

Office of Administrative Hearings
Department of Natural Resources and Conservation
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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

* * * * *

**IN THE MATTER OF CHANGE APPLICATION)
NO. 41O-30138934 BY MONTANA) ORDER DISMISSING CONTESTED CASE
DEPARTMENT OF FISH, WILDLIFE, &) AND GRANTING APPLICATION
PARKS)**

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BACKGROUND

On September 10, 2019, the State of Montana Department of Fish, Wildlife, and Parks (Applicant or FWP) submitted Application to Change Water Right No. 41O 30138934 (Application) to change the purpose and place of use of Water Right Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 to the Havre Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete January 16, 2020. An Environmental Assessment for this Application was completed on March 31, 2020.

The Applicant seeks to temporarily change the purpose and place of use of Statements of Claim 41O 178054-00 and 41O 171394-00 from irrigation to instream flow protection within the Teton River. Statement of Claim specific information is located in the Preliminary Determination to Grant Temporary Change. Both Statements of Claim are located on the Teton River in Teton County approximately 5.5 miles north of Dutton, MT.

The Applicant proposes to protect the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical point of diversion (POD) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant also proposes to protect the combined historically consumed flow rate (3.54 CFS) and historically consumed volume (294.9 AF) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historical POD to a point immediately below USGS gage No. 06108000 on the Teton River. This

reach is approximately 17 miles long. The proposed protected reach is a section of the Teton River which runs through Sections 10, 12, 13, 14, and 15, TWP 25N, RNG 1W and Sections 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, and 18, TWP 25N, RNG 1E, Teton County. (PD ¶ 2)

The Applicant has entered into a lease agreement with the owners of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 to lease the claims for instream flow purposes in the lower Teton River. As this is a temporary change under § 85-2-436, MCA, the temporary period is ten years upon approval with the option to renew when the ten-year period comes to an end. (PD ¶ 3)

The Department is authorized to approve a temporary change for instream flow filed by FWP where FWP proves the applicable §§ 85-2-402, and -436, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. For this Application, the applicable change criteria in §85-2-402(2), MCA, are:

- (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
 - (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
.....
 - (c) The proposed use of water is a beneficial use. . .

The applicable criteria under Section 85-2-436, MCA, are:

- (2) The change in purpose of use or place of use must meet all of the criteria and process outlined in 85-2-307 through 85-2-309, 85-2-401, and 85-2-402 and the additional criteria and process described in subsection (3) of this section to protect the rights of other appropriators from adverse impacts.
- (3) (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of protecting, maintaining, or enhancing streamflows to benefit the fishery resource.

Upon determining the elements of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00, and their historic use, the Department conducted an extensive analysis of the Application and determined that all of the applicable criteria of §§ 85-2-402, and -436, MCA, have been proven by a preponderance of the evidence. The Department issued a “Preliminary Determination to Grant Temporary Change” (PD) on April 8, 2020. Notice of the PD was sent to interested individuals on April 28, 2020 and was published in the Choteau Acantha and River Press on April 29, 2020.

As a result of the public notice, the Application received three valid objections pursuant to § 85-2-308, MCA. Objection # 89104 by Salmond Ranch Co. (Salmond), Objection # 89106 by Thomas and William Stott (Stotts), and Objection # 89110 by Higgins-Bunn Ranch Partnership (Higgins-Bunn). Each objection was deemed valid for adverse effect under the criteria in § 85-2-402(2)(a) and this matter was scheduled for a contested case hearing pursuant to § 85-2-309, MCA.

On September 30, 2020 Salmond filed a “Consent Agreement” wherein Salmond and FWP wish to settle all issues raised by the objections of Salmond without the need for a hearing before the DNRC.

On October 29 and 30, 2020 Higgins-Bunn and Stotts each filed Consent Agreements that are substantively identical to the Salmond Consent Agreement. All three of the Consent Agreements use identical language regarding consent to DNRC entering an administrative order approving Application No. 41O 30138934.

CONSENT AGREEMENT(S)

The Consent Agreements contain, *inter alia*, the following language:

1. The parties consent to the DNRC’s entry of administrative orders approving Application Nos. 41O 30138928 and 41O 30138934, provided that the Authorizations to Change include a remark noting the existence of a private agreement between the parties regarding administration of the temporarily changed water rights.
2. Further, the parties consent to the DNRC’s entry of an administrative order approving Application No. 41O 30138934, provided that the Authorization to Change contain the following additional measurement condition:

MONTANA FISH WILDLIFE AND PARKS SHALL MEASURE THE FLOW IN THE TETON RIVER AT OR NEAR AS PRACTICAL TO THE HISTORIC POINT OF DIVERSION FOR CLAIM 41O 178148-00 IN THE SE SW NE SEC. 6, TWP 24N, RGE

9E IMMEDIATELY BEFORE MEASURING THE FLOW IN THE TETON RIVER AT THE MEASURING POINT IN THE SESE SEC. 31 TWP 25N, RGE 9E.

THE FLOW MEASUREMENTS AT THE HISTORIC POIN OF DIVERSION FOR CLAIM 41O 17848-00 SHALL BE TAKEN MONTHLY, BUT ONLY AT TIMES FLOW IN THE TETON RIVER AS REPORTED BY USGS GAGE 06108800 TETON RIVER AT LOMA IS 10 CUBIC FEET PER SECOND (CFS) OR LESS.

THE TWO FLOW MEASUREMENTS WILL BE USED TO ESTABLISH THE PERCENT LOSS, IF ANY IN THE REACH. THE AMOUNT OF ANY INTERVENING DIVERSION WILL NOT BE PART OF THE LOSS. THE HISTORIC DIVERTED AMOUNT TO BE USED UNDER CLAIM 41O 178148-00 SHALL BE REDUCED BY THE PERCENT LOSS. THE PERCENT LOSS WILL APPLY UNTIL THE NEXT MONTHLY MEASUREMENT. ANY SET OF MEASURMENTS TO DETERMINE THE PERCENT LOSS TAKEN BY DNRC OR THE WATER COMMISSIONER SHALL APPLY FROM THE TIME OF MEASUREMENT UNTIL THE NEXT MEASURMENT IS TAKEN.

THE ADDITIONAL MEASUREMENTS OUTLINED ABOVE MAY BE DISCONTINUED IF ALL OBJECTORS TO THIS CHANGE AUTHORIZATION AND DNRC AGREE THAT MEASURABLE LOSS DOES NOT OCCUR IN THE RIVER REACH OF CONCERN, OR IF THEY AGREE TO A SET SCHEDULE OF PERCENT LOSS TO BE APPLIED BASED ON FLOW LEVELS, TIME OF YEAR OR OTHER CONDCTIONS DEEMED APPROPRIATE.

3. Further, the parties consent to the DNRC's entry of an administrative order approving Application No. 41O 30138934, provided that the Authorizations to Change contain the following additional measurement condition:

MONTANA FISH WILDLIFE AND PARKS SHALL MEASURE THE FLOW IN THE TETON RIVER AT OR NEAR AS PRACTICAL TO THE HISTORIC POINT OF DIVERSION FOR CLAIMS 41O 171394-00 AND 41O 178054-00 IN THE NW NE NE SEC. 15, TWP 25N. RGE 1W IMMEDIATELY BEFORE MEASURING THE FLOW IN THE TETON RIVER AT OR NEAR USGS GAGE 06108000 TETON RIVER NEAR DUTTON.

THE FLOW MEASUREMENTS AT OR NEAR USGS GAGE 06108000 TETON RIVER NEAR DUTTON SHALL BE TAKEN MONTHLY, BUT ONLY AT TIMES FLOW IN THE TETON RIVER AS REPORTED BY USGS GAGE 06108800 TETON RIVER AT LOMA IS 50 CUBIC FEET PER SECOND (CFS) OR LESS

THE TWO FLOW MEASUREMENTS WILL BE USED TO ESTABLISH THE PERCENT LOSS, IF ANY IN THE REACH. THE AMOUNT OF ANY INTERVENING DIVERSION WILL NOT BE PART OF THE LOSS. THE HISTORIC CONSUMED AMOUNT TO BE USED UNDER THE TEMPORARY CHANGE TO INSTREAM FLOW SHALL BE REDUCED BY THE PERCENT LOSS. THE PERCENT LOSS WILL APPLY UNTIL THE NEXT MONTHLY MEASUREMENT. ANY SET OF MEASUREMENTS TO DETERMINE THE PERCENT LOSS TAKEN BY DNRC OR THE WATER COMMISSIONER SHALL APPLY FROM THE TIME OF MEASUREMENT UNTIL THE NEXT MONTHLY MEASUREMENT IS TAKEN.

THE ADDITIONAL MEASUREMENTS OUTLINED ABOVE MAY BE DISCONTINUED IF ALL OBJECTORS TO THIS CHANGE AUTHORIZATION AND DNRC AGREE THAT MEASURABLE LOSS DOES NOT OCCUR IN THE RIVER REACH OF CONCERN, OR IF THEY AGREE TO A SET SCHEDULE OF PERCENT LOSS TO BE APPLIED BASED ON FLOW LEVELS, TIME OF YEAR OR OTHER CONDITIONS DEEMED APPROPRIATE.

.....

6. The Parties agree that if any of the material conditions described in Paragraphs 2 and 3 above cannot be made part of the DNRC's respective approvals of Application Nos. 41O 30138928 and 41O 30138934, then [Objector] consents to the issuance of the Change Authorizations and FWP agrees to adhere to the conditions in Paragraph 2 and 3 above regardless if they are included as a condition of the Change Authorizations.

CONCLUSIONS

1. It is clear from the Consent Agreements that the Objectors consent to the issuance of Application to Change Water Right No. 41O 30138934 based on the Department of Fish, Wildlife and Parks' agreement to adhere to the proposed conditions. The Consent Agreements are third-party agreements between the FWP and the Objectors.

2. Informal disposition of a contested case can be made by stipulation, agreed settlement, consent order, or default and must be documented in writing. § 2-4-603, MCA. In addition, pursuant to § 85-2-310(4), MCA:

If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

For water right contested cases, the Department's administrative rules provide:

36.12.207 SETTLEMENT, STIPULATION OR CONSENT

(1) The terms of a settlement, stipulation, or consent entered between parties as a private contractual agreement are not binding on the department.

(2) If the parties propose inclusion of the terms of a settlement, stipulation, or consent as a condition(s) to a permit or change authorization, the parties shall submit a copy of the written settlement, stipulation, or consent along with any proposed condition(s) to the department for consideration. At the department's discretion, the terms of a settlement, stipulation, or consent may be included as a condition(s) to a permit or change authorization upon determination that the terms of the settlement, stipulation, or consent are consistent with and necessary to satisfy the applicable statutory criteria.

(3) A complete copy of any settlement, stipulation, or consent considered by the department must be included in the record.

3. In this case, the Consent Agreements amount to a settlement between FWP and the Objectors and are not binding on the Department. While the parties agreed to the inclusion of the proposed conditions in paragraphs 2 and 3 of the Consent Agreements as a condition to the permit, the parties have made no showing that the proposed conditions are consistent with and necessary to satisfy the § 85-2-402 and -436, MCA, criteria. Further, paragraph 6 of the Consent agreements provides that Objectors consent to the issuance of the change without the proposed conditions. There is no evidence in the record for the hearing examiner to determine that the proposed conditions are necessary to satisfy the statutory criteria.

ORDER

Application to Change Water Right No. 41O 30138934 by State of Montana Department of Fish, Wildlife, and Parks is hereby **GRANTED** as proposed in the Preliminary Determination to Grant Temporary Change dated April 8, 2020. The Consent Agreements shall be included in the record and the following remark added to the authorization and abstract:

EXERCISE OF THIS CHANGE AUTHORIZATION IS SUBJECT TO THREE PRIVATE WATER USE AGREEMENTS AS DESCRIBED IN THE CONSENT AGREEMENTS FILED WITH THE DEPARTMENT ON SEPTEMBER 30, OCTOBER 29 AND OCTOBER 30, 2020. SAID AGREEMENTS ARE INCLUDED IN THE FILE FOR APPLICATION TO CHANGE WATER RIGHT NO. 41O 30138934 BY MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS.

This contested case proceeding is hereby **DISMISSED**.

IT IS SO ORDERED.

Dated this 21st day of January 2021.

/Original signed by David A. Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER DISMISSING CONTESTED CASE AND GRANTING APPLICATION was served upon all parties listed below on this 21st day of January 2021 by first class United States mail.

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