Date:	07/02/90	**Examiner:**	Stults
Hearing Date:	08/06/91	**Use:**	Domestic and Stock

A-4.9348.00
A-4.9383
A-4.9392
B-21.780
Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. The laws providing a mechanism for pursuing

L-1.940 issue of cumulative effects are §§ 85-2-319, or 85-2-506 or 507, MCA.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

J-21.800 State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation.

Final Order Date:	03/30/94 (G w/C)	**Applicant:**	Wyrick
Case #/Type:	80600-s42M (P) G(P)036242-42M (C)	**Regional Office:**	Miles City
Application Date:	02/24/92 (P) 06/03/92 (C)	**Examiner:**	Stults
Hearing Date:	06/08/93	**Use:**	Irrigation

J-21.800
T-5.800 Only the Department has authority to place conditions on permits and change authorizations, and so long as conditions are necessary to meet the statutory criteria it is within the Department's discretion to determine what conditions should be placed on a permit or change authorization.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

B-21.780
U-14.1259.00
U-14.1274
E-24.480 Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion in the amount applied for at the times it is proposed to be put to use. **Cites 70511 by Winter Sports; 63997 by Crisafulli;** and Department Summary Report: Clark Fork Basin Water Use (1990). In addition, water physically present must not be under control of and destined to use of prior appropriator. **Cites 80175 by Tintzman and 69739 by McDonald**.

Final Order Date:	04/12/94 (G w/C)	**Applicant:**	Bemis
Case #/Type:	84560-s76H (P)	**Regional Office:**	Missoula
Application Date:	01/07/93	**Examiner:**	Lighthizer
Hearing Date:	02/28/94	**Use:**	Irrigation/Stock

B-5.6979 Applicants' intent is to divert and use water for irrigation in the same manner and on the same acreage with no intention of using more water than claimed by statement of claim filed with Water Court. Permit must be conditioned so that the combined appropriation cannot exceed the claimed amount.

Final Order Date:	05/12/94 (G w/C)	**Applicant:**	Anaconda-Deer Lodge
Case #/Type:	72455-s76G (P) G(W)017056-76G (C)	**Regional Office:**	Helena
Application Date:	05/29/90 (P) 04/01/93 (C)	**Examiner:**	Lighthizer
Hearing Date:	03/04/94	**Use:**	Commercial

B-21.780
O-2.490
A-4.9395

Upon Applicant's discharge of the burden to produce a preponderance of evidence by submitting hydrologic evidence and other data on the issue of adverse effect, objectors must show they have water rights, describe the operation of their rights, state how the proposed use will change the conditions of water occurrence in the source of supply or how it will otherwise affect their rights, and why they will not be able to reasonably exercise their water right under the changed condition. **Cites Houston**. Here objectors offered no evidence to substantiate or establish a claim of adverse effect related to the proposed project.

O-23.6975

City has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use by its city or inhabitants.

Final Order Date:	05/17/94 (G w/C)	**Applicant:**	McMaster
Case #/Type:	83761-s76L (P)	**Regional Office:**	Kalispell
Application Date:	09/21/94	**Examiner:**	Lighthizer
Hearing Date:	No Hearing	**Use:**	Domestic

J-21.800

State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation.

Final Order Date:	06/16/94 (G w/C)	**Applicant:**	di Stefano
Case #/Type:	82374-s76L (P)	**Regional Office:**	Kalispell
Application Date:	06/26/92	**Examiner:**	Lighthizer
Hearing Date:	04/12/94	**Use:**	Domestic

B-21.780

Objector alleged Applicant's proposal may be part of cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects.

U-14.1259.00
U-14.1274

Entire volume of dead storage physically and legally available to Applicants since Objector's diversion is above dead storage water level.

M-5.110
O-2.490

Whether Objector's means of diversion is reasonable is arguable since courts in Montana and other jurisdictions have found that a means of diversion which requires appropriator to command whole of source merely to facilitate diversion of a portion of the entire flow and volume to which their senior appropriation entitles them is not reasonable means of diversion.

E-24.4879

Senior has no right to prevent changes by later appropriators in condition of water occurrence, such as increase or decrease of stream flow or lowering of water table, artesian pressure, or water level, if prior appropriator can reasonably exercise water right under changed conditions.

J-21.800

State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation.

Final Order Date:	06/16/94 (G w/C)	**Applicant:**	Richards
Case #/Type:	86507-s41C (P)	**Regional Office:**	Bozeman
Application Date:	07/08/93	**Examiner:**	Lighthizer
Hearing Date:	04/19/94	**Use:**	Fish Pond

U-14.1259.70

Because use is primarily nonconsumptive, proof that sufficient water physically present at point of diversion fulfills § 85-2-311(a). Consumptive use (filling the pond) must be accomplished during high spring runoff.

S-21.6621
U-14.1259.70

Although record shows source over-appropriated, use is primarily nonconsumptive and there are unappropriated waters for nonconsumptive use.

A-4.930

"Opening floodgates" argument that future similar appropriations will threaten prior appropriators not relevant. Future appropriators must also get permit.

J-21.800
T-5.800
S-20.720
S-15.920

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed Mont. Code § 85-2-311. Here Applicant proposes to fill pond initially from Wisconsin Creek, a consumptive use in partially closed basin where MDFWP has reservation. To prevent adverse effect and unreasonable interference with reservation and comply with Mont. Code Ann. § 85-2-341 (1993), pond can only be filled during high spring runoff periods and permit must be so conditioned.

Final Order Date:	07/18/94 (G w/C)	**Applicant:**	Landfall
Interlocutory Order:	08/07/92		
Case #/Type:	G(C)010517-76LJ ©	**Regional Office:**	Kalispell
Application Date:	01/20/91	**Examiner:**	Lighthizer
Hearing Date:	07/15/92	**Use:**	Multiple Domestic

A-4.9383
B-21.780
U-14.1259

Although there may be a connection between Applicant's source and Objectors' source, it must remain speculative, without data from a properly conducted aquifer test. Distance of a well from another well not a factor in determining adverse effect by one well on the other in a fractured aquifer, rather whether specific well is located in the same fracture set as pumping well. Interlocutory Order for Applicant to conduct an aquifer test.

B-21.780
A-4.9395

Upon Applicant's discharge of burden to produce substantial credible evidence on issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively, within their power to produce. Here Objectors produced no evidence other than their testimony.

J-21.800
T-5.800

The Department has authority to place conditions on authorizations to change provided such conditions are necessary to satisfy the criteria. Here Applicant proposes to construct third well in fractured bedrock aquifer. Evidence shows wells must be in same fracture system for effect to be observed. Therefore, authorization to change must be conditioned so that when third well is completed, Applicant must notify Objectors before bringing new well on line so Objectors can observe static water levels in their wells prior to pumping new well and may then periodically observe static water level to determine whether water level is declining sufficiently to cause adverse effect.

Final Order Date:	07/26/94 (D)	**Applicant:**	Anderson Ranch
Case #/Type:	G(W)001422-41QJ	**Regional Office:**	Lewistown
Application Date:	01/17/89	**Examiner:**	Stults
Hearing Date:	09/16/93	**Use:**	Irrigation

E-24.4831

The Department has the authority to make administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if criteria of 85-2-402 have been met.

B-21.780
E-24.4831

In conjunction with the requirement that the underlying water right must be shown to exist before it can be changed, applicant must be shown to exist before it can be changed, applicant must also show

the extent and pattern of the past use of water, i.e., its historic use, to ensure that the use is not being enlarged under the guise of a change.

A-4.9348.00
A-4.9348.10
An increased use of water is a new appropriation and cannot be not be allowed under the guise of a change application.

A-4.9373
A-4.9348.48
E-24.480
E-22.480
B-21.780
Without evidence system will not divert more water than was diverted historically, and Applicant's intent to continue irrigation of historic place of use, Department unable to authorize change so that new place of use may be expanded beyond bounds of historic place of use.

Final Order Date:	09/22/94 (G w/C)	**Applicant:**	Bitterroot Native Growers
Case #/Type:	88365-g76H (P)	**Regional Office:**	Missoula
Application Date:	11/26/93	**Examiner:**	Lighthizer
Hearing Date:	06/07/94	**Use:**	Irrigation

E-22.480
S-15.690
A-4.930
If an appropriator can make beneficial use of intended appropriation without adversely affecting senior appropriators, and can meet the relevant criteria, appropriator not bound to use water from alternate source.

APPEALED TO DISTRICT COURT.

Final Order Date:	10/05/94 (G)	**Applicant:**	Ryen
Case #/Type:	P049632-41H (E) G(W)120401-41H G(W)120403-41H	**Regional Office:**	Bozeman
Application Date:	11/22/93	**Examiner:**	Lighthizer
Hearing Date:	07/19/94	**Use:**	Hydropower

E-22.2480
P-5.8031
Evidence of work done on a project after completion deadline but during temporary extension of Department jurisdiction for purposes of determination of whether extension should be granted, admissible.

P-5.8031
Due diligence can be exercised by party other than applicant.

P-5.8031
Permittee's lessee has been active in legal, administrative and engineering aspects of project, clearly showing good faith and due diligence.

Final Order Date:	10/28/94 (D)	**Applicant:**	Pope/Justice
Case #/Type:	87074-s76H (P)	**Regional Office:**	Missoula
Application Date:	08/11/93	**Examiner:**	Lighthizer
Hearing Date:	09/08/94	**Use:**	Fish & Wildlife

B-21.780
D-21.310
S-21.660
Since applicant is required to show by substantial credible evidence that all criteria have been met and applicant failed to show 311(a) and (b) had been met, no finding is necessary on other criteria.

Final Order Date:	11/02/94 (G w/C)	**Applicant:**	McAlpin
Case #/Type:	81523-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	05/19/92	**Examiner:**	Lighthizer
Hearing Date:	07/12/94	**Use:**	Irrigation

E-22.4879
M-5.110
Although a shallow well is an adequate means of diversion, it is not a protectable one. An appropriator may not prevent new appropriations where he can reasonably exercise his water right

under the changed conditions. He cannot monopolize the source simply so he may have a convenient means of diversion.

E-24.4879 Objector's prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

A-4.930
E-22.480 Bare assertion that Applicants' test pumping caused seven foot decline in static water level of Objectors' well is not sufficient to prove adverse effect.

Final Order Date:	11/18/94 (G w/C)	**Applicant:**	Wills Cattle Co/McLean
Case #/Type:	85184-s76F (P)	**Regional Office:**	Missoula
Application Date:	03/22/93	**Examiner:**	Lighthizer
Hearing Date:	06/17/94	**Use:**	Irrigation

B-5.6979
S-21.760
T-5.800 Several water rights must not be combined to appropriate more water than can be beneficially used. Therefore, permit must identify this limitation on the supplemental nature of applicant's water rights.

A-16.750
U-14.120 Applicant can make use of less flow than was requested; accordingly, the amount requested is considered to include lesser flows as well.

U-14.1259.00
U-14.1274
A-4.9321 To comply with Mont. Code Ann. § 85-2-311(1)(a), applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator.

A-4.9321
E-24.4831 Since the objectors have no water rights for natural flow of drain ditch used by objectors to carry Vaughn Ditch water, there is possibility of call from Wills for natural flow; however, there is no way to separate natural flow from Vaughn Ditch water. Call would be futile.

APPEALED TO DISTRICT COURT. COURT UPHELD DEPARTMENT'S DECISION.

Final Order Date:	11/28/94 (D)	**Applicant:**	Hardy/Miller
Case #/Type:	85129-s76M (P)	**Regional Office:**	Missoula
Application Date:	02/16/93	**Examiner:**	Lighthizer
Hearing Date:	03/22/94	**Use:**	Domestic/Stock

B-21.780
U-14.120 Applicants must show availability of water. Here Applicants provided only an estimate of the flow of water while the statutes clearly require a preponderance of evidence in the form of hydrologic or other evidence such as water supply data, field reports, and other information developed by the applicant, department, USGS, or SCS.

B-21.780
M-5.110 Applicants must show their proposed system can be constructed and operated to divert and deliver the amount of water requested and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Here Applicants failed to show how the flow from precipitation and snow melt would be allowed to pass the proposed diversion.

B-21.780
D-21.310
S-21.660 Since Applicants are required to show by a preponderance of evidence that all criteria have been met and Applicants failed to show 311(a) and (c) had been met, no finding necessary on other criteria.

Final Order Date:	12/07/94 (G w/C)	**Applicant:**	Dietz
Case #/Type:	88504-s76F (P)	**Regional Office:**	Missoula
Application Date:	02/07/94	**Examiner:**	Lighthizer
Hearing Date:	09/13/94	**Use:**	Fishery/Wildlife/ Waterfowl

B-21.310
O-2.490

Objections withdrawn at hearing. However, Applicant is not relieved of duty to present evidence to satisfy substantive burden of proof when all parties withdraw their objections.

Final Order Date:	01/24/95 (D)	**Applicant:**	Blakely
Case #/Type:	G(W)046021-41H (C)	**Regional Office:**	Bozeman
Application Date:	03/25/94	**Examiner:**	Lighthizer
Hearing Date:	10/25/94	**Use:**	Irrigation

B-21.780
M-5.110

Applicant must show proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste. Here applicant failed to show how water would be transported under the railroad.

A-4.930
B-21.780

Applicant must show there will be no adverse effect to the water rights of other persons. Since other ditch users are now using an alternate system, applicant failed to demonstrate that her ditch use would not cause further adverse effect.

B-21.780
D-21.310
S-21.660

Since applicant is required to show by substantial credible evidence all criteria have been met and applicant failed to show 402(a) and (b) had been met, no finding is necessary on other criteria.

Final Order Date:	02/28/95 (G w/C)	**Applicant:**	USA, Dept of Interior, BLM
Case #/Type:	86859-s40J (P)	**Regional Office:**	Havre
Application Date:	04/04/94	**Examiner:**	Lighthizer
Hearing Date:	11/29/94	**Use:**	Stock/Waterfowl/ Wildlife

B-21.780
O-2.490

An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

Final Order Date:	04/13/95 (D)	**Applicant:**	Schrader
Case #/Type:	89459-s76H (P)	**Regional Office:**	Missoula
Application Date:	04/28/94	**Examiner:**	Lighthizer
Hearing Date:	02/14/95	**Use:**	Domestic/Irrigation

S-15.920
A-4.930

Even though the tributary does not flow into North Woodchuck Creek on the surface, it contributes to flow of the stream with subsurface flow. Interruption of said flow would reduce the amount of water available for prior rights in an already water-short stream, causing an adverse effect.

Final Order Date:	04/13/95 (G w/C)	**Applicant:**	Vermedahl
Case #/Type:	G(W)024095-76L (C)	**Regional Office:**	Kalispell
Application Date:	02/15/94	**Examiner:**	Lighthizer
Hearing Date:	11/09/94	**Use:**	Irrigation

A-16.7576
O-2.490

Even though there was error in the notice, Objectors can’t complain. They had actual knowledge of place of use which constitutes notice. Objectors waited too long to make objection. By waiting until the hearing to voice concerns, objectors foreclosed the Department's

ability to correct error. Requests for continuance based on lack of proper notice made less than 10 days prior to hearing can only be granted upon showing that reason for request could not have been ascertained earlier. Mont. Admin. R. 36.12.222(3) 1994. As part of defective notice objection, objectors also point to errors in applicant's claims of existing rights, in particular, an apparent scrivener's error. Erroneous or inflated claims for existing rights in adjudication do not constitute defective notice in Department's change authorization proceedings.

A-4.9348.20 Record shows only 20 acres were irrigated instead of the 80 claimed by applicant. Historic use cannot be expanded by change in place of use.

J-21.800
E-24.4831 Department has authority to make preliminary administrative determinations of scope and parameters of underlying right to extent necessary to fulfill its statutory duties of deciding if criteria in 85-2-402 have been met.

E-22.480
J-21.800 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an Authorization to Change. The Department has no authority to deny an Authorization on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of an Authorization.

Final Order Date:	04/18/95 (G w/C)	**Applicant:**	Kingsbury Ditch Co.
Case #/Type:	G(W)199792 (C)	**Regional Office:**	Havre
Application Date:	01/23/76	**Examiner:**	Lighthizer
Hearing Date:	N/A	**Use:**	Irrigation

B-21.780
O-2.490 An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

Final Order Date:	04/27/95 (G w/C)	**Applicant:**	Polson Ready Mix Concrete Inc.
Case #/Type:	79387-g76LJ (P)	**Regional Office:**	Kalispell
Application Date:	11/27/91	**Examiner:**	Lighthizer
Hearing Date:	06/08/93	**Use:**	Industrial

E-24.4831 A certificate of water right for a well with a flow rate of less than 100 gpm (now 35 gpm) must be filed after the water has been put to beneficial use. One cannot reserve water by filing Form 602 for the maximum volume one can produce with the flow rate under 85-2-306 for a ground water well. A 602 is to be filed after the fact.

U-14.120
S-15.920 Permit was granted only because Applicant is not appropriating an an additional volume of water. The aquifer will not decline further as a result of this permit.

Final Order Date:	06/06/95 (G w/C)	**Applicant:**	Montana DFWP
Case #/Type:	V(W)099722-76H (C)	**Regional Office:**	Missoula
Application Date:	01/14/94	**Examiner:**	Lighthizer
Hearing Date:	03/22/95	**Use:**	Instream flow

E-24.4810 Absent proof of intent to abandon, claimed rights treated as legitimate even if unused for a long time.

A-4.9348
A-4.9348.48 Where the consumptivity of water use is reduced for a period of 27 years through no fault of the appropriator who then wishes to

E-24.4810 resume same consumptivity as originally used and there is no evidence of intent to abandon the consumptive portion of the original water right, a return to the original consumptivity does not constitute an increase in burden on the source.

A-4.9348.48
E-24.4810 Where water right owners periodically sought to find a conveyance for water over a period of 27 years, no presumption of intent to abandon arises.

Final Order Date:	06/23/95 (G w/C)	**Applicant:**	Missoula County RSID
Case #/Type:	90476-g76M (P)	**Regional Office:**	Missoula
Application Date:	06/24/94	**Examiner:**	Lighthizer
Hearing Date:	04/11/95	**Use:**	Municipal

A-4.930
O-2.490 Objectors' wells located in tighter tertiary materials result in shortage of water before Applicant's well was completed. Applicant’s well located in younger alluvial sands and gravel. Well test indicated no adverse effect.

Final Order Date:	07/11/95 (D)	**Applicant:**	Stellick
Case #/Type:	84577-s76H (P)	**Regional Office:**	Missoula
Application Date:	01/13/93	**Examiner:**	Lighthizer
Hearing Date:	09/29/93	**OA Examiner:**	Stults
Oral Argument Date:	01/25/94	**Use:**	Fish & Wildlife

U-14.120 Unappropriated water available only during high spring runoff. Permit limited to that period. So long as unappropriated water is available in some years, § 85-2-311(1)(a), MCA, is satisfied.

B-21.780 Applicant is required to prove criteria by preponderance of evidence, and evidence must be substantial and credible. Cites 77304-s40C by Roberts and 80761-s40A by Pitsch.

B-21.780 Absence of evidence criterion would be violated. Does not meet the required standard of proof.

B-5.6934
B-5.690
B-5.6979 Applicant must provide preponderance of evidence use of water will benefit appropriator, other persons, or public, and amount of water is reasonable for purpose, and is not wasteful. Cites 81855-s41H by Martin and Ewing, 77304-s40C by Roberts, 54694-g41O by Crumpled Horn, 50510-s76L by Meyer, and 56738-s76M by Brookside Estates.

[P4D modified by OA.]

Final Order Date:	08/09/95 (G w/C)	**Applicant:**	Montana DFWP
Case #/Type:	V(W)122539-43B (C)	**Regional Office:**	Bozeman
Application Date:	11/10/93	**Examiner:**	Lighthizer
Hearing Date:	01/20/95	**Use:**	Instream flow

I-14.870
B-5.6934
S-15.920 Irrigation rights may be leased by the Montana Dept. of Fish, Wildlife and Parks and temporarily changed to instream flow to prevent dewatering of the stream and protect the fishery of that stream.

A-4.9379
A-4.9373 Although the return flow would be less than before the lease, less water would be diverted from the stream leaving more water in the stream for appropriation by downstream users.

A-4.9373
E-24.4831 The consumptive use of the rights to be changed amounts to approximately 85 percent of the amounts diverted. Therefore of the

E-24.4834 water instream that is available for the rights to be changed, only 85 percent could be protected instream under this change application.

Final Order Date:	08/11/95 (D)	**Applicant:**	Nelson
Case #/Type:	92024-g40C (P)	**Regional Office:**	Lewistown
Application Date:	01/13/95	**Examiner:**	Lighthizer
Hearing Date:	06/07/95	**Use:**	Irrigation

M-5.110
B-21.780
E-22.480

A statement that an irrigation firm would be employed so that the right equipment needed would be used does not constitute adequate means of diversion, construction and operation of the appropriation works.

U-14.1259.00
U-14.1274
A-4.930
S-15.920
E-22.480

Pumping the source for 45 minutes at a rate lower than requested in application does not prove legal or physical availability especially when it is not known where the water pumped from the source was discharged. Neither does it prove no adverse effect to existing water rights when existing rights were not monitored during brief pumping test.

Final Order Date:	08/30/95 (G w/C)	**Applicant:**	Schweitzer
Case #/Type:	88962-s41H (P)	**Regional Office:**	Bozeman
Application Date:	02/11/94	**Examiner:**	Lighthizer
Hearing Date:	05/23/95	**Use:**	Fish/Wildlife

B-21.780
O-2.490

An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when objectors default.

Final Order Date:	09/08/95 (D)	**Applicant:**	Wallace
Case #/Type:	91277-s76H (P)	**Regional Office:**	Missoula
Application Date:	09/19/94	**Examiner:**	Lighthizer
Hearing Date:	05/26/95	**Use:**	Fish & Wildlife

B-21.780
D-21.310
S-21.660

Since applicant is required to show by a preponderance of evidence all criteria have been met and applicant failed to show 311(c) had been met, no finding is necessary on remaining criteria.

Final Order Date:	09/21/95 (G w/C)	**Applicant:**	Fisher
Case #/Type:	90192-s76D (P)	**Regional Office:**	Kalispell
Application Date:	06/13/94	**Examiner:**	Lighthizer
Hearing Date:	07/13/95	**Use:**	Fish/Wildlife/ Irrigation

B-21.780
O-2.490

An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when objecting parties fail to appear and are declared in default.

Final Order Date:	09/21/95 (G w/C)	**Applicant:**	O'Bryan
Case #/Type:	80959-s76H (P)	**Regional Office:**	Missoula
Application Date:	02/21/92	**Examiner:**	Lighthizer
Hearing Date:	None	**Use:**	Fish/Wildlife/ Irrigation

B-21.780
O-2.490

An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

Final Order Date:	10/04/95 (R)	**Applicant:**	Ashcraft
Case #/Type:	G(W)016111-41H (R)	**Regional Office:**	Bozeman
Application Date:	05/12/87	**Examiner:**	Lighthizer
Hearing Date:	07/20/95	**Use:**	Irrigation

J-21.800 The Department has no jurisdiction to determine whether appropriator stands in the shoes of an "innocent purchaser."

S-15.920
T-5.800 Authorization to change was granted for a well to tap the shallow aquifer at a depth of 40 to 80 feet. Well completed taps a deeper aquifer at a depth of 153 feet.

Final Order Date:	10/25/95 (D)	**Applicant:**	Ratliff
Case #/Type:	91828-s43Q (P)	**Regional Office:**	Billings
Application Date:	12/05/94	**Examiner:**	Lighthizer
Hearing Date:	07/18/95	**Use:**	Fish & Wildlife

M-5.110
J-21.800
E-22.480 Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion was first constructed "illegally" is not relevant to how the data from that diversion served to satisfy the criteria for issuance of a permit.

U-14.1274
U-14.1259.00
A-4.930
O-2.490 Because after the initial filling and topping off each spring, water flows through the overflow pipe approximately every two weeks or any time Applicants irrigate, water is clearly physically available at the point of diversion. It is not clear, however, that the water has not been appropriated for use downstream by Objectors.

A-16.750
O-23.6994
P-5.800 Applicants' dam was constructed before Objectors' pond. However, a priority date is not assigned to a new water right until the date an application is filed with the Department, regardless of which reservoir was constructed first. Clearly Objectors have an earlier priority date; thus a senior right.

B-21.780
S-15.920
E-22.480 It was Applicants' burden to show that unappropriated water is available and that senior rights are not adversely affected. To do so Applicants needed to establish how much water in the drainage may be seepage from the Cove Ditch, irrigation runoff, or natural runoff, the extent of seepage out of their pond down the gully toward Objectors' pond and the extent of the evaporative losses from their pond. Absent this kind of information, the permit cannot be granted.

Final Order Date:	10/25/95 (D)	**Applicant:**	Laxson/Courtney
Case #/Type:	89309-s76LJ (P) 39310-s76LJ (P)	**Regional Office:**	Kalispell
Application Date:	04/29/94	**Examiner:**	Lighthizer
Hearing Date:	06/27/95	**Use:**	Fish & Wildlife/ Stock

B-21.780
U-14.1259.00
U-14.1274
E-22.480 Water must be measured at the proposed point of diversion to meet the statutory burden of proof set forth in 85-2-311(1)(a).

A-4.9321 Having to call a stream is not an adverse effect. The appropriative system by its nature contemplates the supply may be less than

demand. First in time, first in right would never operate if no call were ever made.

Final Order Date:	11/14/95 (G w/C)	**Applicant:**	Binley/Gleason
Case #/Type:	92178-s76K (P)	**Regional Office:**	Missoula
Application Date:	11/07/94	**Examiner:**	Lighthizer
Hearing Date:	07/31/95	**Use:**	Domestic

J-21.800
M-5.1129
P-5.800

The Department has no jurisdiction concerning easement and zoning matters. A permit issued by the Department does not grant easements. If a permittee cannot gain an easement or violates a zoning issue, the permit cannot be perfected and the Department would subsequently revoke the permit.

O-23.6975

Applicant need only show possessory interest in the proposed place of use.

Final Order Date:	11/30/95 (G w/C)	**Applicant:**	Snapp
Case #/Type:	G(W)119067-41S (C)	**Regional Office:**	Lewistown
Application Date:	03/29/95	**Examiner:**	Lighthizer
Hearing Date:	09/06/95	**Use:**	Irrigation

J-21.80
P-18.720
M-5.110
S-15.920

The Department has no jurisdiction in matters pertaining to property damage. Even if it did, there is no evidence in the record that the change will increase property damage or exacerbate the seepage problem. There will be no change in the means of diversion, the means of conveyance, the source, the flow rate, or volume of water diverted.

Final Order Date:	11/30/95 (REMAND)	**Applicant:**	Stevensville, Town of
Case #/Type:	76760-s76H (P)	**Regional Office:**	Missoula
Application Date:	12/28/90	**Examiner:**	Lighthizer
Hearing Date:	02/02/93	**Use:**	Municipal

P-18.720

Property damage or the possibility of property damage as a result of a permittee exercising its water right is not reason to deny a permit.

M-5.110

It is not incumbent on an appropriator to use the most efficient means of diversion.

M-5.110
W-1.870
B-5.690
A-4.930

Water that escapes Applicant's property is not beneficial to the Applicant and results in waste of water when it cannot be beneficially used by the neighboring property owners. If stream froze to bottom and could not be used for stock water as a result of Applicant's use, that would constitute an adverse effect to the prior water right owners.

U-14.1259.00
U-14.1274

Applicant failed to meet burden to show water reasonably available in amount sought to appropriate during the period Applicant seeks to appropriate. Applicant presented no measurements of stream flow during proposed period of appropriation.

S-15.920

Appropriator is not bound to use water from alternative source.

O-2.490

An appropriator may not prevent an applicant from appropriating water simply because appropriator's headgate has been damaged by rodents and proposed appropriation will cause water to flow through, around, or under damaged headgate.

O-2.490

Objections settled. Applicants not relieved of duty to prove the

B-21.780
A-16.7567
criteria for an authorization to change have been met. Conditions made to settle the objections altered the application such that application was remanded to Regional Office for amendment to reflect the changes. [Notice of Remand]

Final Order Date:	01/22/96 (D)	**Applicant:**	McDonald
Interlocutory Order:	08/10/93		
Case #/Type:	69739-g76L (P)	**Regional Office:**	Kalispell
Application Date:	09/21/88	**Examiner:**	Stults
Hearing Date:	04/03/91	**Use:**	Irrigation

A-4.9321
Where a senior water right holder would have to call for water every time the senior wishes to divert water, there is an adverse effect to the senior. Cites Ridgeway (53498) & Frederick (58432).

A-4.9383
T-5.800
Since there is a relationship between the surface flows and the groundwater, and the project would influence surface flows, ranking in priority of the permit must be against all rights to surface water as well as the groundwater source. Cites Crisafulli (63997).

A-4.9383
L-1.940
S-15.920
There is no distinction in Montana between surface water and ground water in the operation of law. The only distinction is our ability to understand the factual circumstances which is improving with the development of increasingly sophisticated data collection techniques and with the amount of data collected. [P4D on Remand]

A-4.9383
S-15.920
The establishment of a tributary relationship is a question of fact. [P4D on Remand]

A-4.930
E-24.480
S-15.920
Prior appropriators of waters of a stream gain the right to natural flows of all tributaries in so far as the flows are necessary for their entitlements. [P4D on Remand]

A-4.930
E-24.480
S-15.920
Feeder springs that naturally form a part of the flows of a stream belong to that stream as a part of its source of supply. [P4D on Remand]

A-4.930
A-4.9383
S-15.920
The waters of a tributary may not be diverted to the injury of prior appropriators. The groundwater flowing at the proposed point of diversion has been specifically established as tributary to the surface flows relied upon by prior appropriators, therefore it may not be diverted to their injury. [P4D on Remand]

A-4.930
E-24.4879
U-14.120
If adequate means of providing sufficient supply can be made available to the senior, whose present adequate facilities cannot be operated to obtain his full entitlement because of the acts of the junior, provision for such should be made at the expense of the junior, it being unreasonable to require the senior to supply such means out of his own financial resources. [P4D on Remand]

B-5.690
E-24.4879
M-5.110
T-5.800
A spring discharge stabilization system would not be an additional appropriation with a separate water right or change of an existing water right. Such a system, however, would need to be an element of the proposed appropriation so that it could be regulated and protected as a part of the appropriation scheme. Cites Western Water (39786) & East Bench (25170). [P4D on Remand]

E-22.480
R-5.930
A report referred to in the initial hearing, but not introduced or officially noticed, appears necessary for a full understanding of this matter. To ensure the fullest understanding of this matter, the

department remanded the matter for notice of the report, notice of Hildreth (71133), and evidence and argument on them.

M-5.110
T-5.800
When a relatively complex plan is necessary, and applicant does not provide that plan, the department will not unilaterally impose its own plan as a condition placed on the permit. Cites DeBruycker (58133). [P4D on Remand]

A-4.9321
E-24.480
S-15.920
After flow of stream declines so it is not feasible to pump from it for irrigation even though the feeder spring is still flowing its undiminished flow, applicant could appropriate from aquifer without adversely affecting downstream users. Any call on flow of spring would be futile because flow under those circumstances is not usable by senior. [IO Order]

P-5.8032
Applicant failed to obey terms of interim permit. Beneficial water use permit denied.

Final Order Date:	01/31/96 (G w/C)	**Applicant:**	Janney
Case #/Type:	G(E)088756-76G (C)	**Regional Office:**	Helena
Application Date:	05/16/94	**Examiner:**	Lighthizer
Hearing Date:	11/01/95	**Use:**	Stock

E-24.4831
E-22.480
B-21.310
M-5.110
There is nothing in the statutes to prevent an exempt water right owner from changing an exempt instream right to a nonexempt right by adding a ditch to convey water to a new place of use provided all the criteria for issuance of an authorization are met.

Final Order Date:	05/13/96 (G)	**Applicant:**	Smith
Case #/Type:	G(W)194309-41D (C)	**Regional Office:**	Helena
Application Date:	4/6/95	**Examiner:**	Lighthizer
Hearing Date:	1/10/96	**Use:**	Irrigation

A-4.9348.20
E-22.480
O-2.490
O-23.6994
Applicant would not adversely affect Objector's water right since she agreed to leave five miner's inches in the ditch for carriage water. Although Objector stated he needed all the water, both Applicant's and his own, to irrigate his property, he offered no evidence to substantiate that assertion. Objector's position amounts to claiming exclusive ownership of the underlying water rights. The Department's records and the record in this case indicate otherwise. Applicant owns the water right she proposes to change.

Final Order Date:	06/27/96 (G)	**Applicant:**	Klemo
Case #/Type:	G(W)210737-41C (C)	**Regional Office:**	Bozeman
Application Date:	08/03/95	**Examiner:**	Lighthizer
Hearing Date:	N/A	**Use:**	Irrigation

B-21.780
O-2.490
An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

E-22.480
J-21.800
Although changing a water right without authorization is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an authorization. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1995). The Department has no statutory authority to deny a change on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit.

Final Order Date:	07/12/96 (G)	**Applicant:**	Shelstad
Case #/Type:	86867-40J (P)	**Regional Office:**	Havre
Application Date:	03/14/94	**Examiner:**	Lighthizer
Hearing Date:	04/30/96	**Use:**	Irrigation

A-4.9394
B-21.780

Although objections relative to water quality were filed against this application, Objectors failed to provide substantial credible information establishing to the satisfaction of the Department that the criteria in subsection (1)(g), (h), or (i) as applicable may not be met;, therefore their objection concerning water quality is not valid.

Final Order Date:	08/27/96 (G)	**Applicant:**	O'Bryan
Case #/Type:	77814-76H (P)	**Regional Office:**	Missoula
Application Date:	05/30/91	**Examiner:**	Lighthizer
Hearing Date:	05/07/96	**Use:**	Fish & Wildlife

A-16.7567
A-16.7576
D-21.310

Application may be amended after public notice if amendments would not prejudice anyone. To cause prejudice, the amendment must suggest an increase in the burden on the source.

Final Order Date:	8/27/96 (D)	**Applicant:**	Pierce, Thomas
Case #/Type:	77814-76H (P)	**Regional Office:**	Missoula
Application Date:	5/30/91	**Examiner:**	Lighthizer
Hearing Date:	5/7/96	**Use:**	Fish and Wildlife

A-16.7567
A-16.7576
D-21.310

Application may be amended after public notice if amendments would not prejudice anyone. To cause prejudice, the amendment must suggest an increase in the burden on the source.

Final Order Date:	8/27/96 (D)	**Applicant:**	Pierce, Martin
Case #/Type:	80130-76H (P)	**Regional Office:**	Missoula
Application Date:	12/19/91	**Examiner:**	Lighthizer
Hearing Date:	5/7/96	**Use:**	Irrigation/stock

B-21.780
A-16.750

It is the applicant's burden to prove the criteria for issuance is presented. Applicant's counsel appeared at the beginning of the hearing and stated his client could not attend and that he stood on his application. Application not sufficient to meet the criteria for issuance of permit. Permit denied.

Final Order Date:	10/25/96 (G)	**Applicant:**	M & W Enterprises
Case #/Type:	92815-41I (P)	**Regional Office:**	Helena
Application Date:	08/18/95	**Examiner:**	Lighthizer
Hearing Date:	08/12/96	**Use:**	Commercial, irrigation and multiple domestic

E-24.4879
M-5.110

Objectors' prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the changed conditions.

A-4.9395
B-21.780

Applicant who provided evidence that a lower groundwater level would not cause adverse effect to the objectors has met his burden of proof. Objectors who produced no evidence that the lower groundwater level would adversely affect them have not met their burden to go forward.

Final Order Date:	10/25/96 (G)	**Applicant:**	Townview Estates
Case #/Type:	G(P)023312-41I (C)	**Regional Office:**	Helena
Application Date:	08/22/95	**Examiner:**	Lighthizer
Hearing Date:	NA	**Use:**	Multiple domestic

A-4.930
S-20.720
The proposed change appropriating from the same source, the same amount, during the same period, will not adversely affect other water rights.

Final Order Date:	11/08/96 (G)	**Applicant:**	Oswalt
Case #/Type:	93438-76F (P)	**Regional Office:**	Missoula
Application Date:	04/13/95	**Examiner:**	Lighthizer
Hearing Date:	09/04/96	**Use:**	fish, recreation, & wildlife

O-2,490
S-15.920
E-24.4831
J-21,800
The Department not bound by covenants. Although Objectors believe the covenants of the subdivision give them all the surface rights for the good of all the residents, they have no water rights of record on the proposed source. The water rights they do have are all upstream of the proposed pond. Held no adverse effect.

Final Order Date:	11/19/96 (D)	**Applicant:**	Foss
Case #/Type:	95828-76D (P)	**Regional Office:**	Kalispell
Application Date:	11/01/95	**Examiner:**	Lighthizer
Hearing Date:	09/10/96	**Use:**	fish pond

B-21.780
U-14.120
E-22.480
Applicants must show availability of water. Here, having no measurements, Applicants relied on the Orsborn method which results in mean monthly estimates. Subtracting the water use on the source according to Dept records, showed no water available during August, September, and October.

B-5.690
B-5.6979
Applicants applied for 50 gpm because expert advised them to keep water in delivery pipe from freezing, that was necessary. There is no need for 50 gpm in the warmer months, and application showed a need of 11.5 gpm. If permit had been approved, flow rate would have been 11.5 gpm from May to October and 50 gpm from November to April.

B-21.780
D-21.310
S-21.660
Since Applicants are required to show by a preponderance of evidence all criteria have been met and Applicants failed to show water availability, no finding is necessary on other criteria.

Final Order Date:	2/11/97 (G)	**Applicant:**	Fehsenfeld
Case #/Type:	83286-41H (P)	**Regional Office:**	Bozeman
Application Date:	10/13/92	**Examiner:**	Lighthizer
Hearing Date:	NA	**Use:**	Irrigation and stock

B-21.780
O-2.490
An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

Final Order Date:	02/27/97 (G)	**Applicant:**	Hughes
Case #/Type:	98096-76H (P)	**Regional Office:**	Missoula
Application Date:	05/24/96	**Examiner:**	Lighthizer
Hearing Date:	12/05/96	**Use:**	Fishery

S-15.920
A-4.9325
A-4.930
W-1.870
Source is 5 developed springs which flow into existing ditch. Water would flow through ponds and back into ditch with little or no delay. No users between the intake and outlet. No loss to seepage. Loss to evaporation is less than or equal to evapotranspiration

M-5.110 from vegetation that now grows in proposed pond site. There can be no adverse effect.

O-2.490 Objectors would have Applicants install measuring device in Bunkhouse Creek. Applicants not diverting from Bunkhouse Creek and therefore are not required to install such measuring device.

Final Order Date:	03/10/97	**Applicant:**	Guyette
Case #/Type:	93752-41F (P)	**Regional Office:**	Bozeman
Application Date:	05/10/95	**Examiner:**	Lighthi0zer
Hearing Date:	NA	**Use:**	Irrigation and stock

A-4.930
O-2.490
E-24.4879

To prevent adverse effect, Applicant proposes to construct a new ditch with a dividing box to measure and direct the flow of water to Objector's ditch providing the claimed amount of 60 miner's inches when Objector needs it. Held, no adverse effect.

Final Order Date:	06/06/97 (D)	**Applicant:**	Gochanour
Case #/Type:	G(W)032359 (C)	**Regional Office:**	Helena
Application Date:	05/22/95	**Examiner:**	Lighthizer
Hearing Date:	10/24/96	**Use:**	Irrigation

A-4.930
A-4.9397
B-21.780
E-22.480

Water had not been used on acres designated to be taken out of irrigation for approximately 89 years and had not been used for any purpose for 31 years. From 1907 to 1996, water had been used for mining. During period of nonuse, other appropriators had been able to use water rights with later priority dates. If applicants began using water now, those appropriators could be adversely affected. Since it is applicants' burden to provide a preponderance of evidence there would be no adverse effect, applicants have failed to meet their burden of proof.

Final Order Date:	6/06/97 (G)	**Applicant:**	Martin
Case #/Type:	93433-76H (P)	**Regional Office:**	Missoula
Application Date:	4/11/95	**Examiner:**	Lighthizer
Hearing Date:	None	**Use:**	Commercial/irrigation/ Domestic

B-21.780
E-22.480

Applicants are not relieved of the duty to present evidence to satisfy their substantive burden of proof when objections have been withdrawn.

S-20.110
S-21.600

The Department is not required to consider exceptions from parties that are not adversely affected by a proposal for decision. ARM 36.12.229(1). Because the Department will be adopting the Proposal as written, Applicant will not be adversely affected and the Exceptions are moot. [FO]

J-21.800
E-22.480
A-16.750
A-4.930
U-14.1274

It is proper for Department to make water use determinations. Department must evaluate water use information as part of adverse effect and water availability determinations that must be before a permit can issue. [FO]

Final Order Date:	08/08/97 (G)	**Applicant**:	Taylor
Case #/Type:	98469-76H (P)	**Regional Office:**	Missoula
Application Date:	07/15/96	**Examiner:**	Lighthizer
Hearing Date:	05/01/97	**Use:**	Irrigation

A-4.930
O-2.490

Objector has no water right in the source of supply except an exempt right for 0.68 acre-foot of stock water. Held no adverse effect.

S-15.920 Permit granted.

Final Order Date:	9/3/97 (G)	**Applicant:**	Van Dyke
Case #/Type:	P59786-41H (R)	**Regional Office:**	Bozeman
Application Date:	10/30/97	**Examiner:**	Lighthizer
Hearing Date:	4/18/97	**Use:**	Irrigation

E-22.480 Obtaining a bid for completion of a well and seeding the place of use with grass is evidence of diligence in perfecting the permit.

Final Order Date:	9/05/97 (G)	**Applicant:**	Holland
Case #/Type:	G(W)110835-76N (M)	**Regional Office:**	Missoula
Application Date:	N/A	**Examiner:**	Lighthizer
Hearing Date:	5/10/96	**Use:**	Irrigation

T-5.800
A-4.930
S-15.920
P-5.800
The Department may propose a condition on an authorization to change to limit amount of water withdrawn to avoid adverse effect. To ensure appropriator is in compliance, a second condition may be proposed to require measuring devices. A stay of one year was granted for appropriator to gather information to establish other water users would not be adversely affected. Appropriator did not establish no adverse effect. Authorization modified.

Final Order Date:	10/27/97 (Gw/C)	**Applicant:**	Williams
Case #/Type:	41I-098917(P)	**Regional Office:**	Helena
Application Date:	10/8/96	**Examiner:**	Lighthizer
Hearing Date:	08/26/97	**Use:**	Irrigation

A-4.930
A-4.9383
M-5.110
Since irrigation wells were installed the surface water and shallow subsurface water has diminished. Held, the cause is most likely the cessation of flood irrigation on hundreds of acres in the area rather than direct reduction as a result of wells in the area. Held no adverse effect.

A-4.930
E-24.4879
O-2.490
S-15.92
Lowering of the static water level in Objector’s well is not, in itself, an adverse effect. Neither can the obstruction in the casing in the well be the basis for limiting the development of the aquifer aquifer.

Final Order Date:	10/27/97 (D)	**Applicant:**	Bargfrede
Case #/Type:	G(W)118417-76H (C)	**Regional Office:**	Missoula
Application Date:	7/26/96	**Examiner:**	Lighthizer
Hearing Date:	7/16/97	**Use:**	Irrigation

A-4.9348.00
B-21.780
E-22.480
Change applicant has the initial burden to show the proposed change will not increase the burden on the source and thereby will not cause an adverse effect. Here applicant failed to provide evidence of no adverse effect.

M-5.110
B-21.780
E-22.480
Applicant must show proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant failed to show adequate means of conveyance and operation.

Final Order Date:	11/12/97 (Gw/C)	**Applicant:**	Thomson
Case #/Type:	97905-41H (P)	**Regional Office:**	Bozeman
Application Date:	5/10/96	**Examiner:**	Lighthizer
Hearing Date:	3/26/97	**Use:**	Fish & wildlife

A-16.750
S-15.920
Application set point of diversion at a point on what applicant described as a newly constructed channel for McDonald Creek.

M-5.110 However, channel did not exist on date application was filed. New channel deemed a component of the appropriation to carry water from McDonald Creek to ponds for beneficial use.

W-1.870
M-5.110
L-1.940
New channel was not lined and water would be lost to seepage which is forbidden in the Upper Missouri Basin closure. There can be no consumptive surface water use. Applicant must line channel and ditches. Evaporation losses must be replaced with ground water.

Final Order Date:	12/19/97 (Gw/C)	**Applicant:**	Hoovestal
Case #/Type:	41I-095584(P)	**Regional Office:**	Helena
Application Date:	6/30/95	**Examiner:**	Lighthizer
Hearing Date:	9/30/97	**Use:**	Multiple domestic

M-5.110 Wells, diversion works, and operation of the water system would meet all Public Water Supply regulations and specifications required by law. Held means of diversion, construction, and operation of the appropriation adequate.

Final Order Date:	1/15/98 (Gw/C)	**Applicant:**	McDowell
Case #/Type:	43D-G011185(C)	**Regional Office:**	Billings
Application Date:	7/11/96	**Examiner:**	Lighthizer
Hearing Date:	7/1/97	**Use:**	Irrigation

A-16.7521
O-2.490
B-21.780
E-22.480
Applicant met initial burden by submitting a correct and complete application. Information supplied by Applicant and reviewed by Department which determined, with respect to information provided, criteria were met. After objections Applicant is required to provide additional information to overcome objections.

M-5.1129
J-21.800
A-4.930
Applicant proposed to move point of diversion from a pump site on on the source to the existing point of diversion of Orchard Ditch. Ditch company has no water rights, but sells shares to those who wish to use it as conveyance. Whether Applicant has or can get a ditch right must be determined in a different forum. Department has no jurisdiction concerning ditch rights. There are no existing rights between the old and new points of diversion. No additional water would be appropriated. Held no adverse effect.

Final Order Date:	2/23/98 (Gw/C)	**Applicant:**	Ridgeway
Case #/Type:	41S-G002909(C)	**Regional Office:**	Lewistown
Application Date:	11/19/96	**Examiner:**	Lighthizer
Hearing Date:	10/14/97	**Use:**	Irrigation

S-20.720
E-24-4831
Where a change was filed to add a place of storage to several water rights. The periods of use of each water right do not change nor does the flow rate and volume. Each water right is limited to the original appropriation.

Final Order Date:	NA	**Applicant:**	Howard
Case #/Type:	G(W)150892-76H (C) G(W)151192-76H (C)	**Regional Office:**	Missoula
Application Date:	01/06/94 05/01/94	**Examiner:**	Lighthizer
Hearing Date:	10/06/95	**Use:**	Irrigation

J-21.800
O-23.6994
E-22.480
The Department may grant a change authorization when applicant shows prima facie evidence of owning the water right. If Water Court later later determines applicant does not own the water right, any authorization to change would be void.

W-1.870
B-5.690

When water turned into ditch may not reach the place of use, the use is not beneficial and water is wasted.

Proposal for Decision recommended denying the change. Parties settled and contested case dismissed. Final Order not issued. Change authorization issued with conditions.

Final Order Date:	4/14/98 (GwC)	**Applicant:**	Wilder Resort Inc
Case #/Type:	76G-097326(P)	**Regional Office:**	Helena
Application Date:	01/09/96	**Examiner:**	Lighthizer
Hearing Date:	12/17/98	**Use:**	Commercial

E-22.480
J-21.800

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

Final Order Date:	12/09/98 (G w/c)	**Applicant:**	Polson
Case #/Type:	76LJ-099791(P)	**Regional Office:**	Kalispell
Application Date:	10/09/96	**Examiner:**	Lighthizer
Hearing Date:	05/29/98	**Use:**	Municipal

T-5.800
A-4.9395

The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, static water measurements go to the issue of adverse effect. However, requiring permittee to make the static water level measurements available for inspection and copying at City Hall does not serve to meet the criteria for issuance and cannot be required as a condition of the permit.

Final Order Date:	06/23/99 (G W/C)	**Applicant:**	Palisades Ranch
Case #/Type:	43G-G(W)111421(G)	**Regional Office:**	Billings
Application Date:	11/13/95	**Examiner:**	Lighthizer
Hearing Date:	02/25/99	**Use**:	Irrigation

A-4.9348.48
A-4.9379

Although the proposed change would not return flow to Objector’s first point of diversion, held no adverse effect because Applicant would be irrigating only 8 acres compared to previously irrigated 16 acres thereby appropriating less water than before. Also the period of diversion would be shortened by the reduction of acreage.

Final Order Date:	1/3/2000 (Revoked)	**Applicant:**	Blakely Farms
Case #/Type:	41F-P007504(SC)	**Regional Office:**	Bozeman
Application Date:	10/30/99	**Examiner:**	Brasen
Hearing Date:	12/16/99	**Use:**	Irrigation

S-21.6625

The appropriator did not appear for the hearing. Default may occur when an appropriator does not appear at a properly noticed hearing. Mont. Admin. R. 36.12.208 (1999) Discretion to revoke was invoked; the findings of fact and conclusions of law contained in the hearing notice were adopted.

Final Order Date:	06/23/99 (D)	**Applicant:**	Knerr
Case #/Type:	41S-104572(P)	**Regional Office:**	Lewistown
Application Date:	07/30/99	**Examiner:**	Lighthizer
Hearing Date:	04/14/99	**Use:**	Irrigation

M-5.1129
O-2.490
E-24.480
J-21.800

If applicant had met the criteria for issuance of a permit, the water right would be useless. The other users of the ditch (Objectors) have senior rights and, with the inadequate ditch, Applicant would never receive any water. DNRC has no jurisdiction over ditch rights.

Final Order Date:	8/10/99 (GW/C)	**Applicant:**	Parks
Case #/Type:	76D-104069(P)	**Regional Office:**	Kalispell
Application Date:	5/19/98	**Examiner:**	Lighthizer
Hearing Date:	05/05/99	**Use:**	Fish and Wildlife

E-24.4894
S-15.920
A-4.9321
S-15.920
M-5.110
P-5.800
U-14.1259.70

Reducing the stream flow is not an adverse effect if the prior appropriator can reasonably exercise that prior right. Having to call the source is not an adverse effect. Calling the source is the essence of the priority system. To prevent taking more water than permitted, the intake pipe must be sized to divert only 20.97 gpm. The return flow pipe must be sized to release a minimum of 20.97 gpm for the pond to be nonconsumptive.

Final Order Date:	12/23/99 (D)	**Applicant:**	McElfish
Case #/Type:	76H-103855 (P)	**Regional Office:**	Missoula
Application Date:	06/09/98	**Examiner:**	Lighthizer
Hearing Date:	07/20/99	**Use:**	Irrigation

B-21.780
M-5.110
S-5.920

Without a clear plan of his intentions, a permit cannot issue. Here, applicant was not sure where the point of diversion would be or whether the means of diversion would be a pump or gravity flow system or whether he would flood irrigate or use a sprinkler.

Appealed to District Court.

Final Order Date:	07/12/00 (G in part)	**Applicant:**	Baitis
Case #/Type:	76M-103849 (P)	**Regional Office:**	Missoula
Application Date:	06/08/98	**Examiner:**	Brasen
Hearing Date:	11/17/99	**Use:**	Fish

B-5.6934
B-5.6979

Evidence must be presented to establish amount of water requested is necessary for the proposed use. Applicants unable to prove the proposed use of water for wildlife is beneficial. Fish pond is beneficial, providing benefit to applicant.

Final Order Date:	10/03/00 (Gw/C)	**Applicant:**	Beardsley
Case #/Type:	41F-107597 (P)	**Regional Office:**	Bozeman
Application Date:	07/06/99	**Examiner:**	Brasen
Hearing Date:	02/24/00	**Use:**	Stock/domestic

S-15.920

An undeveloped spring is surface water. A developed spring is groundwater. Source is flow of undeveloped spring on objector’s property.

M-5.110

Means of diversion is an infiltration gallery. To ensure only surface water is collected in the infiltration gallery, it cannot be perforated below the one-foot level.

Final Order Date:	10/13/98 (D)	**Applicant:**	Blalack
Case #/Type:	43P-G(E)086325(G)	**Regional Office:**	Billings
Application Date:	10/23/98	**Examiner:**	Lighthizer
Hearing Date:	05/11/98	**Use:**	Stock

O-23.6994

One cannot appropriate groundwater unless the appropriator has

S-15.920 possessory interest in the property where the water is to be put to beneficial use and has possessory interest in the property rights in the groundwater development works or the written consent of the person with those property rights as required by MCA 85-2-306(1997).

E-24.4831
J-21.800
O-23.6994 Department has authority to make and must make a threshold determination on the existence and extent of the water right an applicant proposes to change. The Department may make a preliminary determination as to Applicant's ownership interest in the subject water right.

E-24.4831 The Department will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.

Final Order Date:	01/10/00 (D)	**Applicant:**	Cross
Case #/Type:	G(W)142365-00 (c)	**Regional Office:**	Kalispell
Application Date:	01/14/99	**Examiner:**	Lighthizer
Hearing Date:	08/10/99	**Use:**	Irrigation

A-4.9348.10
A-4.9348.00 A change application cannot be used to expand the place of use if the change places an additional burden on the source. Here, Applicant applied to expand place of use by adding 150 acres, but did not prove that this would not increase the consumptivity of the use. Held, this is not a change, but a new appropriation, which would adversely affect other appropriators if change were granted.

A-4.9348.00
L-1.940 The existence of an established water right does not give the appropriator a right to increase his demand upon the source without making a new appropriation.

Final Order Date:	(GW/C)	**Applicant:**	Day Spring Land Co.
Case #/Type:	(P)	**Regional Office:**	Helena
Application Date:	02/12/97	**Examiner:**	Lighthizer
Hearing Date:	06/15/98	**Use:**	Irrigation

I-14.900
J-21.800
E-22.780
B-21.780 The Department may issue an Interim Permit authorizing immediate appropriation of water unless there is substantial information available to show the 311 criteria cannot be met. Here, there was information tending to show the criteria could be met but additional testing while actually irrigating was required to provide the preponderance of evidence needed.

I-14.900 Terms of Interim Permit included applicant filing a report to be reviewed by all parties who could comment on report and/or request a hearing. No comments were received and no request was made for a hearing. Permit granted with conditions.

Final Order Date:	04/99 (GwC)	**Applicant:**	Empire Sand & Gravel
Case #/Type:	42C-103575(P) 43C-103601(P) 43C-104945(P)	**Regional Office:**	Billings
Application Date:	05/22/98 06/03/98 06/22/98	**Examiner:**	Lighthizer
Hearing Date:	12/0998	**Use:**	Industrial

A-4.932 Having to call the source is not an adverse effect. Here, objector

E-24.480 experienced some water shortage, and upon notification, applicant ceased diverting and objector was able to use his well. This is the very essence of the priority system.

A-4.9395
S-15.920 All fluids, including groundwater, can only flow down gradient. Objectors wells are up gradient. Moreover, applicant's well is withdrawing from a shallow alluvial aquifer while objector's well is in an aquifer 400 feet deep. There can be no adverse effect.

P-5.800 Permits are temporary and expire December 31, 2000.

Final Order Date:	09/09/99 Gw/C)	**Applicant:**	Flying J Inc
Case #/Type:	41I-105511(P)	**Regional Office:**	Helena
Application Date:	07/24/98	**Examiner:**	Lighthizer
Hearing Date:	04/27/99	**Use:**	Commercial/irrigation

E-22.480 A witness need not have a degree in the subject matter to present proficient testimony about it when the witness has been involved in the subject matter for many years.

P-5.800
A-4.9394 The criteria for issuance of a permit can be proved whether or not not DEQ has made a non-degradation determination.

M-5.110
A-4.9394
S-15.920 Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer.

J-21.800 Leaky fuel tanks and storm water runoff which are unrelated to the removal of groundwater are not within the DNRC's jurisdiction.

Final Order Date:	08/22/00 (Gw/C)	**Applicant:**	French
Case #/Type:	41S-105823 (P)	**Regional Office:**	Lewistown
Application Date:	11/30/98	**Examiner:**	Brasen
Hearing Date:	02/15/00	**Use:**	Fish/irrigation

U-14.1259.00
S-15.920 Source is water developed by placing drain tiles to collect groundwater which has not been historically available to downstream users.

M-5.1110
A-4/930 Applicant must be able to bypass natural flow of stream since application was for developed water.

B-5.6934 Evidence must be presented to show the amount of water requested is necessary to be beneficial and to show benefit to applicant or others. Applicant did not quantify the amount of water for wildlife nor establish the benefit to the appropriator. Permit cannot issue without such proof.

Final Order Date:	08/02/99 (D)	**Applicant:**	Gerhart
Case #/Type:	41Q-105850 (SC)	**Regional Office:**	Lewistown
Application Date:	01/20/99	**Examiner:**	Lighthizer
Hearing Date:	05/18/99	**Use:**	stock/wildlife/irrigation

A-16.7521
M-5.110
S-15.920
J.21.800 An application deemed incorrect and incomplete must be returned to to applicant for correction and completion. Here, applicant applied for surface water which the Department determined was groundwater and returned the application. When excavation has been

performed to bring the water to the surface, the source is groundwater Mont. Code Ann. § 85-2-102(9) (1999)

Final Order Date:	07/28/98 (G)	**Applicant:**	Hamilton
Case #/Type:	76H-100868(P)	**Regional Office:**	Missoula
Application Date:	05/08/97	**Examiner:**	Lighthizer
Hearing Date:	05/08/98	**Use:**	Fish and Wildlife

E-24.4831 Prior appropriators are not entitled to water stored by permittee. [FO]_

Final Order Date:	12/29/2000 (D)	**Applicant:**	Hensel Land Partnership
Case #/Type:	40A-107356	**Regional Office:**	Lewistown
Application Date:	06/11/99	**Examiner:**	Brasen
Hearing Date:	04/14/00	**Use:**	Fish and Wildlife

E-22.480
B-5.6934
B-5.6979
Record reopened to allow applicant to provide written justification for volume of water requested. No justification received. Evidence to show why the quantity of water is required for fish and how the fish will survive when there is no flow is required to meet the criterion for beneficial use.

B-5.6934
B-5.6979
Evidence is required to establish the amount of water for wildlife use and to show how applicant or others would benefit from wildlife. Here, applicant failed to produce evidence to establish either.

Final Order Date:	08/02/00 (G in part)	**Applicant:**	Matheson
Case #/Type:	40A-108497	**Regional Office:**	Lewistown
Application Date:	08/05/99	**Examiner:**	Brasen
Hearing Date:	02/02/00	**Use:**	Lawn/garden/ stock/irrigation

B-5.6934 Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove recreation, fish, and wildlife were beneficial uses. (Memorandum)

Final Order Date:	04/22/98 (D)	**Applicant:**	Mobley
Case #/Type:	42JG(W)002343 (C)	**Regional Office:**	Billings
Application Date:	07/01/96	**Examiner:**	Lighthizer
Hearing Date:	12/09/97	**Use:**	Irrigation

S-15.920
A-4.9348.20
M-5.110
W-1.870
Where source is waste water with point of diversion off-stream below two waterspreading systems. Upstream water user no longer wastes water from one system to Applicant’s pick up point. Point of diversion cannot be changed to on-stream site without means to measure waste water flowing back into stream.

Final Order Date:	01/05/01 (D)	**Applicant:**	Mohl
Case #/Type:	76G-106676 (P)	**Regional Office:**	Helena
Application Date:	02/16/99	**Examiner:**	Brasen
Hearing Date:	06/21/2000	**Use:**	Stock

A-16.7567 A permit application may be modified at hearing if amendments would not prejudice anyone.

A-4.930 Carriage water must be included when calculating the amount of

E-24.480 water to be left in stream. Here, Applicant proposed to leave 1.25 cubic feet per second which is the total flow.
rate of water rights downstream. Water would never get down to some of users.

Final Order Date:	NA (Gw/C)	**Applicant:**	Shemer
Case #/Type:	43C-G(W)02364(C)	**Regional Office:**	Billings
Application Date:	02/27/97	**Examiner:**	Lighthizer
Hearing Date:	11/12/97	**Use:**	Irrigation

A-4.930
E-24.4879
O-2.490
Installing a water gap in applicants' fence would mitigate any adverse effect to objector's stock use caused by moving the ditch outside objector's fence. (P4D)

Agreement reached before oral argument. No final order.

Final Order Date:	03/12/99 (Gw/C)	**Applicant:**	Richland County Conservation Dist.
Case #/Type:	42M-G(M)103698	**Regional Office:**	Glasgow
Application Date:	09/01/98	**Examiner:**	Lighthizer
Hearing Date:	01/28/99	**Use**	Irrigation

R-5.850 A change of water reservation must establish purpose, need, and amount of water necessary for the change of reservation, and that the change of reservation is in the public interest. Here, applicant has established the water to be changed is necessary for crop irrigation on the project property and the project is in the public interest.

A-4.9348.00
E-24.4879
S-15.920
Objectors are entitled to maintenance of original stream conditions unless the appropriation can be reasonably exercised under changed conditions. Here, objectors would still have the volume of Yellowstone River water flowing past their property. Having to install a pump in the river is not an adverse effect if objectors can reasonably exercise their water right by doing so.

E-22.480
B-21.780
Application to change results in 4,000 or more af/year and 5.5 cfs of water consumption. Applicant has the burden to prove by clear & convincing evidence the criteria in § 85-2-402(2) & (4) is met.

M-5.110
E-14.9376
A-4.9394
Means of diversion is a cluster of pumps in the river. Permittee must install signs upstream and downstream to warn boaters of the hazard. Appropriator must work with agencies to determine wetlands mitigation measurements to be implemented to protect the quality and quantity of water in Fox Creek, Crane Creek and Sears Creek drainages.

Final Order Date:	06/01/00 (G in part)	**Applicant:**	Woods
Case #/Type:	41H-104667(P) 41H-G(W)125497(G)	**Regional Office:**	Bozeman
Application Date:	06/25/98	**Examiner:**	Brasen
Hearing Date:	01/20/00	**Use:**	Fish/fire protection

B-5.6934
B-21.780
Evidence must be presented to show why the amount of water requested for use is necessary. Here, applicant did not prove the amount of water requested for wildlife use was necessary and therefore beneficial. Evidence must show how pond use would benefit applicant or others. Here, the fish pond use is a beneficial use since fishing from the pond would improve campus life at the school.

B-5.690 In this case fire protection is a beneficial use. A water reservoir for fire fighting is a county subdivision requirement that must be satisfied before buildings can be occupied.

A-4.9321 Having to call the source is not an adverse effect.

U-14.1259.70
U-14.1274 To ensure the pond is non consumptive, intake and outflow conveyances must be lined or conveyed by pipe. Evaporation must be replaced by some reduction in other uses. Here the water would be replaced by water made available through the change of another water right.

A-16.750 The proposed flow rate cannot produce the volume of water requested on the application. Volume reduced to 63.6 acre-feet.(FO)

Final Order Date:	01/31/01	**Applicant:**	Rock Chuck Ranch
Case #/Type:	41D-G(W)194315 (C)	**Regional Office:**	Helena
Application Date:	06/19/96	**Examiner:**	Brasen
Hearing Date:	04/17/00	**Use:**	Irrigation

A-4.9348.00
A-4.9379 A senior water right owner cannot change the point of diversion to the detriment of a junior user. Here, Applicant proposed to move his point of diversion upstream of a junior on the basis that he could not adversely affect the junior because the senior had an earlier priority date which made it superior.

M-5.110 Applicant must prove the means of diversion, construction, and operation of the appropriation is adequate. Absent such proof, a change of water right cannot be issued.

Final Order Date:	01/31/01	**Applicant:**	Wahl
Case #/Type:	43C-106059 (P) 43C-106060 (P)	**Regional Office:**	Billings
Application Date:	02/18/99	**Examiner:**	Brasen
Hearing Date:	08/09/00	**Use:**	Commercial Fish Pond

A-16.7567
A-16.7576 Application may be amended after public notice if amendments would not prejudice anyone. Here, the applicant reduced the amount of water requested and amended the proposed use to commercial trout from wildlife and waterfowl. Held, a reduction of the flow rate cannot cause prejudice and the proposed change of use changed the label but not the substance of the application notice.

S-15.920
M-5.110 The new point of diversion must not restrict the source, a drain ditch. Applicant required to construct the means of diversion so flows in the source drain ditch immediately return to the source.

Final Order Date:	03/20/01	**Applicant:**	Moldenhauer
Case #/Type:	41I-G(W)001042 (C)	**Regional Office:**	Helena
Application Date:	05/25/99	**Examiner:**	Brasen
Hearing Date:	10/30/99	**Use:**	Irrigation

A-4.9348.20
A-4.9348.00
S-15.9220 Proof of conveyance of original water right from owner of the historic place of use is critical to show a portion of the water right will not be claimed and used by the new owner of the historic place of use thus enlarging the appropriation causing an additional burden on the source.

B-5.6979
A-4.9325
E-22.480
B-21.780

When seeking to change a water right, an applicant must show the amount of water to be changed was used in the historic place of use. Here, the amount of water to be changed was 156.6 acre-feet per year. The Department estimated the reasonable amount of water needed to irrigate the original place of use was 52 acre-feet per year considering the decreed limits, the efficiency of the system, and the consumptive crop use. Applicant offered no evidence to the contrary.

E-22.480

Testimony of Applicant outweighed by first-hand knowledge testimony of former owner.

M-5.110

Rehabilitation of an existing diversion works and ditch system can be considered as an adequate means of diversion, construction, and operation of the appropriation works.

Final Order Date:	03/26/01	**Applicant:**	Barber
Case #/Type:	41Q-G(W)110197 (C)	**Regional Office:**	Lewistown
Application Date:	01/21/99	**Examiner:**	Brasen
Hearing Date:	01/10/01	**Use:**	Domestic

J-21.800
L-1.940
B-21.780
A-4.9373
M-5.110

Only the Department can grant a change of appropriation water right. The purpose of use may have been altered many years ago; however, by law, there was no change. Now, 17 years after the altered purpose and place of use, applicants have the burden to prove the criteria for change are met. To meet the criteria for change as set forth in 85-2-402(a) and (b), the means of diversion must be altered to equally divide the water as stated in the contract for deed.

[Appealed to District Court.]

Final Order Date:	05/14/2001 (G w/C)	**Applicant:**	**Nash, Phillip and Pamela**
Case #/Type:	43QJ-P109903	**Regional Office:**	Billings
Application Date:	02/09/2000	**Examiner:**	Brasen
Hearing Date:	03/07/2001	**Use:**	Irrigation

P-18.720

Property damage or the possibility of property damage (by raising groundwater level) as a result of a permittee exercising its water right is not reason to deny a permit.

Even if property damage was reason for denial, there is no evidence, beyond conjecture, that this diversion has increased groundwater levels at the Objectors' property located one-half mile upstream and ten feet higher in elevation from the Applicant.

Final Order Date:	5/23/2001 (G w/c)	**Applicant:**	**Sunny Brook Colony**
Case #/Type:	41P-105759 (P)	**Regional Office:**	Havre
Application Date:	9/22/99	**Examiner:**	Brasen
Hearing Date:	10/11/2000	**OA Examiner:**	Stults
Oral Argument Date:	4/26/2001	**Use:**	Irrigation

U-14.1274
U-14.1259.00

Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights and reduce exaggerated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available.

A-4.93
R-5.85
E-14.930

Upstream senior rights can not be adversely affected. Permittee must record daily use rate, instead of monthly flows, to assure DFWP instream reservation is not affected. Permit conditioned to a trigger flow, or cutoff flow, at the upstream gauge based on the higher DFWP biological needs identified in the Environmental Assessment instead of the lower DFWP reservation. **[PFD Trigger flow lowered to DFWP reservation flow in Final Order]**. Adverse affect recognized for measured actual use rather than uses in Department records.

R-5.850

Cutoff flow need not include irrigation reservations flows until they are perfected.

[P4D modified by OA.]

Final Order Date:	06/08/2001 (G W/C)	**Applicant:**	**Cox, Ellie**
Case #/Type:	76H-G(P)053960 (G)	**Regional Office:**	Missoula
Application Date:	11/09/1999	**Examiner:**	Brasen
Hearing Date:	09/08/2000	**Use:**	Fishery

E-14.930
T-5.800

Proposal for decision conditioned the authorization based on findings in the agency Environmental Assessment. Prior to Final Order HB 473 became law; HB 473 does not allow conditioning based upon findings in an EA. The conditions are also typical of those used to show the diversion works are adequate, and Applicant had agreed to the conditions (also imposed by the County Land Services Office). **(FO did not modify the conditions for these reasons.)**

B-5.6934
B-5.6979

Evidence must be presented to establish amount of water requested is necessary for the proposed use. Fish pond is beneficial, providing benefit to applicant when stocked with fish from a lawful source according to a DFWP private pond license.

A-4.9348.48
T-5.800

Applicant showed amount being changed had actually been put to prior use, and agreed to measure amount diverted to the changed use to show the right is not being enlarged. The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, water use measurements go to the issue of adverse effect. Evaporation required to be made up by not diverting balance of the right remaining.

[P4D modified by FO: Conclusions of Law modified; conditions remain the same.]

Final Order Date:	07/2/2001 (G W/C)	**Applicant:**	**Kellogg**
Case #/Type:	41U-106673 (P)	**Regional Office:**	Helena
Application Date:	02/11/1999	**Examiner:**	Brasen
Hearing Date:	8/18/2000	**OA Examiner:**	Lighthizer
Oral Argument Date:	5/21/2001	**Use:**	Domestic, Lawn/Garden, Stock, Fishery

U-14.1259.00
U-14.1274

To comply with Mont. Code Ann. §85-2-311(1)(a), applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, or is available during high flows to store for use during low flow periods.

J-21.800
U-14.120
U-14.1259.70
S-20.720
S-15.920
T-5.800
L-1.940
W-1.87

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed Mont. Code Ann. § § 85-2-311 and 85-2-343 (Upper Missouri Basin Closure). Here permit is conditioned to fill pond during high spring flows from Joslyn Creek, a consumptive use in a partially closed basin. After the high spring flow period, the pond must be operated so that it is non consumptive and does not affect existing rights. Evaporation must be stood by the stored water in the pond. Conditions requiring the pond outlet device be modified so it can pass inflows after high spring flow period, and after the high spring flow period pond inflow must equal pond outflow.

Appealed to District Court 8/01; Remanded 2004; Certified to WC 1/2005

Final Order Date:	06/07/2001 (G W/C)	**Applicant:**	**Lang**
Case #/Type:	76L-109371 (P)	**Regional Office:**	Kalispell
Application Date:	09/21/1999	**Examiner:**	Brasen
Hearing Date:	9/7/2000	**Use:**	Domestic, Commercial water bottling

A-4.9383
S-15.920

The waters of a tributary may not be diverted to the injury of prior appropriators. The establishment of a tributary relationship is a question of fact. The groundwater flowing at the proposed point of diversion has been established as non tributary to the surface flows relied upon by prior appropriators (Confederated Salish & Kootenai Tribes Indian Reserved rights), therefore it may be diverted.

E-24.4848

Any Confederated Salish and Kootenai Tribal reserved rights in the source of supply must be protected.

E-24.4879
M-5.110

Objectors' prior rights in the artesian aquifer do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

T-5.800

The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, water quantity and quality measurements go to the issue of beneficial use. Measuring quality and quantity shows the standards for bottled water continue to be met, and establishes the quantity of water finally appropriated for this use.

U-1259.00

Found no connection between the groundwater aquifer and the surface flows; thus, held legal availability could be determined even though an un-quantified Indian Reserved right to surface flows exists. Other Objectors are in the same aquifer as Applicant, and the trend in aquifer flows and pressure is downward in their wells; however, their wells continue to flow under pressure. Held water legally available because no testimony of calls or insufficient water in the aquifer.

Petition for Writ of Supervisory Control filed with Montana Supreme Court by CSKT (time for appeal of Final Order tolled by the Mt Sup Ct)

Final Order Date:	06/25/2001 (G w/c)	**Applicant:**	**Durocher**
Case #/Type:	41QJ-111525 (P)	**Regional Office:**	Lewistown
Application Date:	05/02/2000	**Examiner:**	Brasen
Hearing Date:	03/14/2001	**Use:**	Wildlife & wetland Habitat

L-1.940

Diversion is within the Upper Missouri Basin closure area which limits diversions to storage during high spring flows. Finding no statutory definition of "high spring flows" the hearing examiner defined such for purposes of the order. "High spring flows are seasonal, sustained, moderately high flow characteristic of a basin or region affected by runoff from the winter snowpack." Diversion limited to high spring flows.

Final Order Date:	07/23/2001 (G w/c)	**Applicant:**	**Carlson**
Case #/Type:	76LJ G(P)007481 (C)	**Regional Office:**	Kalispell
Application Date:	02/02/2000	**Examiner:**	Brasen
Hearing Date:	03/21/2001	**Use:**	Industrial (gravel washing)

A-4.9394

Department determined water quality objection valid for a limited scope. Authorization conditioned to prevent runoff through berms containing harmful hydrocarbons from entering groundwater through the gravel washing settling ponds.

Final Order Date:	08/21/2001 (G w/c)	**Applicant:**	**The Briarwood**
Case #/Type:	43Q-107167 (P)	**Regional Office:**	Billings
Application Date:	06/22/1999	**Examiner:**	Brasen
Hearing Date:	03/28/2001	**Use:**	Irrigation

U-14.1259.00
U-14.1274

Application is for storage of flood flows. Water physically available only during high or flood flows on an uncertain frequency as shown by Applicants projections using data from nearby gauged streams and Objector observations. Flood flows estimated by applicant with a numerical flow rate that exceeds existing downstream rights and recharge for a downstream adjacent shallow aquifer. Diversion limited to times streamflows exceed this flowrate as shown on a staff gauge to be installed by Applicant under auspices of a professional engineer.

P-5.800

Compliance problems with previously issued permits or water use have no relevance in a hearing for a new application.

S-21.6625

Several objectors did not appear for the hearing. Default may occur when an appropriator does not appear at a properly noticed hearing. The Objectors' interests in the proceeding were dismissed.

Final Order Date:	08/2/2001 (G)	**Applicant:**	**Savik**
Case # (Type):	76M-112876 (P)	**Regional Office:**	Missoula
Application Date:	11/28/2000	**Examiner:**	Brasen
Hearing Date:	6/13/2001	**Use:**	Multiple domestic/lawn & garden

A-4.9395
B-21.780

Applicant who provided evidence that a .02 foot lower groundwater level would not cause adverse effect to the Objectors has met his burden of proof. Objectors' wells fully penetrate the aquifer; however, Objectors did not state why they could not reasonably exercise their rights under the changed conditions and have not met their burden of production.

Final Order Date:	9/14/2001 (D])	**Applicant:**	**USA (DOI/BLM)**
Case #/Type:	40J-111302 (P), 40M-111303 (P)	**Regional Office:**	Glasgow
Application Date:	2/17/2000	**Examiner:**	Brasen
Hearing Date:	11/16/2000	**Use:**	Stock/fishery/waterfowl/wildlife pond

B-21.780
U-14.1259.00
U-14.1274

Water shown to be physically available using runoff estimating techniques and size of upstream diversions. In application 40M-111303 evidence showed it may take two years to fill the proposed reservoir. Applicant failed to prove water present was not needed downstream to fulfill senior water uses, or that a call by downstream seniors would be futile. Absent an objection by a downstream appropriator, the comparison of water physically available with existing demands must still be addressed.

A-4.9321
M-5.110

Adverse affect may occur and the means of operation are not adequate since there is no release mechanism to pass through water in excess of the annual appropriation or to honor a legitimate call from a downstream appropriator in the event of a precipitation event.

B-5.6934
B-5.6979

Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove waterfowl and wildlife were beneficial uses.

A-16.7576

Application may be amended after public notice if amendments would not prejudice anyone. Here, the applicant added the fishery purpose at hearing. Held, the proposed change of use changed the label but not the substance of the application as noticed; thus, the amendment did not prejudice anyone.

Final Order Date:	9/24/2001 (G W/C)	**Applicant:**	**Mayne**
Case #/Type:	41F-108990 (P)	**Regional Office:**	Bozeman
Application Date:	10/3/2000	**Examiner:**	Brasen
Hearing Date:	7/11/2001	**Use:**	Stock/fire protection

U-12.59.00
U-12.74
T-5.80

Applicant measured flows in the source in different years. Measured flows vary and above and below existing downstream demands, and depend upon climatic conditions. Applicant agreed to measure the source and not divert when flows were less than downstream demands. Permit conditioned such that Applicant must measure source at the point of diversion and stop diverting when flows drop below 20 gallons per minute.

M-5.11
W-1.87
T-5.80

Applicant must line the pond to prevent seepage, and provide fire department access according to local department regulation, and make up any evaporation from another source.

J-21.800
S-20.720
S-15.920
T-5.800
L-1.940
W-1.87

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed Mont. Code Ann. § § 85-2-311, 341, and 343 (Madison, Upper Missouri Basin Closure). Here permit is conditioned to fill pond during high spring flows. Evaporation must be stood by the stored water in the pond or be replaced from a groundwater source.

B-5.6979
B-21.780
L-1.940
S-20.720

Applicants must prove amount of water is not wasteful. Applicants did not establish the flow through amount requested to keep the stockwater fresh is reasonable and does not constitute waste. Lesser amounts may have accomplished the same result. Without evidence of why the requested rate was needed, the use could not be determined beneficial, and was not allowed. Therefore, as to flow through, the criterion was not met.

As to fire protection the volume of water to be stored in the pond was justified based on a possible future structure fire. Thus, it is not an "emergency appropriation" exempt from the closure.

Final Order Date:	07/09/2001 (G w/c)	**Applicant:**	**Peterson / MDOT**
Case #/Type:	76GJ-110821 (P)	**Regional Office:**	Missoula
Application Date:	05/10/2000	**Examiner:**	Brasen
Hearing Date:	None (settled)	**Use:**	Wildlife/Waterfowl habitat mitigation

L-1.940
T-5.80

Groundwater project lies in the Upper Clark Fork River Basin Closure Area. Groundwater permits may be issued if an augmentation plan shows surface water depleted by the loss of tributary groundwater will be sufficiently augmented in amount, time, and location to replace depletions to senior rights in the receiving waters (and all other criteria are met). Applicant's plan augmented appropriators down-ditch rather than down-gradient surface waters. Because Applicant's augmentation plan does not accomplish the statutory requirement, a condition must be placed on the permit requiring applicant to obtain a change of use for the augmentation water which comes from an existing right, and require a portion of the existing right to remain in the source of the existing right to replace depletions to senior rights.

Final Order Date:	11/16/01 (D])	**Applicant:**	Borland
Case #/Type:	43C-112035 (P)	**Regional Office:**	Billings
Application Date:	10/31/00	**Examiner:**	Brasen
Hearing Date:	9/25/01	**Use:**	Wildlife Habitat

U-14.1274

Applicant failed to meet burden to show water reasonably available in amount sought to appropriate during the period Applicant seeks to appropriate. Applicant's personal observations of streamflow and snow drifts in the upper drainage since 1992 not confirmed by Applicant's own weir measurements of flow at the proposed point of diversion.

U-14.1259.00

Applicant did not show that downstream exempt stockwater rights and other filed rights would have sufficient flows during times the proposed pond would take all the flow for filling, or that pond seepage and evaporation would not be destined for downstream existing rights.

A-4.93
B-21.78

Applicant did not show that after the initial fill the pond would be non consumptive with a minimal 1-2 acre-feet of evaporative loss per year. The evaporated volume is equal to a flow $^{1}/_{3}$ of that measured by a downstream objector. Applicant met initial burden by submitting a correct and complete application. After objections Applicant is required to provide additional information to overcome objections. Applicant had the burden to show downstream rights could be reasonably exercised during times of pond evaporation and filling, but did not.

M-5.11

Applicant did not show they could honor a downstream call at times the pond water level was below the stop planks in the vertical release pipe. Applicant did not explain the contradiction that soils beneath the pond are a tight clay type and their statement that geology in the area causes Horse Creek to go underground. Applicant had no plan to prevent increased seepage at the pond site.

B-5.6934

The wildlife habitat to benefit from the proposed appropriation are naturally occurring in the area and not under the control of Applicant. Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove wildlife habitat is a beneficial use.

Final Order Date:	02/19/02 (G W/C)	**Applicant:**	Taylor
Case #/Type:	41B-111806 (P)	**Regional Office:**	Helena
Application Date:	06/16/00	**Examiner:**	Brasen
Hearing Date:	11/07/01	**Use:**	Irrigation (golf Course)

U-14.1274
T-5.80

Applicant provided hydrologic evidence of available water via a one-time pump test and mass balance determination, and by agreeing to measure water diverted so the water from this source could be determined and shown to exist beyond the term of the pump test.

A-4.93
B-21.78

Applicant provided evidence that pumping the proposed shallow source would not affect Objector's spring flows has met his burden of proof. Objectors who produced no evidence that pumping this source would adversely affect their spring flows have not met their burden to go forward

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Final Order Date:	02/19/02 (G W/C)	**Applicant:**	**Taylor**
Case #/Type:	41B-111807 (P)	**Regional Office:**	Helena
Application Date:	06/16/00	**Examiner:**	Brasen
Hearing Date:	11/07/01	**Use:**	Irrigation (golf Course)

T-5.800
A-4.9395

Applicant must test his well(s) when drilled to confirm aquifer characteristics used in prehearing projections are real. Applicant must monitor pumping rates and volumes to provide data to determine affects to nearby spring flows, if any. Applicant's evidence was from a one time 24-hour pump test in the 1980's from a well which saw only one year of use. To show lack of adverse affect from long term use, Applicant must monitor static water levels each season for five seasons. The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, static water measurements go to the issue of adverse effect.

E-24.4879

Objectors' prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the changed conditions.

Final Order Date:	08/16/02 (D])	**Applicant:**	**Mineral Rights Unlimited, LLC**
Case #/Type:	41I 111746 (P)	**Regional Office:**	Helena
Application Date:	5/12/00	**Examiner:**	Brasen
Hearing Date:	01/10/02	**OA Examiner:**	Hall
Oral Argument Date:	06/06/02	**Use:**	Mining

B-21.78
E-21.80

Applicant must present evidence to make a prima facie case to meet the preponderance standard. Applicant cannot meet this statutory requirement by waiting until the Department's application review reports are in the file and having their expert critique them. Applicant must present a prima facie case for the burden of production to shift. Applicant did not present a prima facie case.

Applicant relies on §§ 26-1-301, 401, 403, but those statutes do not mandate anything in a case where the facts are disputed. Here, the Hearing Examiner chose to believe other non-expert witnesses; the fact finder is not mandated to believe Applicant's witness.

A-4.9394

A statement by Applicant that they will add no chemicals in the mining operation is not sufficient to show no adverse effect to water quality. Evidence showing the material mined and coming in contact with the water during the placer operation will not adversely effect the water quality is needed but was not provided.

Final Order Date:	07/29/2002	**Applicant:**	**Siebel, Kenneth F. and Judith A.**
Action:	Granted with Conditions		
Case/Application #:	76H106450, 76H-106451; 76H-106452, 76H-106454	**Regional Office:**	Missoula
Application Type:	Permit		
Application Date:	03/19/99	**Examiner:**	Brasen
Hearing Date:	11/27/2001	**OA Examiner:**	Stults
Oral Argument Date:	05/08/2002	**Use:**	Fishery, recreation, wildlife/waterfowl

PFD: Evidence not provided to establish direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife, or waterfowl population, or recreational activity. Therefore, applicant did not prove minimum amount necessary for beneficial use. Proposed use not proven to be a beneficial use. If quantity of water necessary to sustain the use cannot be determined, permit cannot be granted.

B-5.6910
B-5.6934
B-5.6979

FO: Reversed. Applicant proved that quantity of water proposed to be used is the amount reasonably necessary for proposed use. Proved that proposed use of water is a beneficial use of water. A use that cannot reasonably be quantified cannot be recognized as a water right. Since applicant makes no assertion of legal control over fish or wildlife, applicant is left with burden of establishing actual need for the amount of water requested. Applicant need only establish a reasonable amount of water to meet burden of proof; private appropriator does not need to control or manage the fish, wildlife, or waterfowl. Since at least 1986, DNRC has, on an application-by-application basis, applied reasonable amount quantification for beneficial uses associated with pond development.

E-22.480

What a DNRC employee felt prior to hearing is not probative of whether in fact statutory criteria satisfied.

E-22.480 Interlocutory order allowing more time to provide evidence not appropriate when applicant is not arguing that there is new additional evidence to be presented.

L-1.940 Hearing Examiner not bound by agency written policies not formally adopted under MAPA.

E-22.480
L-1.940 Legal conclusions in memorandum from DNRC attorney not binding on hearing examiner. Memorandum not relevant to establish existence of law; treated as legal argument of objector.

T.5800 Conditions: decreed stream-water commissioner; water measurement records required; fish-friendly diversion structure required in Mitchell system; control structure to regulate diversion of water required; separate private agreement not recognized but included in file.

Appealed to MT District Court (Cause No. BDV-2002-519). Final order reversed and hearing examiner's order reinstated. District Court held DNRC erred in allowing heavily amended applications to proceed after closure of the Bitterroot subbasin to appropriation. **Appealed to MT Supreme Court** (Case No. 03-753).

Final Order Date:	09/24/2003	**Applicant:**	**French, Daniel and Roberta**
Action:	Granted With Conditions		
Case/Application #:	41S 11321999	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	05/31/2000	**Examiner:**	Brasen
Hearing Date:	02/27/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	Ir

O-2.490
S-20.11 A person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3). Objectors claimed upstream interests which may be effected by the proposed appropriation. Burden of production moves to the Objector after the Applicant makes a prima facie case. Here, Objector did not bring adequate proof to overcome Applicant's proof.

A-4.9392
A-4.9348.00 Prior to the hearing Objector and Applicant entered into a separate private agreement. The private agreement which the Applicant and Objector can enforce in court between the parties, contains conditions which are not appropriate for placement on any authorizations that may issue. Expansion of the period of use under the guise of a change is not allowed. An increased use of water is a new appropriation.

L-1.940 Objector Ackley Lake Water Users Association could not be represented by its President and Vice-President and were informed by the Hearing Examiner that corporations must be represented by counsel in administrative hearings. The Association President could only read or make a statement for the record but could not cross-examine other witness, introduce witnesses, making opening or closing statements, object to testimony or exhibits.

A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney

L-1.940 There can be no claim of adverse effect by Objector if Objector has no water right.

Final Order Date:	10/09/2002	**Applicant:**	**Three Creeks Ranch of Wyoming, LLC**
Action:	Granted; Granted in Part with Conditions		
Case/Application #:	41C-11339900; 41C-19391600	**Regional Office:**	Bozeman
Application Type:	Permit; Change		
Application Date:	10/13/2000	**Examiner:**	Brasen
Hearing Date:	05/22/2002; 6/3/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	stock; fish; wildlife

A-4.930 **U-14.1259.00**	Water is legally available when it is not destined for a senior appropriator at a time it can be diverted and used by the senior. Objector did not provide sufficient evidence water at issue is destined to its right at a time objector can put to use.
E-24.4831	Actual beneficial use is basis for historic right, not Water Court decree.
M-5.110	Extent of information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity. Project designed by licensed engineer meets adequate means of diversion criterion in this instance.
B-21.780	Applicant has the burden to produce a preponderance of evidence on a criterion even if the DNRC doesn't request it.
T-5.800	41C-19391600: Authorization may be reduced to historic use established under adjudication; removal of acreage from irrigation; storage pond designed by licensed engineer; and operation of headgate.
E-22.480 **A.16.7567**	Used evidence in permit application (not in change application) to grant change authorization. No prejudice to objector/area water users because amounts are less than stated in public notice.
B-5.6934 **B-5.6979**	Applicant did not prove flow rate and volume reasonably necessary for proposed fishery, wildlife, and waterfowl uses.

Final Order Date:	11/29/2002	**Applicant:**	**Louisiana Land & Livestock, LLC**
Action:	Granted in Part-Denied in Part		
Case/Application #:	76LJ-00796599	**Regional Office:**	Kalispell
Application Type:	Change		
Application Date:	10/04/2001	**Examiner:**	Brasen
Hearing Date:	08/01/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	irrigation, fish

E24-4831	An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. (Change limited to historic use.)
B-5.690	Applicant did not prove that changing the point of diversion for an irrigation right that will not be used is a beneficial use of water.
A-4.930	Adverse effect criterion applies to existing rights of other persons, not just rights of those who object to the application.
E-22.480	**Final order:** New evidence cannot be introduced after record closed without reopening the record. Finding of fact not changed.
R-5.930	**Final order:** Hearing examiner not required to address every fact to make decision, only findings and conclusions that are the basis for decision.

T-5.800	Minimum pond outflow; point of pond outflow; discontinue irrigation of specified acres, prohibition on diversion under two permits at same time; pond stocking permit and stocking required; issuance of pending permit required; authorization to be reduced if historic use reduced by adjudication; specified measuring device required; flow and volume records required.

Final Order Date:	10/09/2002	**Applicant:**	**Wilkins, Dave and Howard**
Action:	Granted With Conditions		
Case/Application #:	76LJ-11406600	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	12/15/2000	**Examiner:**	Brasen
Hearing Date:	08/13/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	power generation

T-5.800	Minimum flow instream below point of diversion; return water diverted to stream at specified point; specific construction measures required to dissipate energy of falling water to prevent channel bed erosion by water re-entry; measuring device and reporting of flow and volume required. Minimum flow condition not usually placed on permits; however, pursuant to MEPA, measures mutually developed at the request of project sponsor may be incorporated into a permit.

Final Order Date:	12/12/2002	**Applicant:**	**Poulsen, Harold**
Action:	Denied		
Case/Application #:	41K-11226000	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	07/24/2000	**Examiner:**	Brasen
Hearing Date:	09/11/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	stock; erosion

A-4.9392 **T-5800**	Applicant’s agreement to conditions becomes an implied plan to assure use of water can be controlled so water rights of prior appropriators will be satisfied.
B-5.690	Applicant did not prove erosion control purpose is a beneficial use of water.
B-5.6979	Applicant did not show flow rate that can be beneficially used for stock purposes without waste.
S-15.920 **J-21.800** **U-14.1259.00**	Without ditch company canal, water would flow to Sun River; therefore, water is tributary to the Sun River and exception to basin closure for erosion control in Muddy Creek drainage does not apply.
R-5.930	**Final order:** No need to address the exceptions of objector whose interests cannot be prejudiced due to denial of application.

Final Order Date:	12/24/2002	**Applicant:**	**Smelko, Daniel B. and Terry M.**
Action:	Granted With Conditions		
Case/Application #:	41I-143072	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	11/13/2000	**Examiner:**	Brasen
Hearing Date:	06/19/2002	**OA Examiner:**	Martin
Oral Argument Date:	11/25/2002	**Use:**	irrigation

E-24.4810
E-24.4831

Issues of abandonment, inclusion in a Water Court decree, and lack of objection to a water right in a water right in a Water Court decree are all matters that require supporting evidence to prove whether or not use exists that can be changed. Applicant provided evidence of minimal prior use in late 1970's. Although significant time has elapsed, it does not appear the rights have been abandoned. No evidence of abandonment beyond personal belief presented to establish rights abandoned.

T-5.800

Authorization to be reduced if historic use reduced by adjudication; purchased flow rate to be left instream at old point of diversion; measuring device required; hours and rate of pumping to be recorded for first full irrigation season; combined appropriation for associated water rights with overlapping places of use limited to 38.1 acre-feet.

Final Order Date:	01/19/2003	**Applicant:**	**Weidling, Benjamin L. & Laura M.**
Action:	Granted in Part with Conditions; Denied in Part		
Case/Application #:	76LJ-11583100	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	05/23/2001	**Examiner:**	Brasen
Hearing Date:	09/26/2002	**OA Examiner:**	none
Oral Argument Date:	none	**Use:**	fish, wildlife, irrigation

S-15.920

Water being appropriated may have been ground water originally; however, water being appropriated in this application is not water that was brought from below the ground surface by this project. Water being appropriated is surface water.

U-14.1259.00
E-24.4831

Legal availability is determined by analysis of nondrought periods. Using DNRC records to determine existing legal demands on the source is merely a starting point. The actual needs of valid water rights are the basis for determining existing legal demands.

Water rights claimed are *prima facie* only in the adjudication and are not binding in this proceeding.

Although smaller rights were claimed by objector in adjudication than actual historic use testified to in this proceeding, actual beneficial use is the basis, the measure and the limit of all rights.

M-5.110
W-1.870

Allowing all water diverted to pond to seep out bottom is a wasteful use of water when alternatives exist that prevent such loss and still accomplish the intended purpose.

B-5.6934
B-5.6979

Applicant did not prove that quantity of water proposed to be used for fish and wildlife is minimum amount necessary for proposed beneficial use.

L-1.940 Rescinding a policy does not replace the burden an applicant has to show the proposed use is a beneficial use of water and the amount requested is justified.

M-5.110 **Final order:** The record does not show that inspection of means of diversion, construction, and operation by licensed engineer is necessary to show criteria are satisfied.

T-5.800 Diversion limited to certain months; pond must be lined to prevent seepage; and excess water must be diverted back to source.

Final order: Record does not show that continuous flow monitoring by applicant will help satisfy a criteria for issuance of a permit. Monitoring upstream of objectors will not tell applicant what objectors' needs are.

Consolidated with hearing *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583000* by Ramona S. and William N. Nessly

Appealed to District Court.

Final Order Date:	01/19/2003		
Action:	Granted in Part with Conditions; Denied in Part	**Applicant:**	**Nessly, Ramona S. and William N.**
Case/Application #:	76LJ-11583000	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	05/23/2001	**Examiner:**	Brasen
Hearing Date:	09/26/2002	**OA Examiner:**	none
Oral Argument Date:	none	**Use:**	fish, wildlife, irrigation, stock

M-5.1129 Property ownership at point of diversion not relevant after Hearing Examiner determined water subject to application was surface water, not ground water. Right of access by way of an easement is not a criterion for issuance of permit.

S-15.920 Water being appropriated may have been ground water originally; however, water being appropriated in this application is not water that was brought from below the ground surface by this project. Water being appropriated is surface water.

U-14.1259.00
E-24.4831 Legal availability is determined by analysis of nondrought periods. Using DNRC records to determine existing legal demands on the source is merely a starting point. The actual needs of valid water rights are the basis for determining existing legal demands.

Water rights claimed are *prima facie* only in the adjudication and are not binding in this proceeding.

Although smaller rights were claimed by objector in adjudication than actual historic use testified to in this proceeding, actual beneficial use is the basis, the measure and the limit of all rights.

M-5.110
W-1.870 Allowing all water diverted to pond to seep out bottom is a wasteful use of water when alternatives exist that prevent such loss and still accomplish the intended purpose.

B-5.6934
B-5.6979 Applicant did not prove that quantity of water proposed to be used for fish and wildlife is minimum amount necessary for proposed beneficial use.

L-1.940 Rescinding a policy does not replace the burden an applicant has to show the proposed use is a beneficial use of water and the amount requested is justified.

M-5.110 **Final order:** The record does not show that inspection of means of diversion, construction, and operation by licensed engineer is necessary to show criteria are satisfied.

T-5.800 Diversion limited to certain months; pond must be lined to prevent seepage; and excess water must be diverted back to source.

Final order: Record does not show that continuous flow monitoring by applicant will help satisfy a criteria for issuance of a permit. Monitoring upstream of objectors will not tell applicant what objectors' needs are.

Consolidated with hearing *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583100* by Benjamin L. & Laura M. Weidling.

Appealed to District Court.

Final Order Date:	12/24/2002	**Applicant:**	**Eberhart, Lois E.**
Action:	Denied		
Case/Application #:	11533100	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	06/27/2001	**Examiner:**	Brasen
Hearing Date:	10/21/2002	**OA Examiner:**	none
Oral Argument Date:	none	**Use:**	lawn and garden

U-14.1259.00 Applicant did not provide any analysis comparing water physically available with the legal demand. The lack of this analysis does not allow a conclusion that water is legally available in spite of the fact water was historically used as requested prior to July 1, 1973. (No claim filed.)

Final Order Date:	04/08/2003	**Applicant:**	**Robert and Lindalee Mummey**
Action:	Granted With Conditions		
Case/Application #:	76LJ G(B)215025	**Regional Office:**	Kalispell
Application Type:	Change		
Application Date:	2/9/2001	**Examiner:**	Brasen
Hearing Date:	11/20/2002	**OA Examiner:**	Martin
Oral Argument Date:	02/21/2003	**Use:**	**Fish**

E-22.480
J-21.800

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an Authorization to Change. The Department has no authority to deny an Authorization on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of an Authorization.

A-4.9321
O-23.69

Objector suggests that transfer of ownership of water rights is an adverse affect if the new owner files a complaint with the Department regarding the Objector's use of water. However, the right to use water passes with the conveyance of land to a new owner and transfer of water right ownership occurs without loss of priority. In addition, changes in water occurrence is contemplated by the statutes. Mont. Code Ann. § 85-2-401(1). The limit imposed on junior appropriators by this statute is that "the prior appropriator can reasonably exercise the water right under the changed conditions." Here, two complaints in addition to being upstream of the Applicant do not constitute adverse affect to the Objector.

T-5.800

The Final Order required a measuring device, monitoring, and reporting to resolve future conflicts on the basis of facts rather than conjecture.

Final Order Date:	04/14/2003		
Action:	Granted With Conditions	**Applicant:**	**Masolo Ranch**
Case/Application #:	41I 00274101		
Application Type:	Change	**Regional Office:**	Name
Application Date:	08/11/1999	**Examiner:**	Brasen
Hearing Date:	01/08/2003	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation

A-4.9321

Tributary branches of a stream are inseparable parts of the main stream. Undeveloped tributary water which surfaces on Applicant's land is subject to call by downstream senior appropriators.

A-4.9348.00

Enlargements of historic use are significant precisely because they change the stream conditions to the detriment of junior appropriators. Here, prevention of use of historic and proposed points of diversion at the same protect existing right holders from enlargement of historic use.

Final Order Date:	04/23/2003		
Action:	Granted With Conditions	**Applicant:**	**Staninger**
Case/Application #:	76M 108580		
Application Type:	Permit	**Regional Office:**	Name
Application Date:	08/25/1999	**Examiner:**	Brasen
Hearing Date:	01/23/2003	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Fish and Wildlife

A-4.930
A-4.9348.00

The source for this permit is closed during the irrigation season. Permit is for non irrigation season flows for pond flow through and to replace pond evaporation. Down-ditch irrigation water is routed through the pond. Outside the period of appropriation, during the irrigation season, evaporation water must come from a nearby ground water well so existing down-ditch irrigation water rights are satisfied.

B-5.6934

Amount of water for fishery purpose justified by aquatic biologist. No evidence of wildlife purpose provided, so permit issued for fishery purpose only.

A-4.9394

A valid water quality objection was received. Applicant contested the validity of the objection alleging that the objector had no standing. The Hearing Examiner ruled that Applicant may have a proper reason to contest the validity of the objection, it must be done in a timely manner. Otherwise, Applicant must provide evidence sufficient to overcome the objection. Here, Applicant provided sufficient evidence.

T-5.80

Permittee required to obtain an appropriation for non-tributary ground water to replace pond evaporation.

Final Order Date:	07/11/2003		
Action:	Granted With Conditions	**Applicant:**	**Naccarto/Taylor**
Case/Application #:	41H 11547900		
Application Type:	Permit	**Regional Office:**	Bozeman
Application Date:	03/21/2001	**Examiner:**	Brasen
Hearing Date:	03/20/2003	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Fishery

B-5.6934
B-5.6979
J-21-800
T-5.80

Applicant did not prove that quantity of water proposed to be used for recreation purpose which was added just prior to the hearing. Applicant provided flow rate and volume justification for the fishery purpose, but not the recreation purpose.

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed in Mont. Code Ann. §§ 85-2-311, 342, and 343 (Upper Missouri Basin Closure). Here Applicant provided evidence that pond evaporation is equal to or less than what transpired from the plants prior to pond construction, and permit is conditioned to legal requirement for a use to be nonconsumptive, i.e., that the Appropriator must not allow plants to grow in the pond that result in any part of the plant being exposed on the pond surface and operate the pond in a manner such that substantially all water diverted returns without delay to the source of supply, and causes little or no disruption in the stream conditions.

Final Order Date:	04/18/2003		
Action:	Granted With Conditions	**Applicant:**	**RV Ranch Co.**
Case/Application #:	41I 08904101, 41I 13005991	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	01/02/2001	**Examiner:**	Brasen
Hearing Date:	N/A	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation

O-2.490
T-5.80

Prior to the hearing Applicant agreed to conditions which resulted in the withdrawal of all objections and no hearing was held. Generally, the conditions require annual flume and staff gauge maintenance; appropriation only between April 15 and July 1, inclusive; appropriation only when stream flows equal of exceed 18.63 cfs; limit the changed volumes and the overlapping volumes.

A-4.930
E-22.480

The Department files did not contain direct evidence of use at the historic place of use. Regional Office staff assisted the Hearing Examiner by locating photographs showing historic use of the rights being changed in an earlier change application filed by this Applicant, and offered personal knowledge of historic use of the rights being changed. There being no objection filed claiming the historic use was never perfected, used, or was abandoned, the Hearing Examiner accepted the Regional Office staff as sufficient proof of historic use.

Final Order Date:	04/23/2003	**Applicant:**	**Roedel, Lawrence**
Action:	Granted With Conditions		
Case/Application #:	76LJ 11694000	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	08/20/2001	**Examiner:**	Brasen
Hearing Date:	12/12/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation

B-5.6979

Applicant adapted the requirements for cultivation of wild rice to the local conditions, included seepage, evaporation, and flow through to provide persuasive evidence that the proposed irrigation of wild rice is beneficial and the amount of water requested is reasonable.

A-4.93
B-5.6979
T-5.800

To prevent a pipe that is not a part of this project from carrying water into the project, it must be capped to ensure that Applicant does not divert more water than authorized or more water than can be put to beneficial use. Taking more water than approved will result in downstream existing rights not being satisfied when flows are low. Department may approve a change subject to a condition that it considers necessary to satisfy the criteria.

Final Order Date:	N/A (No Final Order Issued)	**Applicant:**	**Montana Golf Enterprises, LLC**
Action:	Denied		
Case/Application #:	41H 30003523	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	09/12/2002	**Examiner:**	Lighthizer
Hearing Date:	07/08/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	

APPLICATION # 30003523-41H WAS FILED TO IRRIGATE A GOLF COURSE, AND SUPPLY A CLUBHOUSE AND 110 RENTAL CABINS. WHEN THE TWO IRRIGATION WELLS ARE PUMPED, THERE IS AN IMMEDIATE AND DIRECT CONNECTION TO FISH CREEK. UNDER THE UPPER MISSOURI RIVER BASIN CLOSURE, GROUNDWATER MUST NOT BE IMMEDIATELY OR DIRECTLY CONNECTED TO SURFACE WATER. THIS CHANGE WAS FILED TO AUGMENT THIS LOSS TO FISH CREEK. A TOTAL OF 20.12 ACRES IS BEING REMOVED FROM THE CLAIMED PLACE OF USE. A FLOW RATE OF UP TO 0.381 CFS WILL BE DIRECTLY DIVERTED INTO FISH CREEK WHEN THE IRRIGATION WELLS ARE BEING PUMPED. A TOTAL VOLUME OF 44.76 ACRE-FEET OF SAVED WATER WILL BE USED TO MAKE UP THE LOSS TO FISH CREEK.

Final Order Date:	N/A (No Final Order Issued)	**Applicant:**	**Montana Golf Enterprises, LLC**
Action:	Denied		
Case/Application #:	41H 30000806	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	12/14/2001	**Examiner:**	Lighthizer
Hearing Date:	07/08/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	

APPLICATION # 30003523-41H WAS FILED TO IRRIGATE A GOLF COURSE, AND SUPPLY A CLUBHOUSE AND 110 RENTAL CABINS. WHEN THE TWO IRRIGATION WELLS ARE PUMPED, THERE IS AN IMMEDIATE AND DIRECT CONNECTION TO FISH CREEK. UNDER THE UPPER MISSOURI RIVER BASIN CLOSURE, GROUNDWATER MUST NOT BE IMMEDIATELY OR DIRECTLY CONNECTED TO SURFACE WATER. THIS CHANGE WAS FILED TO AUGMENT THIS LOSS TO FISH CREEK. A TOTAL OF 20.12 ACRES IS BEING REMOVED FROM THE CLAIMED PLACE OF USE. A FLOW RATE OF UP TO 0.381 CFS WILL BE DIRECTLY DIVERTED INTO FISH CREEK WHEN THE IRRIGATION WELLS ARE BEING PUMPED. A TOTAL VOLUME OF 44.76 ACRE-FEET OF SAVED WATER WILL BE USED TO MAKE UP THE LOSS TO FISH CREEK.

A-4.93	Failure to identify historic use and/or specific acreage to be retired must result in denial or change application. (change app)
a-4.94	Retiring acreage from direct irrigation, which would continue to be sub-irrigated, will result in even more acreage needing to be retired under mitigation plan (change app) than would otherwise be necessary. Applicant did not identify additional acreage.
U-14.1274	Failure to perform adequate pump tests will result in a failure to show physical availability of ground water.
A-4.9383	Failure to perform adequate pump tests results in failure to show amount of depletion to surface water source in hydrologically connected system. Department cannot determine extent of adverse effect and amount of mitigation water needed to prevent adverse effect.
A-4.93	Failure to show physical availability or legal availability will result in failure to show by preponderance of the evidence that no adverse effect will result.

NOTE: This case discusses, but does not conclude whether augmentation in closed basins (other than the Clark Fork) is allowed to prevent adverse effect.

Final Order Date:	10/31/2003	**Applicant:**	**PC Development**
Action:	Denied		
Case/Application #:	41H 11548700	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	03/23/2001	**Examiner:**	Brasen
Hearing Date:	03/18/2003	**OA Examiner:**	Martin
Oral Argument Date:	08/13/2003	**Use:**	Multiple domestic, lawn and garden

A-4.93
B-21.78
U-14.1259.00

The water physically available in the deep zone has been estimated, but the existing legal demands within the area of potential impact was not provided. Applicant did not determine how many wells are within the cones of depression of the proposed wells, and did not determine total depth and pumping water level of those wells within the cones of depression. Applicant did not show those wells can be reasonable exercised according to their rights. Legal availability analysis of existing legal demands is not limited to an estimate of volume of water consumed by prior water users to estimated water physically available. Instead, existing legal demands include the amount of water diverted. Applicant has not shown that at least in some years, no legitimate calls for water will be made on it by a senior appropriator. It is Applicant's burden by a preponderance of evidence to show that the proposed use will not adversely effect a senior user. Objectors informed Applicant of the existence of their wells and problems with their wells, but Applicant did not determine the extent of the proposed drawdown on the wells within the cone of depression.

E-22.480

PFD allowed Exhibit OG9. It was an error to allow expert witness evidence into the record under the hearsay exception over objection of Applicant's counsel when such expert evidence had been sought in discovery where the obligation to supplement discovery was continuing, and where the author of the document was not present for cross-examination. Admission of the exhibit overturned. Surprise is not allowed. **[FO]**

A-4.9395
U-14.1259.00

Applicant argued in its exceptions to the PFD that the Department had previously accepted its aquifer-testing methodology in other instances and situations, and an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure. The record shows this is a complex aquifer system from which there are already a considerable number of appropriators who are experiencing problems with their wells and utilizing their legal water rights. Applicant relied upon assumptions about aquifer characteristics, the vertical connections between the three aquifer zones, and long-term impacts upon the upper zones caused by depletions in the deep zone that were questioned by the Staff Expert and Objectors. More convincing evidence needed than was presented in this case. **[FO]**

[P4D modified by FO: Conclusion of Law No. 4 reversed only as to the admission of Exhibit OG9; P4D recommendation to Deny upheld.]

Final Order Date:	06/18/2003	**Applicant:**	**Cattle Development Center, LLC**
Action:	Granted With Conditions		
Case/Application #:	43Q 112059	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	12/04/2000	**Examiner:**	Brasen
Hearing Date:	10/24/2001	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Commercial (CFO)

U-14.1274

Where substantial production variation exists in wells in the area, wells must be drilled and tested to show flows requested are physically available. Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion in the amount applied for at the times it is proposed to be put to use. Here, Applicant dropped un-drilled well from the Application, so physical availability was no longer an issue for that well.

Permit was conditioned to reduce pumping rates, require a cyclic pumping schedule, and water level measurement to prevent aquifer water level from dropping below the top of the upper confined aquifer. Dropping the pumping water level into the confined aquifer will result in dewatering the aquifer and diminished well flows in Applicant's wells. The conditions assure physical availability, that is, sustainable discharge during peak-use.

E-24.4848

A permit remark regarding reserved water rights of the Crow Tribe must appear on the permit to fully inform permittee of the risks involved.

Final Order Date:	01/16/2003	**Applicant:**	**Pursley, Mike**
Action:	Denied		
Case/Application #:	41QJ 09035999	**Regional Office:**	Lewistown
Application Type:	Change		
Application Date:	11/09/2001	**Examiner:**	Brasen
Hearing Date:	12/04/2002	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation, Multiple Domestic, Recreation

A-4.93
A-4.9348

Applicant must provide sufficient evidence to show the proposed change will not increase the volume of water diverted, and evidence to show the effects on existing rights on the source.

B-5.690

Applicant must show the amount being changed is a reasonable amount for each purpose being changed. When the amounts have not been shown to be needed, a determination that the use is beneficial cannot be made.

A-4.9394

When a valid water quality objection is received, Applicant must provide evidence from a competent source, not merely Applicant's lay opinion, that the water quality of a prior appropriator will not be affected as alleged in the valid objection.

Final Order Date:	N/A (No Final Order Issued)	**Applicant:**	**Springdale Colony**
Action:	Denied		
Case/Application #:	41J-11508000	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	3/15/2001	**Examiner:**	Brasen
Hearing Date:	1/22/2004	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation

U-14.1259.00	Applicant's theory that cone of depression did not extend to nearest surface water source based on observation of observation well and thus no analysis of legal availability was conducted was overcome by modeling and testimony of objector's expert and staff expert. Applicant failed to prove legal availability of surface water.
A-4.93	FWP instream flows currently not being met and calls have been placed on junior water users in the vicinity of Applicant's proposal. Applicant admits that there will be prestream capture of groundwater. FWP's prior appropriation will be adversely affected by Applicant's proposal.

Final Order Date:	12/08/2003	**Applicant:**	**Laible, Richard and Frances**
Action:	Denied in part; Granted in part		
Case/Application #:	76H-30001046	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	03/16/2001	**Examiner:**	Brasen
Hearing Date:	06/17/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	Wildlife; irrigation

A-4.9348.00	Addition of storage pond for irrigation use without a means of diverting out of pond to POU creates potential additional burden on source. Addition of pond for irrigation use denied.
B-5.6934	Applicant must prove that adding a use of 'wildlife' to a stock pond will be beneficial to the applicant. Applicant did not show control or reasonable amount of water required for wildlife use.
S-20.72	Addition of pond for applicant's stock water right approved to the extent that evaporations is made up for by use of exempt well or applicants contract water.

Final Order Date:	02/20/2004	**Applicant:**	**Brewer Land Co. LLC**
Action:	Denied		
Case/Application #:	41I-30002512	**Regional Office:**	Lewistown
Application Type:	Change		
Application Date:	06/27/2002	**Examiner:**	Brasen
Hearing Date:	09/10/2003	**OA Examiner:**	Stults
Oral Argument Date:	N/A	**Use:**	Irrigation

A-16.7567	Amending application to reflect a lesser volume to change and going from permanent change to temporary change does require re-publication.

J-21.80	Department has jurisdiction to, and in fact must, determine historic use of water right under change application notwithstanding the claimed amount in the state wide general stream adjudication. Statement of Claim is only *prima facie* proof for purposed of the state wide general stream adjudication, not for change proceedings.
E-24.4831	Universal feature of western water law is that over an extended period of time the pattern of historic diversions and use under a decreed right at its place of use will mature and become the measure of the water right for change purposes.
A-4.93	In change application "Adverse effect to other water users would occur if irrigation *requirements* are used to determine the extent of historic use instead of the maximum past volume actually *historically* diverted and used.
A-4.93 A-4.9376	Leaving "saved" water from conversion from flood to sprinkler irrigation in diversion ditch to run down to down-ditch water users creates adverse effect on down-stream water users who previously relied on return flows from acreage being retired.

Final Order Date:	03/04/2004	**Applicant:**	**Mowery, Thomas and Loreli**
Action:	Denied		
Case/Application #:	76N-30001166	**Regional Office:**	Kalispell
Application Type:	Change		
Application Date:	02/14/2002	**Examiner:**	Brasen
Hearing Date:	11/19/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	New POD

A-4.9348.20	Co-owner of shared water right and ditch who wishes to move the POD of their portion of water right downstream from ditch headgate must show that other owners along ditch will not be adversely affected by loss of carriage water especially when the shared right has not been apportioned.
A-4.9348.20	Moving POD to downstream tributary requires showing of no adverse effect on users below proposed POD. Only taking a portion of the water which will flow past original POD cannot make tributary users whole.
A-4.9373	Changing POD which will allow water to be taken at times when it was not historically taken is a change in the pattern of use and an expansion of right.
A-4.9348.10 B-5.6979	Expansion of historically irrigated acres is an expansion of the right and results in potential adverse effect. No proof offered to explain the amount of water requested for the historically irrigated acres especially when moving POD from very leaky ditch to a pump/pipeline diversion system.

Final Order Date:	03/26/2004	**Applicant:**	**Midway Colony**
Action:	Granted		
Case/Application #:	41O-30000571	**Regional Office:**	Havre
Application Type:	Permit		
Application Date:	01/17/2002	**Examiner:**	Brasen
Hearing Date:	12/17/2003	**OA Examiner:**	
Oral Argument Date:		**Use:**	stock; irrigation; domestic

A-4.93	When Applicant proves that his source is not hydraulically connected to surface water or to other area aquifers in which senior appropriators have rights, then Applicant has met a *prima facie* level of evidence has been met and burden of production moves to objectors. Objectors failed to produce adequate evidence to overcome Applicant's evidence. No adverse effect. **Note: Pre TU case.**
A-4.9394	When stock waste lagoons are designed and approved by DEQ as "no discharge" lagoons and subsequent solids will be used on fields and plowed in, no adverse effect on water quality.

Final Order Date:	05/12/2004	**Applicant:**	**Perry, Lisa and Gary**
Action:	Granted		
Case/Application #:	41H-11716500	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	10/10/2001	**Examiner:**	Brasen
Hearing Date:	03/03/2004	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation

U-14.1274	Eight hour pump test that showed no drawdown in observation well 282 feet away deemed adequate to show physical availability.
U-14.1259.00 A-4.93	Use of well for irrigation for 3-4 hours which resulted in no drawdown in neighbor's well 150 feet away deemed adequate to prove legal availability and no adverse effect especially in extremely responsive aquifer. **THIS IS A PRE-TU APPLICATION** thus surface water not evaluated.
A-4.9395 E-24.4879	Problems with adjacent wells no due to changes in aquifer conditions. Prior appropriators have a responsibility to construct an adequate means of diversion that reasonably penetrates the aquifer. To hold that an appropriator is entitle to maintain wells that penetrate only the top of an aquifer against subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier.
A-4.93	Applicant's plan to simply shut off pump to prevent adverse effect deemed adequate plan in extremely responsive aquifer.

Final Order Date:	5/01/2004	**Applicant:**	**Thom Farms**
Action:	Denied		
Case/Application #:	41S-30000871	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	2/11/2002	**Examiner:**	Brasen
Hearing Date:	8/14/2003	**OA Examiner:**	Martin
Oral Argument Date:	2/19/2004	**Use:**	irrigation

U-14.1274	Applicant's contention that physical availability does not have to be shown "during the entire requested period of diversion" is misplaced. Department has always required both surface and groundwater applicants to show that water requested is physically available at the proposed point of diversion during the period of use. Proof that flow rate is adequate to meet requested flow rate is not enough.
U-14.1259.00	Similarly applicant must show that water is legally available for the entire requested period of diversion. Argument that pump testing is only required for 72 hours thus legal availability only need be shown for 72 hours is straw man argument. Pump testing is not designed to show legal availability directly, but rather to enable the determination of aquifer characteristics in order to model legal availability.
L-1.940	Water Use Act is not to "preserve the status quo" but to protect senior water users and have new applicants prove their case by a preponderance of the evidence.

Final Order Date:	08/02/2005	**Applicant:**	**Fieldstone Estates**
Action:	Denied		
Case/Application #:	41I-11495000	**Regional Office:**	Helena
Application Type:	Permit		
Application Date:	03/12/2001	**Examiner:**	Brasen
Hearing Date:	09/01/2004	**OA Examiner:**	Vandenbosch
Oral Argument Date:	05/17/2005	**Use:**	Multiple domestic; lawn & garden; commercial

A-4.93 U-14.1259.25	Issue is whether water is available from the aquifer itself, not if continued leakage from nearby canal contributes to the aquifer. Neither Applicant nor Objectors have right to continued leakage from canal. (G)
A-4.93	Applicant's plan to measure water use and monitor area shallow and deep groundwater levels deemed adequate to prevent adverse effect. (G)

A-4.93 B-5.6979	Department does not require an appropriator to prove “generations” of water availability, but rather appropriator must show availability only for one season of use (or year-round when applicable). Evidence that leaking canal contributes water to aquifer combined with the fact that Applicants wells are 200+ feet deep deemed adequate to show that canal owner has relinquished control of the seepage. Neither Applicant nor Objectors can compel canal owner to continuance of leakage. (COL upheld)
A-16.75	Priority date of application is the date a properly filed application is filed. Fact that Applicant had previously filed applications for same project and then significantly altered the application deemed not sufficient to preserve earlier priority date.
A-4.93	Montana water law requires that Applicant for new permit have a plan to *control* his new appropriation so that prior appropriators will not be adversely affected. Here, the Applicant’s plan (as designed by the HE) is a *monitoring plan* to determine if adverse effect is created. While monitoring may be a useful element of a plan, it is not sufficient by itself.

Final Order Date:	6/03/2005	**Applicant:**	**Zoot Properties, LLC**
Action:	Granted		
Case/Application #:	41H-11546900	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	3/09/2001	**Examiner:**	Brasen
Hearing Date:	9/28/2004	**OA Examiner:**	Robinson
Oral Argument Date:	5/05/2005	**Use:**	Multiple domestic; irrigation; commercial; other purpose

A-4.9383	‘Immediately or directly connected’ determined to mean no induced infiltration of surface water through groundwater pumping. Applicant’s wells will create a cone of depression that extends to the nearby river but since the river is gaining in this stretch the cone of depression will not reverse the hydraulic gradient thus basin closure does not apply.
U-14.1259.00	Drawdown in adjacent wells of less than 0.4 feet deemed adequate to show that water is legally available.
A-4.93 T-5.80	Even though basin closure does not apply, applicant must mitigate depletion to river to prevent adverse effect.
	Reversed and remanded by DC in accordance with TU decision issued after FO was issued.
L-1.940	On remand Department issued FO determining that augmentation was not allowed in closed basin.
	Subsequently HB 831 was passed opening door for augmentation in closed basin

Final Order Date:	6/15/2005	**Applicant:**	**Kaechele, Thomas & Diane**
Action:	Granted		
Case/Application #:	76D-30009957	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	03/17/2004	**Examiner:**	Brasen
Hearing Date:	4/21/2005	**OA Examiner:**	
Oral Argument Date:		**Use:**	Fish and wildlife

B-5.69 W-1.87	Seepage from fish pond is waste when other viable options exist (lining). Amount of water granted reduced to only that required for fish survival.
A-4.9394	Objection that removing 20 gpm from creek will weaken TMD: capacity not supported by evidence. Applicants analysis sufficient to show no adverse effect to water quality.
T-5.80	Department may condition permit to ensure beneficial use. Permit granted with condition that ponds be lined and Applicant apply for and receive change in irrigation rights to fishery in order to provide for fish survival.
O-2.490	Claim by objector that running water is required to ‘create a soothing and restful home environment’ not supported by evidence of a water right for that purpose thus Applicant not required to demonstrate that his use will not interfere with that need.

Final Order Date:	5/18/2006	**Applicant:**	**Big Hole Grazing Association & MT Department of Transportation**
Action:	Permit Denied, Change Granted		
Case/Application #:	41D-30002459 (permit) and 41D-3002460 (change)	**Regional Office:**	Helena
Application Type:	Permit and Change		
Application Date:	2/14/2002	**Examiner:**	Vandenbosch
Hearing Date:	2/16/2004	**OA Examiner:**	Vogler
Oral Argument Date:	3/15/2006	**Use:**	Wetland Mitigation

A-4.9383 **M5.110** **B-21.78**	Department cannot prevent landowner from filing in ditches. However, filling in of ditches which will raise water table above ground surface to create wetland will increase evaporation of water previously discharged to creek. Applicant did not provide evidence of adverse effect to creek users. (P)
A-16.7576	Modification at hearing which reduces the volume of requested appropriation does not require new public notice. (P)
J-21.800	Questions of ditch rights and drainage ditches beyond Department jurisdiction. (P)
A-4.9348.48	Increased consumption due to evaporation from artificially dug pond must be accounted for or augmented. Applicant did not provide evidence that prior appropriators would not be adversely affected. (P)
A-16.750	*Trout Unlimited v. DNRC* applies retroactively to applications still pending before the Department. (P)

A-4.9488.48 **T-5.800**	Increased consumption over historic consumption must be accounted for in a change. Department has the ability to impose conditions to prevent adverse effect. (C) [Permit denied (adverse effect) Change granted with conditions]

Final Order Date:	6/15/2006	**Applicant:**	**Mack, Chriss A.**
Action:	Denied		
Case/Application #:	76H-30005957	**Regional Office:**	Missoula
Application Type:	Permit		
Application Date:	4/29/2003	**Examiner:**	Vandenbosch
Hearing Date:	9/25/2006	**OA Examiner:**	Long
Oral Argument Date:	5/9/2006	**Use:**	irrigation

D-21.310	Department is not a court of equity but an administrative review board with jurisdiction limited to the grant or denial of applications.
U14.1259 A-4.93	All water rights potentially affected must be analyzed in order to determine adverse effect including water rights downstream of the ditch.
L-1.940	Preponderance of the evidence does not refer to the sheer quantity of evidence presented but also its weight. Absence of information, where burden is on the applicant, is itself substantial competent evidence.
U-14.1259	Failure to adequately characterize the extent of the cone of depression will result in failure to prove legal availability.

Final Order Date:	9/21/2006	**Applicant:**	**Lapi, Vincent & Ira**
Action:	Granted		
Case/Application #:	76D-30008110	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	10/03/2003	**Examiner:**	Brasen
Hearing Date:	2/22/2006	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation; lawn and garden; stock

A-16.7567 A-16.7576	Modifications to an application may be considered in a proceeding previously publicly noticed so long as other appropriators are not prejudiced, regardless of whether the other appropriators are parties to the case. Where modification is a subset of the original proposal (no proposed increase in burden on the source), other appropriators are not prejudiced.
U-14.1259.00	Applicant must prove, at least in some years, sufficient unappropriated water will be physically available and that, at least in some years, no legitimate calls for water will be made on him. Evidence that sixty percent of the time more water is available to cover existing demand deemed sufficient.
S-21.6625	Objectors that default at hearing and are dismissed treated the same as withdrawn objections, i.e. as if they were never filed.

Final Order Date:	10/19/2006	**Applicant:**	**Leininger, William and Wendy**
Action:	Granted		
Case/Application #:	41S-30005803	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	04/09/2003	**Examiner:**	Brasen
Hearing Date:	08/11/2005	**OA Examiner:**	Schultz
Oral Argument Date:	06/21/2006	**Use:**	Irrigation; geothermal heating

D-21.31 A-16.7576	When amended application is a subset of the application as noticed (i.e. lesser amounts of water, etc.) then republication of application is not required as denial of fundamental due process is not implicated.
A-4.9395	Reduction in pressure in senior appropriators well due to junior use of same aquifer is not considered adverse effect. (PFD)
E-22.48	Use of staff expert report which was included as an exhibit in the record after the record closed was not proper. Exhibit is stricken. (FO)
E-22.48	Where Department finds Hearing Examiner relied on competent substantial evidence to make Findings of Fact, Department will not disturb those findings on review. (FO)
A-4.9395	Although objectors dependent on artesian flow may be affected by a proposed appropriation artesian flow is not a protectable means of diversion.

Final Order Date:	12/21/2006	**Applicant:**	**Thompson River Lumber Co. of Montana**
Action:	Denied		
Case/Application #:	76N-30010429	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	4/29/2004	**Examiner:**	Brasen
Hearing Date:	10/13/2005	**OA Examiner:**	Vogler
Oral Argument Date:	8/8/2006	**Use:**	power generation

S-21.6625	Failure to appear at hearing may result in sanctions including default.
U-14.1259	Legal availability is based on both pre-1973 claims and post 1973 permits.
U-14.1259	To be legally available applicant must show that, at least in some years, no legitimate calls for water will be made on him. Here, Applicant could expect calls for water for all but 16 – 24 days of each year.
A-4.93	Fact that prior appropriator will not be able to measure a depletion does not mean no adverse effect. Question is whether depletion would otherwise reach the prior appropriator to which they are entitled.

A-4.9321	Plan by applicant that prior appropriator can telephone the applicant to see if their pumps are running places burden on wrong party.

Final Order Date:	12/21/2006	**Applicant:**	**Utility Solutions LLC**
Action:	Granted		
Case/Application #:	41H-30014080	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	2/9/2005	**Examiner:**	Brasen
Hearing Date:	2/2/2006	**OA Examiner:**	Vogler
Oral Argument Date:	11/13/2006	**Use:**	augmentation

L-1.940 **B-5.69**	Augmentation is a beneficial use of water. Augmentation benefits the appropriator by allowing them to exercise competing uses of water that would otherwise deplete surface water flows resulting in adverse effect.
E-24.4810	Augmentation does not result in abandonment of the water right. Abandonment requires intent and it is apparent that the applicant intends to have a protectable right to use this water for augmentation.
A-4.93	Augmentation through a change in use is the applicants plan to prevent adverse effect from groundwater pumping. **[Appealed to District Court.]**

Final Order Date:	12/27/2006	**Applicant:**	**Nardi, Vinnie J & Susan N**
Action:	Denied		
Case/Application #:	76LJ-30008762	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	11/28/2003	**Examiner:**	Brasen
Hearing Date:	4/28/2005	**OA Examiner:**	Brasen
Oral Argument Date:	9/26/2006	**Use:**	fish and wildlife

B-5.6934	Beneficial use for fish pond must show the minimum amount necessary for the proposed fishery. Applicant’s use of water requirements for commercial fishery in Canada deemed not adequate to show that those same requirements are needed in Montana.

Final Order Date:	1/10/2007	**Applicant:**	**McDowell, Sam H**
Action:	Denied		
Case/Application #:	43D 10220900	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	9/17/1999	**Examiner:**	Brasen
Hearing Date:	11/17/2006	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation

A-4.93 **E-21.78** **U-14.1259.00** **U-14.1274**	Applicant must present evidence to make a prima facie case to meet the preponderance standard. Applicant cannot meet this statutory requirement to show water availability with only visual observations. Applicant provided incomplete evidence showing existing legal demands and did not show that water is physically available in a manner that can be compared with existing legal demands. Applicant did not identify all existing legal demands and did not provide a plan to show water rights of a prior appropriator will be satisfied.
A-16.7576	Amendments to an application which are a subset of the original application and do not prejudice other appropriators are not cause for re-notice. Held a reduction in volume and acres cannot cause prejudice.

Final Order Date:	2/2/2007	**Applicant:**	**Deaterly, Dee**
Action:	Denied		
Case/Application #:	43C-30007297	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	3/12/2004	**Examiner:**	Brasen
Hearing Date:	9/20/2005	**OA Examiner:**	Long
Oral Argument Date:	9/22/2006	**Use:**	Fish & Wildlife

A-4.93	In order for mitigation plan for evaporative losses from pond to work, source of mitigation water must be different than the source for the pond. (i.e. obtaining an exempt right from a source that is essentially the same source that provides water to a pond is not really mitigation.) It was proper for HE to look at the totality of the circumstances to determine adverse effect.
B-5.6934	Applicant did not define the fish and wildlife or fire protection beneficial use to a degree of specificity that would allow definition of a ‘minimum amount reasonably necessary’.

Final Order Date:	03/22/2007	**Applicant:**	**Perkins, Jack & John**
Action:	Denied		
Case/Application #:	76G 30010753	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	05/27/2004	**Examiner:**	Brasen
Hearing Date:	06/14/2006	**OA Examiner:**	N/A
Oral Argument Date:	N/A	**Use:**	Irrigation

A-4.9348.00
B-21.78
A-4.9348.48
A-4.9379
E-22.480

Applicant did not provide reports or studies, other than personal testimony of witnesses, of how much water was consumed at the current place of use and what happened to any water that was not consumed. Applicant provided no evidence of the effects of removing 26 miner's inches from the conveyance ditch on the down-ditch appropriators, on the effects on return flow to other Dempsey Creek or Quinlan Slough appropriators. Personal testimony using phrases such as "small amount of water, won't be impacted that much, and not affected that much" are not evidence which can be compared with other evidence and the Hearing Examiner struggled to give them the slightest weight. Applicant did not prove the proposed change in place of use will not decrease return flows which other appropriators have relied upon. Applicant has the burden to prove the criteria are met.

A-4.9321
A-4.9348.20

Moving the point of diversion upstream of Objectors may result in an earlier call on appropriators which results in an effect that is adverse because the time water is available to them will be reduced.

Final Order Date:	05/31/2007		
Action:	Granted **Reversed and remanded by District Court**	**Applicant:**	**Fidelity Exploration and Production Co.**
Case/Application #:	42B-30011045	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	06/17/2004	**Examiner:**	Vogler
Hearing Date:	03/05/2007	**OA Examiner:**	Brasen
Oral Argument Date:	04/30/2007	**Use:**	Water marketing

S-15.920

Legislature intended that water produced from coal bed methane development be considered *for the purpose of obtaining a beneficial water use permit under 82-11-175 be considered something other than groundwater.*

L-1.790
A-16.750

Applications for large amounts of water from same source half of which will be used in-state and half of which will be used out-of-state are separate applications because burden of proof and criteria are different.

B-5.690

Managed irrigation through water marketing of coal bed methane water is beneficial use.

[Appealed to District Court. Court found that coal bed methane produced water is groundwater.]

Final Order Date:	05/31/2007		
Action:	Denied **Reversed and remanded by District Court**	**Applicant:**	**Fidelity Exploration and Production Co.**
Case/Application #:	42B-30014358	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	03/02/2005	**Examiner:**	Vogler
Hearing Date:	03/05/2007	**OA Examiner:**	Brasen
Oral Argument Date:	04/30/2007	**Use:**	Water marketing

S-15.920	Legislature intended that water produced from coal bed methane development be considered *for the purpose of obtaining a beneficial water use permit under 82-11-175* be considered something other than groundwater.
L-1.790 **A-16.750**	Applications for large amounts of water from same source half of which will be used in-state and half of which will be used out-of-state are separate applications because burden of proof and criteria are different.
B-5.690	Managed irrigation through water marketing of coal bed methane water is beneficial use.
B-21.78	Burden of proof for out-of-state water use is 'clear and convincing.' Applicant did not provide clear and convincing evidence that use out-of-state is not contrary to conservation of water in Montana and not contrary to the public interest.
	[Appealed to District Court. Court found that coal bed methane produced water is groundwater.]

Final Order Date:	07/24/2007		
Action:	Granted With Conditions	**Applicant:**	**Utility Solutions LLC**
Case/Application #:	41H 30019215	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	01/18/2006	**Examiner:**	Brasen
Hearing Date:	12/05/2006	**OA Examiner:**	Name
Oral Argument Date:	N/A	**Use:**	Municipal

A-16.750 **B-5.69** **E-24.480**	A private entity can appropriate water for a municipal purpose, and the application can be processed even if it is for water within a closed basin.
A-4.930 **A-4.9383** **J-21.80** **T-5.80**	Augmentation cannot be used as an exception to a basin closure and allow processing of the application. Objectors argued augmentation is not allowed within closed basins. Department ruled that if an exception allows processing of an application, augmentation can be used to prevent adverse effect to prior appropriators. The permit can be conditioned to require augmentation which must replace the effect in time and amount of water.
A-4.930 **E-22.480**	Post hearing, the District Court decision in Lohmeier et.al v. DNRC, Cause No. ADV-2006-454 required the Department to determine if this Applicant met the requirements of reinstated Mont. Adm. R. 36.12.101(39). The Hearing Examiner took official notice of documents and then used the hearing record to determine this Applicant qualifies for a municipal use.

[Appealed to District Court.]

Final Order Date:	07/24/2007		
Action:	Granted With Conditions	**Applicant:**	**Utility Solutions, LLC**
Case/Application #:	41H 30021139		
Application Type:	Change	**Regional Office:**	Bozeman
Application Date:	03/38/2006	**Examiner:**	Brasen
Hearing Date:	12/06/2006	**OA Examiner:**	NA
Oral Argument Date:	N/A	**Use:**	Augmentation

A-4.930

The purpose of the application is to prevent adverse affect to senior surface water appropriators that would otherwise be adversely affected by Applicants' ground water permits which appropriate ground water tributary to nearby surface water. The augmentation is accomplished by changing the purpose of two existing irrigation water rights to augmentation.

A-4.9348.00
E-24.48

Under Applicant's proposed changes, the water rights of prior appropriators will continue to be satisfied. Objectors argue the exact historic conditions such as return flow must be matched or maintained. Criterion only requires an appropriator not be adversely affected by the proposed change, not that historic practice be maintained or matched.

B-5.690

Augmentation is a beneficial use because Applicant benefits from the change in use from irrigation. The change in use from irrigation to augmentation allows the Applicant to exercise new ground water permits without adversely affecting downstream surface water uses. Augmentation must be shown to meet the needs of the Applicant's permit plan without adversely effecting other appropriators.

E-24.4810

Objectors argued rights being changed are presumed abandoned under Mont. Code Ann. §85-2-404(2). Hearing Examiner found the rights being changed had not been "finally determined" and there was not prima facie presumption of abandonment by the terms of the statute. The Department will consider the issue of abandonment in a change proceeding under adverse effect. Objectors presented no evidence of Applicant intent to abandon the water rights being changed other than legal argument. Without statutory presumption of abandonment, abandonment requires proof by the person claiming abandonment of intent to abandon the water right by the water right holder, and nonuse.

E-24.4831

The amount of water being changed is limited to the consumptive use of the rights to be changed. Historic use of the rights an issue.

[Appealed to District Court.]

Final Order Date:	9/17/2007	**Applicant:**	**Simpson, Dennis D**
Action:	Granted/w conditions		
Case/Application #:	41H-30013196	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	11/29/2004	**Examiner:**	Vogler
Hearing Date:	3/21/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	recreation/fish

B-5.6910 Quantification of water for recreation/aesthetic purposes has been recognized by the Department but such quantification is highly subjective. Amount of water in ponds will optimize their use as fishery resource.

This decision is not recognized as precedent by the Department.

Final Order Date:	9/17/2007	**Applicant:**	**Simpson, Dennis D**
Action:	Granted		
Case/Application #:	41H-30013197	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	11/29/2004	**Examiner:**	Vogler
Hearing Date:	3/21/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	recreation/fishery

B-5.6910 Quantification of water for recreation/aesthetic purposes has been recognized by the Department but such quantification is highly subjective. Amount of water in ponds will optimize their use as fishery resource.

This decision is not recognized as precedent by the Department.

Final Order Date:	11/6/2007	**Applicant:**	**Marl Lake Inc**
Action:	Granted		
Case/Application #:	76D-30025038	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	11/01/2006	**Examiner:**	Brasen
Hearing Date:	6/29/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	domestic; lawn and garden

A-16.7567
A-16.7576 Amendment of application at hearing such that it is a subset of the application as public noticed (i.e. less volume, etc.) does not require republication.

U-14.1259 Objectors' belief that illegal upstream water use is causing shortage is no relevant in permit proceeding. Legal availability based on Department's records on the source of supply. Legal availability and adverse effect not determined upon uses not lawfully permitted.

A-16.750 Objector's concern that Applicant will alter condition of stream (thus affecting upstream water right) not basis for finding adverse effect when application does not contemplate such alteration.

A-4.9321	Diversion by electric pump which can be shut off if call is made found to be adequate plan to prevent adverse effect. Call is not adverse effect *per se*.

Final Order Date:	12/20/2007	**Applicant:**	**Neal, Lloyd & Danielle**
Action:	Granted		
Case/Application #:	41K-30010365	**Regional Office:**	Helena
Application Type:	606		
Application Date:	4/16/2004	**Examiner:**	Larson
Hearing Date:	12/14/2006	**OA Examiner:**	Brasen
Oral Argument Date:		**Use:**	irrigation

E-24.4831	Evidence, including previous water decree(s), Water Rights Surveys, and field observation by Department staff deemed adequate to prove historic flood irrigation. Configuration of land and ditch system adequate to show full service irrigation.
A-4.9379	Reduced return flows from switching from flood to sprinkler irrigation system will be offset by reduced diversion from the source for the sprinkler system.
A-4.9321	By creating a new POD on a separate tributary source, appropriator was required to agree not to call junior users above the new POD. Applicant will be required to release more water from his primary source to flow down to the new POD so as not to create new burden on juniors above the POD on the mainstem.

Final Order Date:	12/28/2007	**Applicant:**	**Evans, Gary D and Ramona M**
Action:	Granted		
Case/Application #:	76H-30012871	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	10/29/2004	**Examiner:**	Brasen
Hearing Date:	04/26/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation

E-24.4810	Interim owner of property and water rights who continued to allow diversion of his water from creek into shared ditch but did not divert the water out of the ditch onto his fields did not intend to abandon the water rights especially since they went through the state wide adjudication and continued to pay ditch assessments. Subsequent owner could start using those rights as they were used prior to interim owner.
A-4.93	Department does not have jurisdiction to determine if water rights have been abandoned. Abandonment is properly before the court system. Adverse effect is a criteria for a change in use before the Department and in this case no adverse effect was determined because water was continuously diverted out of creek into ditch even though not used by the interim owner. Result of the change leaves objectors (and any other users along the creek) in the same position as before the change.

B-5.69	Reduction in the number of irrigated acres still a beneficial use. Portion of water right dedicated to stock use which will not be used by Applicant left unchanged.

Final Order Date:	1/04/2008	**Applicant:**	**North Corporation**
Action:	Denied		
Case/Application #:	76H-30009407	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	1/23/2004	**Examiner:**	Long
Hearing Date:	7/25/2006	**OA Examiner:**	Vogler
Oral Argument Date:	oral argument waived	**Use:**	irrigation/stock

A-4.9348 **M-5.11**	Actual historic use must be included in change application whether for irrigation or stock use. Applicant provided no information regarding historic diverted or consumed volumes nor any information regarding carrying capacity for livestock. Absent historic use information Department has no ability to assess adverse effect.
J-21.80	Claims filed in statewide adjudication are *prima facie* evidence pursuant to Title 85, Chapter 2, Part 2, MCA, but does not constitute *prima facie* evidence in a change proceeding under 85-2-402, MCA. Department will make independent finding on historic use.
J-21.80	Department is without jurisdiction to make determinations regarding ditch rights. Finding regarding evidence of ditch easements will be stricken from PFD.
A-4.9348	When changing from multiple sources (ditches) to another means of diversion, the actual historic contribution from each of the sources must be determined in order to assess adverse effect.
J-21.80	Department may use its own experience, technical competence and specialized knowledge in assessing applications. Department is required to make a determination of statutory requirements and it is the duty of Applicant to show those criteria are met.

Final Order Date:	2/07/2008	**Applicant:**	**IX Ranch Co.**
Action:	Granted		
Case/Application #:	40H-30017203	**Regional Office:**	Havre
Application Type:	Change		
Application Date:	10/31/2005	**Examiner:**	Vogler
Hearing Date:	6/7/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

A-4.93	Acre for acre swap of historically irrigated acreage (retired) to previously unirrigated acreage within boundaries of same ranch, with not intervening users not adverse effect.
A-4.93	Most senior user who historically takes all the water from a creek and will continue to do so under change not adverse effect. **[Appealed to District Court.]**

Final Order Date:	5/30/2008	**Applicant:**	**Pilati, Julius**
Action:	Denied		
Case/Application #:	43D-30001641	**Regional Office:**	Billings
Application Type:	Change		
Application Date:	4/10/2002	**Examiner:**	Vogler
Hearing Date:	8/1/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Statement that 'no more water use than historically' based on Water Court decree is not sufficient.
A.4.93	Applicant must identify other water users potentially adversely affected in order for Department to make determination of no adverse effect.

Final Order Date:	5/30/2008	**Applicant:**	**Pilati, Paul**
Action:	Denied		
Case/Application #:	43D-30005215	**Regional Office:**	Billings
Application Type:	Change		
Application Date:	2/14/2003	**Examiner:**	Vogler
Hearing Date:	8/1/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Statement that 'no more water will be used than has been used historically' based on Water Court decree is not sufficient.
B5.69	Beneficial use measured by the minimum amount necessary for the proposed use. Excess water is waste. Twenty acre feet per acre for irrigation cannot be considered beneficial use without waste.
A4.93	Applicant must identify other water users potentially adversely affected in order for Department to make determination of no adverse effect.

Final Order Date:	7/11/2008	**Applicant:**	**T Lazy T Ranch Inc**
Action:	Denied		
Case/Application #:	41S-30013940	**Regional Office:**	Lewistown
Application Type:	Change		
Application Date:	12/23/2004	**Examiner:**	Schultz
Hearing Date:	8/28/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

A-4.9348.00 B-21.78	Incomplete, conflicting evidence and historical use based on ditch capacity and current crop consumptive use requirements deemed inadequate to prove historic use when not supported by factual information. Failure to show that all acres planned to be retired were historically irrigated deemed inadequate.

A-4.93	Failure to identify historic diverted flow and consumptive use for water rights proposed to be changed results in failure to show that acreage will not be expanded. Thus, Department cannot find lack of adverse effect.
B-5.6979	Exceeding Department irrigation standard without a plan or assurance that water proposed to be diverted is necessary to accomplish the proposed use without waste deemed failure to prove beneficial use.

Final Order Date:	7/25/2008	**Applicant:**	**Utility Solutions LLC**
Action:	Granted/w conditions		
Case/Application #:	41H-30026244	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	1/26/2007	**Examiner:**	Vogler
Hearing Date:	12/10/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	municipal

U-14.1259	Application for appropriation from groundwater must show legal availability from both a groundwater perspective and legal availability due to depletion of surface water. Legal availability due to surface water depletion can be met by adequate augmentation plan.
A-4.93	Given the saturated thickness of the aquifer and the predicted drawdown in neighboring wells of less than 0.6 feet, prior groundwater users will reasonably be able to continue their use. No adverse effect.
A-4.93	Augmentation plan retiring historic irrigation and placing water in infiltration gallery can offset a stream depletion in amount, location, and timing.
B-5.69	Municipal use means water appropriated by and provided for those in and around a municipality or an unincorporated town. Pending application meets the definition of municipal use.
A-16.75	Augmentation is not foreign to the laws of Montana. Basin closure is for *new* water rights. Augmentation plans are generally *changes* in appropriation and are not prohibited by a basin closure. Augmentation is a tool that can be used to provide legally available water and prevent adverse effect. **[Appealed to District Court.]**

Final Order Date:	7/25/2008	**Applicant:**	**Utility Solutions LLC**
Action:	Granted/w conditions		
Case/Application #:	41H-30026245	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	1/26/2007	**Examiner:**	Vogler
Hearing Date:	12/10/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	augmentation

U-14.12 **A-4.93**	New incremental change in historic water right must be evaluated by looking at all prior changes. I.e. an irrigation right that has been partially changed for augmentation then has another augmentation change to augmentation must be evaluated by including all previous changes.
A-4.93	Use of infiltration gallery for augmentation is acceptable method of offsetting stream depletions on year around basis.
B-5.69	Augmentation is beneficial use of water. Use of water to offset potential stream depletions from new beneficial use permit is beneficial to the applicant.
T-5.80	Change authorization must be conditioned so as to reflect actual historic use. Use was generally out of priority by July so period of use for change is limited to start of irrigation season to that date. **[Appealed to District Court.]**

Final Order Date:	8/5/2008	**Applicant:**	**Cowett, Constance K**
Action:	Denied		
Case/Application #:	41H-30004451	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	11/20/2002	**Examiner:**	Vogler
Hearing Date:	7/26/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	domestic/stock

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Showing of actual historic use is necessary to evaluate no adverse effect criteria.
A-4.93	Applicant must identify other water users (not just objectors) potentially adversely affected in order for Department to make determination of no adverse effect.
A-4.93	Evaluation of changing return flows by changing place of use necessary to evaluate no adverse effect. **[Appealed to District Court.]**

Final Order Date:	8/05/2008	**Applicant:**	**Kelly, Charles & Amelia**
Action:	Denied		
Case/Application #:	41H-2356200	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	5/18/2001	**Examiner:**	Vogler
Hearing Date:	7/26/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	stock

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Showing of actual historic use is necessary to evaluate no adverse effect criteria.
A-4.93	Applicant must identify other water users (not just objectors) potentially adversely affected in order for Department to make determination of no adverse effect.
A-4.93	Evaluation of changing return flows by changing place of use necessary to evaluate no adverse effect.

Final Order Date:	8/05/2008	**Applicant:**	**Rall, David & Cora**
Action:	Denied		
Case/Application #:	41H-3001877	**Regional Office:**	Bozeman
Application Type:	Change		
Application Date:	5/3/2005	**Examiner:**	Vogler
Hearing Date:	7/26/2007	**OA Examiner:**	
Oral Argument Date:		**Use:**	fish/wildlife/rec

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Showing of actual historic use is necessary to evaluate no adverse effect criteria.
A-4.93	Applicant must identify other water users (not just objectors) potentially adversely affected in order for Department to make determination of no adverse effect.
A-4.93	Evaluation of changing return flows by changing place of use necessary to evaluate no adverse effect. **[Appealed to District Court.]**

Final Order Date:	8/07/2008	**Applicant:**	**Granite County**
Action:	Denied		
Case/Application #:	76G-30012925	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	11/05/2004	**Examiner:**	Brasen
Hearing Date:	07/10/2007	**OA Examiner:**	Vogler
Oral Argument Date:	exceptions filed/no OA	**Use:**	fish/wildlife; recreation

L-1.790 **B-21.780**	Evaporation from reservoir is 40 Acre-feet per day or 20 cfs resulting in a consumption of 7,320 acre-feet in 183 days. Thus, the standard of proof is “clear and convincing” under 85-2-402(5), MCA.
B-5.6979	Applicant must show that the amount of water applied for is necessary for fish/wildlife/recreation uses. Applicant did not show that the historic volume and release for power generation was also the amount needed for fish/wildlife/recreation purposes.
R-5.930	Department is not required to consider exceptions to findings that do not adversely affect a party.

Final Order Date:	8/08/2008	**Applicant:**	**Hadley, James**
Action:	Denied		
Case/Application #:	41K-30022398	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	5/26/2006	**Examiner:**	Langel
Hearing Date:	7/25/2007	**OA Examiner:**	Vogler
Oral Argument Date:	4/17/2008	**Use:**	irrigation/livestock

U-14.1274	Applicant must prove that water is physically available on year-round basis for application requesting a period of use from January 1 through December 31. Summer flow data only is not sufficient.
R-5.930	Upon review of PFD finding of fact that is vague will be stricken.
U-14.1259	Legal availability must be determined using legal demands on all sources of supply.
A-4.93	Without adequate legal availability analysis, adverse effect not possible to determine.

Final Order Date:	8/11/2008	**Applicant:**	**Maxwell, Scot**
Action:	Granted		
Case/Application #:	41S-30025168	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	11/14/2006	**Examiner:**	Irvin
Hearing Date:	8/06/2008 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	stock; lawn and garden

B-21.78 E-22.48 L-1.940	Hearing Examiner took official notice of method of estimating runoff different from what Applicant provided and made determination based on that methodology (along with other evidence offered) to find water physically available.
U-14.1259.00	When source for proposed appropriation flowed into Ditch Company canal, and Ditch Company had no rights for that source, Ditch Company has no legal right to its continuance.
U-14.1259.00 A-4.93	When water from source flowed into canal which then discharged its excess into natural stream to which DFWP has Murphy rights, and stream flow records on stream show those rights will be met, then water legally available and no adverse effect.
A-4.93 A-4.9321	When proposed appropriation is for instream reservoir on ephemeral stream which discharges into canal, then proposed plan to prevent adverse affect which consists of simply a pump to pump out the reservoir if call is made deemed adequate.
M-5.11	Testimony that reservoir was full on particular date and plan to use pump to bypass flows in rare event that call is made deemed adequate to prove adequacy of means of diversion.

Final Order Date:	8/25/2008	**Applicant:**	**Negaard, Daniel & Rachel**
Action:	Denied		
Case/Application #:	40B-30026071	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	1/16/2007	**Examiner:**	Irvin
Hearing Date:	8/20/2008 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation; lawn and garden; stock

U-14.1274	Applicant’s testimony of personal observations of stream flows and inconsistent water supply at point of diversion deemed too general to prove physical availability.
A-4.9321	Having to constantly place calls on proposed appropriation deemed unreasonable burden on senior appropriators.
U-14.1259.00	Limited review of existing water rights deemed inadequate to prove legal availability.
U-14.1274	No knowledge of how often “flood” or high water flows during period of proposed appropriation is not adequate to prove physical availability when appropriator proposes to divert only during flood or high water events.

Final Order Date:	9/12/2008	**Applicant:**	**Bailey, David Jr. & Anna M.**
Action:	Denied		
Case/Application #:	76LJ-30024588	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	10/03/2006	**Examiner:**	Eccles
Hearing Date:	9/03/2008 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	domestic

E-24.4831	Department cannot change or limit a water right; that is the sole province of the Water Court. Filed claims are presumed to be prima facie evidence of their existence. No matter how water rights are adjudicated, the Applicant must still prove the criteria of MCA 85-2-311 and show what the actual use is compared to what is adjudicated and that there is legally enough water for Applicant's use. Applicant did provide adequate evidence.
L-1.490	Consultant is an employee of the Applicant and Department need not send notice to consultant when notice was sent to Applicant. Burden is on Applicant to ensure their consultant is notified.
L-1.940	Department has power to overrule prior Department decision, given adequate explanation. Department does not have jurisdiction to "overrule" water rights claims properly before the Water Court. Only Water Court has jurisdiction to adjudicate water rights. **Cf: Application for Beneficial Water Use Permit 82374-s76L by Frank J. and Patricia Distefano**

Final Order Date:	10/09/2008	**Applicant:**	**Cook-Lehrkind Investments**
Action:	Granted		
Case/Application #:	41H-30001469	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	3/27/2002	**Examiner:**	Martin
Hearing Date:	7/16/2008 (Vacated)	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn and garden

L-1.490	Applications pending and submitted post Montana TU v. DNRC must include a finding that there will be no induced infiltration of groundwater and no prestream capture of tributary groundwater
A-4.9395	Application was amended to a purpose of 'multiple domestic use' presumably to qualify for exemption under the Upper Missouri River Closure. Department has recognized multiple domestic use as a beneficial use. If only individual domestic use wells were allowed, in cases of subdivision, this would lead to a proliferation of individual wells which is contrary to engineering efficiency, administrative economy and the long held Department practice of including subdivisions within the meaning of domestic use.
A-4.9395 b-5.69	"[t]he character of the *use* rather than the character of the *applicant* has been the defining factor in determining whether an application could be considered as one within the municipal use category" Logmeir v DNRC. This application for multiple domestic uses was properly processed by the Department.
T-5.80	Permit issued based on condition that no water be diverted until approval of specific change authorization for the purpose of mitigating adverse effect.

Final Order Date:	10/09/2008	**Applicant:**	**Billmayer, James J.**
Action:	Granted		
Case/Application #:	76LJ-30026983	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	3/06/2007	**Examiner:**	Eccles
Hearing Date:	9/30/2008 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn and garden

U-14.1274	Aquifer properties cannot properly be evaluated when both production wells are operating simultaneously (SOP). Applicant must provide sufficient aquifer test data for the Department to evaluate (SOP). Applicant must show that discharge was properly controlled during aquifer test pumping (SOP). All problems were resolved at show cause hearing (FO).
U-14.1259.00	Inadequate aquifer testing precludes Department from conducting proper legal availability analysis (SOP). Applicant must show legal availability from groundwater and surface water supplies (SOP). Applicant must use Department's records of existing water users, both surface and ground, to conduct legal availability analysis (SOP). All problems were resolved at show cause hearing (FO).
A-4.93	Without a showing of legal availability, evidence is not adequate to make showing of no adverse effect (SOP). Applicant must provide a plan for exercise of the permit that demonstrates that use of water will be controlled so that water rights of prior appropriators will be satisfied (SOP). Reasonable to expect that surface water depletion from net consumption will begin to develop within years and will require several decades has an effect on surface water users and that any depletion will not have an adverse effect of ability of surface water users to reasonably exercise their water rights (FO).

Final Order Date:	10/17/2008	**Applicant:**	**Schwend, Chester & Celeste**
Action:	Denied		
Case/Application #:	43D-30002264	**Regional Office:**	Billings
Application Type:	Change		
Application Date:	6/05/2002	**Examiner:**	Vogler
Hearing Date:	1/31/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

A-4.9373 **A-4.9383**	Applicant must provide evidence on actual historic use of water right. Department will evaluate historic beneficial use regardless of Water Court decree. Statement that 'we will not be using any more water than was used before' is not sufficient.
A-4.93	Applicant must identify other water users potentially adversely affected in order for Department to make determination of no adverse effect.
A-4.93	Applicant must show that significant change in timing and location of historic return flows will not be adverse effect.

B-5.69	When adding new water right to lands already irrigated by other water rights, applicant must show that all of the proposed rights together are needed to irrigate those lands. I.e. applicant must show historic use of the water rights previously used on those lands. **[Appealed to District Court.]**

Final Order Date:	10/24/2008	**Applicant:**	**Boyne USA**
Action:	Granted		
Case/Application #:	41H-30026441	**Regional Office:**	Bozeman
Application Type:	Permit		
Application Date:	2/13/2007	**Examiner:**	Martin
Hearing Date:	10/15/2008 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	commercial; fishery

L-1.940	Department may condition a permit so as to meet the statutory requirements
A-4.93	Condition for instream reservoir which captures high spring flow, under which applicant can pump water for commercial use during winter months as long as outflow exceeds inflow during duration of pumping deemed adequate for lack of adverse effect on downstream instream flow right. I.e. if natural flow during winter months is maintained then applicant is only using high spring flow captured water. Cf. Final Order, Bailey 76L-30024588.

Final Order Date:	11/14/2008	**Applicant:**	**Gehring, William G & Tracy L**
Action:	Granted		
Case/Application #:	41I-30024756	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	10/13/2006	**Examiner:**	Eggart
Hearing Date:	01/15/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

T-5.80	Department cannot arbitrarily change the period of use for a claim under a change in appropriation without Applicant specifically asking for such a change and without any evidence in the record to support a change in the period of use. (FO)

Final Order Date:	2/17/2009	**Applicant:**	**Skergan, Patricia and Helmer, Jim**
Action:	Denied		
Case/Application #:	76H-30028713	**Regional Office:**	Missoula
Application Type:	Permit		
Application Date:	7/23/2007	**Examiner:**	Vogler
Hearing Date:	6/12/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	domestic

J-21.80	Compliance with zoning type regulations or orders and granting of variance for aquifer testing procedure are outside the scope of hearings on the merits of an application.

U-14.1259	Legal availability is based on the source of the appropriation, not the appropriation works.
A-4.93 **U-14.1259**	Montana Water Use Act requires applicant to make explicit showing that there are unappropriated waters and no adverse effect. Doubts will not be resolved in favor of new appropriations.
A-4.93	Department does not recognize de minimis effects. Statute does not allow 'some' adverse effect.

Final Order Date:	3/23/2009	**Applicant:**	**Buffalo Mountain LLC**
Action:	Granted		
Case/Application #:	76LJ-30025385	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	12/01/2006	**Examiner:**	Pitman
Hearing Date:	3/12/2009 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn and garden

U-14.1274	Application for multiple domestic use (year-round) must show that water is physically available for a 365 day period us use. Evidence that water must remain above the pump after 365 days of pumping required.
U-14.1259.00	Zone of influence for legal availability must be calculated based on the entire period of use (365 days in this case).
U-14.1259.00 E-24.4879	Large hyropower right over 100 miles downstream of proposed appropriation will still be able to reasonably exercise their right despite very minor depletion of surface water upstream.

Final Order Date:	7/21/2009	**Applicant:**	**Eastgate Village Water & Sewer Association**
Action:	Granted		
Case/Application #:	41I-30026328	**Regional Office:**	Helena
Application Type:	Permit		
Application Date:	2/01/2007	**Examiner:**	Eccles
Hearing Date:	7/09/2009 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn and garden

A-16.750	Modification of Application to reflect a reduction in total volume requested does not affect prior determination in SOP the criteria of physical availability, legal availability of *ground water*, adequacy of diversion or possessory interest. In addition prior determination on beneficial use not affected when Applicant shows that amount requested is still needed for beneficial use and will meet DEQ requirements.
U-14.1259.00 A-4.9383	Applicant's plan to leave irrigation water rights instream as mitigation deemed adequate to show that pumping of well for multiple domestic purposes will be legally available and not cause adverse impact to surface water users.

T-5.80	Grant of application conditioned such that applicant must obtain authorization for mitigation water in amount of calculated net depletion of surface water.

Final Order Date:	8/12/2009	**Applicant:**	**Wesmont Developers Inc.**
Action:	Denied		
Case/Application #:	76H-30026290	**Regional Office:**	Missoula
Application Type:	Permit		
Application Date:	1/30/2007	**Examiner:**	Vogler
Hearing Date:	10/23/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic

L-1.940	Despite application being pre HB 831, in closed basin a depletion to surface water due to groundwater pumping must be offset through augmentation. (*Trout Unlimited).* Without augmentation, showing of no adverse effect can be made.
U-14.1259	Department recognizes the connectivity between groundwater and surface water. Where proposed groundwater appropriation depletes surface water, applicant must prove legal availability of surface water throughout period of diversion either through a mitigation/aquifer recharge plan or by analysis of the legal demands on and availability of water in the surface water source. In admittedly over appropriated basin only mitigation/aquifer recharge plan is available.
U-14.1259	Where there is a connection between ground water and surface water, legal availability of both must be determined.
U-14.1259 **A-4.93**	Department does not recognize de minimis exception for legal availability or adverse effect.
T-5.80	Department will generally not grant a permit on the condition that at some future time the applicant will develop a mitigation plan. It is the applicant burden to come forward with proof at the time the application is made. **[Appealed to District Court.]**

Final Order Date:	09/22/2009	**Applicant:**	**Town of Pinesdale**
Action:	Denied		
Case/Application #:	76H-30005041	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	08/11/1998	**Examiner:**	Eggart
Hearing Date:	03/13/2008	**OA Examiner:**	Yates
Oral Argument Date:		**Use:**	municipal

A-4.93 E-24.4831	Applicant for change must prove historic use of water rights to be changed, including historic diversion and consumptive use. Claim that water rights were used for ‘full service irrigation’ not supported by the record in this case thus use of Montana Irrigation Guide optimal conditions is not proper.
L-1.490	Exceptions to PD which are not specifically referenced to the record or authority given no weight.

L-1.490	No error when application was put on hold due to pending Water Court case involving same water rights.
E-24.48	When changing from irrigation to a 100% consumptive use, applicant cannot use the historic diverted volume at the new place of use – only the historic consumptive use.
B-5.69	To prove beneficial use applicant must show the character of the use is beneficial (i.e. municipal) and the amount of water is necessary to accomplish the beneficial use.
E-24.4831	After a pre-1973 water right has undergone a DNRC change process, a subsequent change application will be based on the water use after the previous change, not the original statement of claim or pre-1973 historic use.

Final Order Date:	10/08/2009	**Applicant:**	**Montana Water Trust**
Action:	Granted		
Case/Application #:	76H-30029998	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	11/06/2007	**Examiner:**	Schultz
Hearing Date:	09/29/2009	**OA Examiner:**	
Oral Argument Date:		**Use:**	instream for fisheries

E-24.4831	Applicant's estimate that water was used for 155 days out of 186 day period of use based on guess that water was not used for 'a period of time at the beginning' and end of season and a few days off for cutting, without any evidence, deemed insufficient to prove the historic rate and volume of water diverted. (SOP)
E-24.4831	When supplemental rights are involved applicant must show the proportionate use of each right in order to establish historic consumptive use. (SOP)
A-4.93	Assuming full service irrigation despite acknowledging that water may not be available for entire period of use, combined with not accounting for supplemental rights on same POD deemed inadequate to prove no adverse effect. (SOP)
R-5.93	Upon show cause hearing applicant provided adequate information (primarily water commissioner records) to establish historic use of water right and determine water is legally available and no adverse effect. (Show Cause)

Final Order Date:	10/16/2009	**Applicant:**	**Vermillion Ranch LTD**
Action:	Denied		
Case/Application #:	43BV-30011611	**Regional Office:**	Billings
Application Type:	Change		
Application Date:	8/02/2004	**Examiner:**	Eggart
Hearing Date:	4/28/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

E-24.4831	Record does not support use of NRCS estimates and formulae based on optimal irrigation conditions. Record is clear that optimal conditions did not exist in this matter.

E-24.4831	Applicant must provide actual quantitative evidence of diverted flow and consumptive use in order to support historical use requirements.
E-24.4831	In order to use NRCS Irrigation Guide, applicants historic operation must mirror the assumptions in the Guide.
A-4.93	Applicant failed to prove the extent of the historic rights to be changed and that the proposed change in combination with the continued irrigation (through supplemental rights) of 'retired' acreage will not expand the water rights claimed.

Final Order Date:	12/14/2009	**Applicant:**	**Sitz Ranch Management Partnership**
Action:	Denied		
Case/Application #:	41B-30028374 41B-30028375	**Regional Office:**	Helena
Application Type:	Permit		
Application Date:	6/19/2007	**Examiner:**	Vogler
Hearing Date:	5/27/2009	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

L-1.940	Applications for new beneficial uses in closed basin after passage of HB 831 require hydrogeologic assessment.
U-14.1259	Department will not assume, without evidence, that all prior appropriators are exercising their full rights and streamflows measured below proposed appropriation that exceed FWP instream flows prove water is legally available.
U-14.1259	Department recognizes the connectivity between groundwater and surface water. Where proposed groundwater appropriation depletes surface water, applicant must prove legal availability of surface water throughout period of diversion either through a mitigation/aquifer recharge plane or by analysis of the legal demands on and availability of water in the surface water source.
U-14.1259	Where there is a connection between ground water and surface water, legal availability of both must be determined.
U-14.1259 **A-4.93**	Department does not recognize de minimis exception for legal availability or adverse effect.
S-21.76	Where supplemental rights are use to irrigate an area, applicant must prove that all of the rights in combination are necessary to sustain the beneficial use. **[Appealed to District Court.]**

Final Order Date:	3/05/2010		
Action:	Denied / Remanded from District Court: Granted	**Applicant:**	**Talan Inc.**
Case/Application #:	76F-30028985	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	11/30/2007	**Examiner:**	Brasen
Hearing Date:	5/28/2009	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation; instream fishery

E-24.4831	When one user on a shared ditch or canal wishes to change their water right, that users proportion must be identified in order to prevent adverse effect and/or expansion of demand on the source.

Permit issued on remand by district court based upon settlement stipulation. DO NOT USE FOR PRECEDENT.

[Appealed to District Court.]

Final Order Date:	4/29/2010	**Applicant:**	**Rowland, David T & Judy**
Action:	Denied		
Case/Application #:	41I-30025564	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	12/11/2006	**Examiner:**	Vogler
Hearing Date:	12/10/2008	**OA Examiner:**	
Oral Argument Date:		**Use:**	fish and wildlife

U-14.1259.00 A-4.93	In application for change, when water rights are comingled in same ditch and application is for only one of those rights, applicant must prove historic use of that one right as opposed to historic use of the ditch as a whole.
B-5.6934	For change from stock to fishery, applicant must prove the historic use for stock right is sufficient to support the fishery use.

Final Order Date:	05/11/2010	**Applicant:**	**Maus, Richard H.**
Action:	Denied		
Case/Application #:	41H-30029944 (Permit); 41H-30029946 (Change)	**Regional Office:**	Bozeman
Application Type:	Permit / Change		
Application Date:	11/01/2007	**Examiner:**	Strasheim
Hearing Date:	04/06/2009	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn & garden (600); mitigation water; irrigation (606)

A-4.93	Applicant must provide a mitigation plan that will offset depletions for the entire period those depletions occur. Retirement of summer irrigated acres (from an irrigation well) does note mitigate winter time depletions caused by new proposed year round use.

L-1.940	HE found that applicant's plan is an aquifer recharge plan which requires DEQ permit. Department cannot grant new appropriation right until DEQ permit is presented to Department (85-2-364). **Note: this is probably not an aquifer recharge plan – plan was to not pump groundwater and retire irrigated acres.**
U-14.1259.00 A_4.93	Applicant must identify and analyze all rights, both surface and ground water, in the radius of influence in order to properly determine legal availability and adverse effect. Applicant did not identify or quantify surface water rights.

Final Order Date:	5/19/2010	**Applicant:**	**Lannen, Jamie**
Action:	Denied		
Case/Application #:	43A-30004087 (Permit); 43A-30004089 (Change)	**Regional Office:**	Bozeman
Application Type:	Permit; Change		
Application Date:	10/17/2002	**Examiner:**	Eccles
Hearing Date:	10/29/2009 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	fishery; stock

U-14.1274 (P)	Application for year-round use must show that water flows in source in amount needed for each month of the year. At show cause hearing Applicant provided measurement data that showed year-round flow in source. Physical availability met at show cause hearing.
U-14.1259.00 (P)	Applicant did not include all downstream prior existing rights in his analysis of legal availability – only two of at least six. Legal availability not met.
A-4.93 (P)	Applicant must provide a plan that proves Applicant's use of water will be controlled so the water right of a prior appropriator will be satisfied. Applicant has not provided a plan to control or release water from reservoirs to meet downstream senior demands. Applicant proposal to divert water from nearby irrigation ditch into drainage were reservoirs are located not adequate because a change is needed to use irrigation water for a different purpose. Adverse effect criteria not met.
M-5.11 (P)	Reservoirs have not regulated outlet works to release water. Applicants assertion that he is willing to provide such outlet works not adequate to prove means of diversion is adequate. Applicant must determine what means of diversion, construction and operation will achieve the results Applicant is attempting to achieve. Means of diversion not met.

B-5.6934 (P)	Applicant did not provide sufficient evidence that the proposed rate an volume of water requested for the fishery is the amount necessary to sustain the intended purpose. Applicant did not provide information to explain how many fish require this amount of water. Applicant has observed water fowl utilizing and nesting on the ponds. Applicant submitted no evidence that Applicant has any control over any wildlife that may use the pond or that the pond is intended to serve any defined population of wildlife. For fish and wildlife beneficial uses Applicant must provide information that the amount of water is necessary for a defined population of fish and that the Applicant has control over the fish and wildlife use of the water. Beneficial use for fish and wildlife not met.
B-5.69 (P)	Applicant provided evidence that stock use of the water is a beneficial use but provided no evidence on the amount of water required for his stock use. Beneficial use for stock not met.
E-24.4831 (C)	For water rights exempt from filing in adjudication, the burden of proof of the existence and extent of the historical exempt water right remains with the owner. In instant case conflicting evidence of the historical stocking rate of the place of use and recent determination that place of use could support significantly less AU's was left decision maker with the conviction that historic use had not been met.
A-4.93 (C)	When reduced stocking rate and evaporation from ponds is considered, the proposed consumptive use exceeds historic consumptive use. Applicant bears the burden to prove that proposed change will not adversely affect the use of existing water rights. Applicant has shown that his proposal will exceed historic consumptive use and has not provided a plan to mitigate potential adverse effect.

Final Order Date:	6/07/2010	**Applicant:**	**Kuney, William D and Hendrickson, Betty J**
Action:	Granted w/conditions		
Case/Application #:	76H-30042357	**Regional Office:**	Missoula
Application Type:	Change		
Application Date:	6/06/2008	**Examiner:**	Vogler
Hearing Date:	10/15/2009	**OA Examiner:**	
Oral Argument Date:		**Use:**	temp. instream flow

E-24.4810	In Application to Change a Water Right contested case proceeding, hearing examiner has no authority to consider whether water right has been abandoned.
O-23.6994	Deed conveying property did not contain a reservation of the water rights to the grantor despite evidence that both parties agreed that grantor would retain water rights. Parties filed amended deed reflecting the parties intention. Held, grantors retained water right and were the owners thereof for this change proceeding.
L-1.940 **I-14.87**	Application for temporary change to instream flow requires applicant to meet criteria in both 85-2-402 and 85-2-408.
I-14.87	For purposes of protecting instream flow below the historic point of diversion, only the portion of water consumed historically by the crop is protected. Ditch loss and wastewater (the amount diverted), however, only protected down to the historic point of diversion.

O-23.69	When joint users of ditch have separate water rights based on a historic decree, but have entered into agreement that each can transfer their interests apart from the other, one user is not entitled to other users water as ‘carriage water’.

Final Order Date:	9/29/2010	**Applicant:**	**American Fork Ranch**
Action:	Granted(2) Denied (1)		
Case/Application #:	40A-30042035 40A-30042036 40A-30042037	**Regional Office:**	Lewistown
Application Type:	Change		
Application Date:	5/14/2008	**Examiner:**	Vogler
Hearing Date:	6/10/2010	**OA Examiner:**	
Oral Argument Date:		**Use:**	stock

L-1.940 **E-24.48**	Non-filed water projects are recognized rights under Montana Law. Non-file rights can be changed pursuant to 85-2-402.
E-24.4831	Consumptive use from stock drinking directly from the stream can be estimated by number of animals in the pasture times the number of days times the standard 0.17 AF/year.
E-24.4831	Stock drinking from ditch is not an instream stock use. Department does not recognize an exempt instream stock right for stock drinking from ditch.

Final Order Date:	10/18/2010	**Applicant:**	**Skergan, Patricia and Helmer, Jim**
Action:	Granted		
Case/Application #:	76H-30046211 (Permit) 76H-30046210 (Change)	**Regional Office:**	Missoula
Application Type:	Permit/Change(combined app)		
Application Date:	6/18/2009	**Examiner:**	Vogler
Hearing Date:	7/14/2010 (C)	**OA Examiner:**	
Oral Argument Date:		**Use:**	domestic

L-1.940	Combined application must be reviewed as a single unit. Both the permit and the change must be approved. If either is not approved then both fail.
A-4.93 **U-14.1259**	Retirement of historic well located upstream of depletion caused by new groundwater appropriation deemed adequate to show legal availability and no adverse effect.
L-1.940 **E-24.48**	Non-filed water projects are recognized rights under Montana law. Non-filed rights can be changed pursuant to 85-2-402.
E-24.4810	Hearing examiner in contested case has no jurisdiction to consider whether a water right has been abandoned.

Final Order Date:	1/24/2011	**Applicant:**	**City of Cut Bank**
Action:	Granted		
Case/Application #:	41L-30025802	**Regional Office:**	Havre
Application Type:	Change(water reservation		
Application Date:	12/27/2006	**Examiner:**	Vogler
Hearing Date:	8/18/2010	**OA Examiner:**	
Oral Argument Date:		**Use:**	municipal/industrial

J-21.80	Department has jurisdiction to consider a change in place of use for a water reservation. Outdated administrative rule that stated that Board of Natural Resources and Conservation must grant change was mooted in 1995 by legislative action that dissolved Board of Natural Resources and Conservation and provided that Department would succeed to those duties
J-21.80	Blackfeet Tribe Compact, which has been ratifies by Montana Legislature and is awaiting congressional approval treated as a quantification of tribal water rights. *Ciotti* and *clinch* cases from Flathead Reservation not applicable. Department has jurisdiction to consider change.
R-5.85	Water reservation is for a future use of water thus historic use not determinable.
A-4.93	When change in place of storage is proposed and no change in rate/volume/point of diversion/ or place of use is contemplated for a water reservation, no adverse effect. **[Appealed to District Court.]**

Final Order Date:	2/09/2011	**Applicant:**	**GBCI Other Real Estate, LLC**
Action:	Granted		
Case/Application #:	76D-30045578	**Regional Office:**	Kalispell
Application Type:	Permit		
Application Date:	4/01/2009	**Examiner:**	Vogler
Hearing Date:	Vacated 8/19/2010	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic commercial

U-14.1259	In an open basin applicant for new water right can show legal availability by using a mitigation/aquifer recharge plan or by a showing that any depletion to surface water by groundwater pumping will not take water already appropriated. In this case, development next to Lake Koocanusa will not take previously appropriated water.

Final Order Date:	4/22/2011	**Applicant:**	**Town of Stevensville**
Action: Show Cause	Granted		
Case/Application #:	76H-30043133 (P) 76H-30043132 (C)	**Regional Office:**	Missoula
Application Type:	Permit/Change(combined app)		
Application Date:	9/03/2008	**Examiner:**	Vogler
Hearing Date:	11/29/2010 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	municipal

A-4.930 **B-5.690**	Statement of Opinion recommended denial of Beneficial Water Use Application due to depletion of surface water from groundwater pumping. Basis of denial was that mitigation plan that retired irrigated acreage and simply left the water instream would not mitigate for year-round depletions. As a result the corresponding change application recommended denial because just leaving water instream is not beneficial use.
L-1.940	In show cause hearing, examiner will not disturb findings made by regional office of criteria that were deemed to be met. Issue at show cause hearings are only those criteria deemed not met.
A-4.93	Use of gravel pit as infiltration gallery for historically diverted irrigation water deemed adequate to offset year-round depletions to surface water source due to groundwater pumping. No adverse effect.
B-5.69	Use of historic irrigation water as mitigation water is beneficial use.

Final Order Date:	7/25/2011	**Applicant:**	**Konen, Nicholas**
Action:	Granted w/ condition		
Case/Application #:	41K-30045713	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	4/20/2009	**Examiner:**	Vogler
Hearing Date:	1/05/2011 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

T-5.80 **U-14.1259**	Show cause hearing challenging conditions which limit the season of irrigation to ensure legal availability to downstream user. Held, despite major downstream user acquiescence in new use, Department must ensure legal availability for all downstream users. If major user agrees not to call this specific use, they may instead call some other junior user thus shifting the burden to another. Senior user cannot subrogate their right to a specific user and shift the burden to another.
T-5.80	Department can condition new use by limiting period of use to high water season in order to meet legal availability.
L-1.940	Muddy Creek exception to Upper Missouri River Basin Closure does not relieve Department of analyzing legal availability.

Final Order Date:	7/25/2011	**Applicant:**	**Lee, Marc E.**
Action:	Granted w/ conditions		
Case/Application #:	41K-30043385	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	9/15/2008	**Examiner:**	Vogler
Hearing Date:	1/05/2011 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

T-5.80 **U-14.1259**	Show cause hearing challenging conditions which limit the season of irrigation to ensure legal availability to downstream user. Held, despite major downstream user acquiescence in new use, Department must ensure legal availability for all downstream users. If major user agrees not to call this specific use, they may instead call some other junior user thus shifting the burden to another. Senior user cannot subrogate their right to a specific user and shift the burden to another.
T-5.80	Department can condition new use by limiting period of use to high water season in order to meet legal availability.
L-1.940	Muddy Creek exception to Upper Missouri River Basin Closure does not relieve Department of analyzing legal availability.

Final Order Date:	8/08/2011	**Applicant:**	**French, Daniel**
Action:	Denied		
Case/Application #:	41S-30004625	**Regional Office:**	Lewistown
Application Type:	Permit		
Application Date:	12/03/2002	**Examiner:**	Vogler
Hearing Date:	6/07/2011 (show cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

P-5.8031	Applicant must use due diligence in perfecting an appropriation. Legislature intended to prohibit prospective appropriators from essentially escrowing water for future beneficial uses.
A-4.93 **M-5.11** **U-14.1259**	Applicant has not proven legal availability, no adverse effect or adequate means of diversion in a timely manner. Due diligence is required **[Appealed to District Court.]**

Final Order Date:	12/02/2011	**Applicant:**	**Wells, Daniel**
Action:	DENIED		
Case/Application #:	43Q-30029329	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	9/05/2007	**Examiner:**	Vogler
Hearing Date:	10/13/2011	**OA Examiner:**	
Oral Argument Date:		**Use:**	multiple domestic; lawn & garden

S-21.6625	Applicant did not appear personally at hearing nor did he have legal representation at hearing. Applicant's experts did show at hearing and were allowed to present their findings, however, Applicant was found in default.
A-4.9383	Appropriator of groundwater must show either that their withdrawal of water will not cause induced infiltration of surface water or prestream capture of groundwater, or if such a showing cannot be proven the appropriator must show that surface water is legally available and there will be no adverse impact to prior appropriators either because surface water is available or through some mitigation plan. In the instant matter, appropriator showed depletion to surface water and had no plan to mitigate. Permit denied.
A-4.93	Montana law does not recognize a *de minimis* level of adverse effect.

Final Order Date:	08/17/2012	**Applicant:**	**Teton Prairie LLC**
Action:	Granted		
Case/Application #:	41O-30049563	**Regional Office:**	Havre
Application Type:	Permit		
Application Date:	10/01/2010	**Examiner:**	Vogler
Hearing Date:	05/30/2012	**OA Examiner:**	
Oral Argument Date:		**Use:**	irrigation

S-15.920 U-14.120	For this application 'high spring flow' defined as flows during March – June that are commonly in excess of the average annual flow.
U-14.1274	Both flow and volume during the period of diversion is higher than the average annual flow. In addition Applicant has further conditioned the permit through private agreement to limit diversions to below agreed trigger flows.
U-14.1259.00	Applicant need not show that water is legally available at all times during the period of diversion but rather that water is legally available often enough to be of benefit to the applicant.
T-5.80	Department can condition permit to ensure that adverse effect will not occur. Hearing examiner can modify conditions originally place on permit after approval by regional office.
T-5.80	Terms of private settlement agreement not included in Department's approval not to be enforced by Department but are contractual in nature to be resolved in court.

Final Order Date:	10/19/2012	**Applicant:**	**Peila Land Company**
Action:	Granted w/conditions		
Case/Application #:	43Q-30048536	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	05/07/2010	**Examiner:**	Vogler
Hearing Date:	07/24/2012	**OA Examiner:**	
Oral Argument Date:		**Use:**	commercial; water fill station

J-21.80	Department is without jurisdiction to hear objections not related to the criteria for a permit or change.
J-21.80	Hearing to be held on evidence presented only in regard to those criteria that were objected to. Criteria approved by the Department and not objected to will be adopted without further inquiry or evidence.
A-16.75 E-22.48	Applicant can conduct further tests prior to hearing in response to objections received to support application.
T-5.80	Application for water depot will be conditioned to create a service area which encompasses the area that applicant analyzed in its application. Water not to be sold for use outside the service area.
T-5.80	Application for water depot will be conditioned such that purchasers of water for use in the service area must be in contractual agreement with seller (applicant) to ensure compliance with conditions of permit.
O-2.49 B-21.78	Objectors must provide some evidence or proof to overcome Department’s expert hydrogeolgists opinion regarding hydrogeologic conditions.
O-2.49 B-21.78	Objectors must provide some causal evidence that decreases in flow of springs or reduction in static water level in wells is related to applicants proposed use.
A-4.93	Uncontradicted expert testimony showing that proposed use will cause no significant drawdown in either applicant’s or any of the surrounding wells is sufficient to prove no adverse effect.
T-5.80	For water depot application, access must be controlled such that only those users with contracts are able to acquire water.

Final Order Date:	11/15/2013	**Applicant:**	**Thiel, Arnold**
Action:	Granted		
Case/Application #:	42M-30064191	**Regional Office:**	Glasgow
Application Type:	Permit		
Application Date:	10/09/2012	**Examiner:**	Balukas
Hearing Date:	09/10/2013	**OA Examiner:**	
Oral Argument Date:		**Use:**	Water marketing

A-4.9395	Objector alleged his well pump went dry due to the applicant's nearby well, but offered insufficient evidence of causation, and can reasonably exercise his water right after lowering his pump. Held no adverse effect. **Permit Granted**.

Final Order Date:	12/05/2013	**Applicant:**	**Sill, Walter & Margaret**
Action:	Denied		
Case/Application #:	41P-30001476	**Regional Office:**	Havre
Application Type:	Permit		
Application Date:	03/29/2002	**Examiner:**	Vogler
Hearing Date:	07/11-12/2013; 8/13/2013	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation; stock

U-14.1274 B-21.78	Preponderance of the evidence not met for physical availability when Applicant's analysis does not incorporate geologic data regarding subsurface conditions and Objector's evidence is as compelling as Applicant's case.
U-14.1274	Physical availability not met when Applicant's pump/aquifer test is conducted concurrently with continued construction of groundwater pit.
M-5.11	Preponderance of the evidence for adequate means of diversion not met when Applicant's analysis of water availability is conducted concurrently with development of groundwater pit.
U-14.1259.00	Legal availability and adverse effect cannot be determined without a finding of physical availability.
U-14.1274	Physical availability cannot be determined without finding the source of the water found in the groundwater pit. Not known if or what percent of water in pit is groundwater vs. surface water.

Final Order Date:	06/28/2013	**Applicant:**	**CHEVALLIER RANCH CO. AND STATE OF MONTANA, BOARD OF LAND COMMISSIONERS, TRUST LAND MANAGEMENT DIVISION**
Action:	Granted		
Case/Application #:	41QJ-30051168	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	06/02/2011	**Examiner:**	Vogler
Hearing Date:	04/25/2013 (show-cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation

J-21.80	Department failed to consider new information provided by Applicant in response to draft PD to deny. Objective of allowing Applicant to provide meet with Department after draft PD to deny is to give Applicant to provide further information or clarification. Department must review and analyze additional information prior to issuing a conclusive PD to deny. Failure to do so and forwarding file to hearing unit vested HE with authority to consider the additional information and conduct the analysis required.
U-14.1274	Actual seepage loss measurements by Applicant deemed more reliable than empirical calculations based on soil type as calculated by Department. Sufficient water shown to be available for contemplated irrigation.
M-5.11	Department’s estimate of ditch capacity of 63 cfs not supported by field observation made by HE. Applicants actual measurements of ditch capacity at normal bankfull levels show a capacity of 15 cfs diminishing to 12 cfs towards end of ditch, consistent with field observations. Held, ditch properly sized for intended diversion.
T-5.80 **S-21.76**	Conditions placed on application to prevent adverse effect. Supplemental rights not directly associated with this change cannot be used in certain historically irrigated areas. Department bifurcated the change process between the instant change and the proposed supplemental rights change in spite of applicants desire to change all associated rights simultaneously.
A-4.9379	Applicant’s proposal will not materially affect return flow.

Final Order Date:	04/18/2014	**Applicant:**	**Eastgate Water & Sewer Association**
Action:	Granted with Conditions		
Case/Application #:	41I-30050020	**Regional Office:**	Helena
Application Type:	Change		
Application Date:	12/16/2010	**Examiner:**	Vogler
Hearing Date:	02/04/2014	**OA Examiner:**	
Oral Argument Date:		**Use:**	

J-21.80 **T-5.80**	Terms of permit which required mitigation water from both a change in some water rights and also some purchase water, held, the change application is concerned only with the changes and the purchased water is properly regulated under the granted permit.
J-21.80	At contested case hearing based on objections, only those specific criteria objected to will be considered.
B-21.78	Under HB40 process, after Department makes PD to grant, initial burden of production shifts to objector to application.
A-4.93 **A-4.9392**	Water left in the stream channel for mitigation purposes instead of being diverted from stream will not result in adverse effect – downstream users will be able to pick up the passed water as it is not protected as instream flow and is available for diversion. Water commissioner will be able to administer the stream as though the water was being diverted.
A-4.93	Objector’s evidence that in some years very little or no water was delivered to proposed changed rights, not sufficient to overcome Department’s finding of historic use.

Final Order Date:	06/06/2014	**Applicant:**	**Power-Teton County Water & Sewer District**
Action:	Granted		
Case/Application #:	41K-30049120	**Regional Office:**	Havre
Application Type:	Permit		
Application Date:	08/25/2010	**Examiner:**	Balukas
Hearing Date:	03/05/2014	**OA Examiner:**	
Oral Argument Date:		**Use:**	

U-14.1274	Physical Availability- testimony that applicant had pumped requested flow rate and volume from source for over 43 years without interruption showed water physically available.
U-14.1259.00	Legal Availability – Large Statement of Claim, though infrequently exercised, constitutes a valid legal demand.
U-14.1259.00	Evidence of actual historic use and projected future use of other water right may be considered when assessing legal availability
A-49321	Permit may be exercised only when prior appropriator’s use allows sufficient legally available water, and this is a calculable, foreseeable event likely to occur much more than one-half the total period of use. Large hydropower rights on the lower Missouri may be mitigated by a purchasing a water service contract from the Canyon Ferry Dam. Trigger flows and measurement conditions may be used to protect downstream prior appropriators when they are incorporated as permit conditions and do not rise to the level of constant call.

Final Order Date:	08/29/2014	**Applicant:**	**Clarys Ranch**
Action:	Revoked		
Case/Application #:	42J-30064354 42J-30065027	**Regional Office:**	Billings
Application Type:	Provisional Permit for Completed Stockwater		
Application Date:	11/05/2012	**Examiner:**	Vogler
Hearing Date:	06/19/2014 07/17/2014	**OA Examiner:**	
Oral Argument Date:		**Use:**	Stock

L-1.940	Two stock water ponds located in close proximity to one another, in the same drainage, challenged under 85-2-306(7). Held, consolidation for hearing purposes deemed proper and convenient.
B-21.78	85-2-306 is a stand alone provision, distinct from 85-2-311, and thus burden of proof to prove adverse effect lies with the prior appropriator. Cites Pribyl.
A-4.93	Dams with no drainage outlet will adversely affect downstream, year round water rights of prior appropriator. Prior appropriator would need to make constant call on permits to ensure prior rights are filled.
A-4.93	Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators.

Final Order Date:	05/13/2015	**Applicant:**	**Ames, John M. and Panasuk, Miles G.**
Action:	Denied		
Case/Application #:	40S 30065911	**Regional Office:**	Glasgow
Application Type:	Change		
Application Date:	04/08/2013	**Examiner:**	Vogler
Hearing Date:	03/04/2015 (show-cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	Water marketing

B-5.690	Application to change partial use of unperfected permit for water marketing in Montana to water marketing in North Dakota denied because the underlying permit was granted for the amount that was proven needed in Montana and moving that water to N.D. would therefore defeat the need in Montana.
B-5.690 B-21.780	Applicant did not prove criteria for out-of-state use of water because there was no showing of feasibility to use that water in Montana and the supply in North Dakota was adequate albeit administratively difficult to obtain permits for.

Order Date:	10/15/2014	**Applicant:**	**Atlantis Water Solutions LLC**
Action:	Granted		
Case/Application #:	40S-30066181	**Regional Office:**	Glasgow
Application Type:	Permit		
Application Date:	04/29/2013	**Examiner:**	Vogler
Hearing Date:	07/15/2014 (show-cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	Water Marketing

M-5.11	Applicants river pumps would need to divert at requested rate 24/7 for the entire year to reach requested volume. Department precedent has established that pumping 24/7/365 to reach requested volume constitutes adequate means of diversion as long as the equipment can produce the volume requested in one year. Means of diversion shown to be adequate.
B-5.6979	Despite statutory requirement, Department has previously recognized that it is difficult to obtain contractual commitments when an applicant does not yet have the water right to sell water. Thus, Department has accepted less than full contractual commitment at the permitting stage so long as applicant shows good faith and bona fide intent to appropriate. Applicants letters of intent from oil field service companies to buy water once it is available exceeds 50% of the requested volume and meets Department requirements to show beneficial use.
B-5.69	Letters of intent from volunteer fire departments to buy water for domestic and other uses deemed not acceptable proof of bona fide intent to beneficially use water as volunteer fire departments are not in the business of providing water for those non-fire fighting purposes.

Order Date:	10/15/2014	**Applicant:**	**Atlantis Water Solutions LLC**
Action:	Granted		
Case/Application #:	40S-30066181	**Regional Office:**	Glasgow
Application Type:	Permit		
Application Date:	04/29/2013	**Examiner:**	Vogler
Hearing Date:	07/15/2014 (show-cause)	**OA Examiner:**	
Oral Argument Date:		**Use:**	Water Marketing

M-5.11	Applicants river pumps would need to divert at requested rate 24/7 for the entire year to reach requested volume. Department precedent has established that pumping 24/7/365 to reach requested volume constitutes adequate means of diversion as long as the equipment can produce the volume requested in one year. Means of diversion shown to be adequate.
B-5.6979	Despite statutory requirement, Department has previously recognized that it is difficult to obtain contractual commitments when an applicant does not yet have the water right to sell water. Thus, Department has accepted less than full contractual commitment at the permitting stage so long as applicant shows good faith and bona fide intent to appropriate. Applicants letters of intent from oil field service companies to buy water once it is available exceeds 50% of the requested volume and meets Department requirements to show beneficial use.

B-5.69	Letters of intent from volunteer fire departments to buy water for domestic and other uses deemed not acceptable proof of bona fide intent to beneficially use water as volunteer fire departments are not in the business of providing water for those non-fire fighting purposes.

Final Order Date:	06/04/2015	**Applicant:**	**Atlantis Water Solutions LLC**
Action:	Denied		
Case/Application #:	40S-30066181	**Regional Office:**	Glasgow
Application Type:	Permit		
Application Date:	04/29/2013	**Examiner:**	Balukas
Hearing Date:	02/19/2015	**OA Examiner:**	
Oral Argument Date:		**Use:**	Water marketing

B-5.69	Objector alleged market for water saturated, thus no beneficial use. Department does not assess market conditions or pricing, plan need not be economically viable if it is logistically viable.
B-5.6979	Objector alleged that Applicant's plan to sell water was speculative and lacked bona fide intent. MCA 85-2-310(9)(D) requires firm contracts for 100% of requested water. Thus, Department's longstanding practice of accepting letters of intent for 50% of the requested volume is insufficient to show bona fide intent to appropriate under statute. In this instance and going forward water marketing applications shall require 100% firm contracts.
D-21.31	Past practice of accepting letters of intent is inconsistent with statute. Department must provide reasonable explanation why practice is changing, in instant case department is amending action to comport with statutory requirements. **[Appealed to District Court.]**

Final Order Date:	06/07/2016	**Applicant:**	**Ellis, Gerald H. & Mary D.**
Action:	Granted		
Case/Application #:	42J-30072589	**Regional Office:**	Billings
Application Type:	Permit		
Application Date:	03/02/2015	**Examiner:**	Vogler
Hearing Date:	03/23/2016	**OA Examiner:**	
Oral Argument Date:		**Use:**	Irrigation

B-21.78	Department's determination to grant permit under Preliminary Determination to Grant created presumption that criteria have been met thus shifting burden of production/persuasion on objector to overcome the presumption.
B-21.78	Objectors' anecdotal and conflicting evidence regarding legal availability without some supporting scientific evidence determined not sufficient to overcome presumption. Permit granted.
	DO NOT USE THIS CASE AS PRECEDENT