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

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBER 41C-11339900 AND APPLICATION TO CHANGE APPROPRIATION WATER RIGHT 41C-19391600 BY THREE CREEKS RANCH OF WYOMING, LLC	)	ORDER CORRECTING CLERICAL ERROR IN PROPOSAL FOR DECISION AND FINAL ORDER

* * * * * * *

It is obvious from elsewhere in the pleadings in the change portion of this proceeding that it involved the water right Claim Nos. 41C-19391600 and 41C-19391900, and not Claim No. 41C-19361900. This is a clerical error and this order corrects the clerical error.

In the Proposal For Decision, on page 23 in the Proposed Order: Change Application Claim 41C-19391600, paragraph one, there is a clerical error. The claim number "41C-19361900" should be "41C-19391900". Please replace your existing page 23 with the enclosed page 23.

In the Final Order, on page 2 in the Order: Change Application Claim 41C-19391600, paragraph one, there is a clerical error. The claim number "41C-19361900" should be "41C-19391900". Please replace your existing page 2 with the enclosed page 2.

Dated this 18th day of February, 2003.

Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

Enc: Corrected Page 23, Proposal For Decision
Corrected Page 2, Final Order

Done

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Order Correcting Clerical Error was served upon all parties listed below by first class United States Mail on this 18th day of February, 2003.

THREE CREEKS RANCH OF WYOMING LLC
%RANCHES OF THE WEST
PO BOX 710
SHERIDAN MT 59749-0710
c/o DONEY, CROWLEY,
BLOOMQUIST & UDA, P.C.
JOHN BLOOMQUIST
ATTORNEY AT LAW
PO BOX 1418
DILLON MT 59725

ERNESTINE H. NEAL
285 WISCONSIN CREEK ROAD
SHERIDAN MT 59749
c/o DAVIS, WARREN & HRITSCO
WILLIAM A. HRITSCO
ATTORNEY AT LAW
122 E. GLENDALE
P.O. BOX 28
DILLON MT 59725

THREE CREEKS WATER COMPANY
PO BOX 691
SHERIDAN MT 59749
c/o W.G. GILBERT, III
ATTORNEY AT LAW
15 SOUTH IDAHO STREET
PO BOX 345
DILLON, MT 59725-0345

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
PO BOX 201601
HELENA MT 59620-1601

SCOTT COMPTON, MANAGER
PORTER DASSENKO, WRS
BOZEMAN REGIONAL OFFICE
151 EVERGREEN DR, SUITE C
BOZEMAN MT 59715

Jill Wilkinson, Hearings Unit
406.444.6615

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBER 41C-11339900 AND APPLICATION TO CHANGE APPROPRIATION WATER RIGHT CLAIM 41C-19391600 BY THREE CREEKS RANCH OF WYOMING, LLC	)	**FINAL ORDER**

* * * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 9, 2002, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER: PERMIT APPLICATION 41C-11339900

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41C-11339900 is **ISSUED** to Three Creeks Ranch of Wyoming, LLC, to appropriate 224.4 gallons per minute (gpm) up to 3.4 acre-feet of water per year from Nugget Creek. The water is to be diverted at a point in the NE¼SW¼SE¼ of Section 2, Township 4 South, Range 5 West, Madison County, Montana. The period of diversion is October 20 to April 20, inclusive, of each year. The means of diversion is a headgate. The use is stock use. The place of use is an off stream ditch locally known as the Marsh Ditch located in the NE¼SW¼SE¼, SE¼SW¼SE¼ of Section 2; in the NE¼NE¼SE¼, SW¼NE¼SE¼, NW¼SE¼SE¼, SW¼SE¼SE¼ of Section 10; in the NE¼NW¼NE¼, NW¼NW¼NE¼, SW¼NW¼NE¼, SE¼NE¼NW¼, NE¼SE¼NW¼, NW¼SE¼NW¼, SW¼SE¼NW¼, SE¼SW¼NW¼, NE¼NW¼SW¼, NW¼NW¼SW¼ of Section 11; in the NW¼NE¼NE¼, NE¼NW¼NE¼, SE¼NW¼NE¼, NE¼SW¼NE¼ of Section 15 all in Township 4 South, Range 5 West, Madison County, Montana. The period of use is October 20 to April 20, inclusive, of each year.

A. After 3.4 acre-feet have been diverted into Marsh Ditch under this appropriation, the diversion must cease.

ORDER: CHANGE APPLICATION CLAIM 41C-19391600

Subject to the terms, conditions, restrictions, and limitations specified below, Application to Change Appropriation Water Right 41C-19391600 is hereby **GRANTED IN PART** to Three Creeks Ranch of Wyoming, LLC, to change water right Claim Nos. 41C-19391600 and 41C-19391900.

Applicant is authorized to change the purpose of 4.0 cfs between April 20 and October 19 and 2.25 cfs between May 1 to July 14 up to 3.4 acre-feet from irrigation to stock; to change a portion of the place of use to, and add storage in, the 5.7 acre-foot pond located in the SW¼NE¼SE¼, in Section 10, Township 4 South, Range 5 West, Madison County, Montana.

A. This authorization is limited to the amount of the historic use recognized by the department in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

B. Applicant will remove 20.76 acres from irrigation in the SW¼NE¼SE¼ and in the NW¼NE¼ all in Section 10, Township 4 South, Range 5 West, Madison County, Montana.

C. The storage pond must be designed by a licensed engineer knowledgeable in such matters to prevent seepage from the pond.

D. The operation of the point of diversion headgate must not be altered from historic practice except changes which diminish the burden on the source at the headgate.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements

with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 9th day of October, 2002.

Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below by first class United States Mail on this 10th day of October, 2002.

THREE CREEKS RANCH OF WYOMING
LLC
%RANCHES OF THE WEST
PO BOX 710
SHERIDAN MT 59749-0710
c/o DONEY, CROWLEY,
BLOOMQUIST & UDA, P.C.
JOHN BLOOMQUIST
ATTORNEY AT LAW
PO BOX 1418
DILLON MT 59725

ERNESTINE H. NEAL
285 WISCONSIN CREEK ROAD
SHERIDAN MT 59749
c/o DAVIS, WARREN & HRITSCO
WILLIAM A. HRITSCO
ATTORNEY AT LAW
122 E. GLENDALE
P.O. BOX 28
DILLON MT 59725

THREE CREEKS WATER COMPANY
PO BOX 691
SHERIDAN MT 59749
c/o W.G. GILBERT, III
ATTORNEY AT LAW
15 SOUTH IDAHO STREET
PO BOX 345
DILLON, MT 59725-0345

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
PO BOX 201601
HELENA MT 59620-1601

SCOTT COMPTON, MANAGER
PORTER DASSENKO, WRS
BOZEMAN REGIONAL OFFICE
151 EVERGREEN DR, SUITE C
BOZEMAN MT 59715

Jill Wilkinson
Hearings Unit
406-444-6615

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

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBER 41C-11339900 AND APPLICATION TO CHANGE APPROPRIATION WATER RIGHT 41C-19391600 BY THREE CREEKS RANCH OF WYOMING, LLC	)	PROPOSAL FOR DECISION

* * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on May 22, 2002, in Sheridan, Montana, to determine whether a beneficial water use permit under the criteria set forth in Mont. Code Ann. § 85-2-311 and to determine whether an authorization to change appropriation water right under the criteria set forth in Mont. Code Ann. § 85-2-402 (2) should be issued to the Three Creeks Ranch of Wyoming, L.L.C., hereinafter referred to as "Applicant" for the above applications.

PRELIMINARY MATTERS

These hearings were consolidated; however, the hearing was held in two sessions. The combined proposal for decision will have separate findings of fact, conclusions of law, and an order for each application.

The first session was held May 22, 2002, with regards to the permit application with Three Creeks Water Company as the sole Objector. The second was held June, 3, 2002, with regards to the change application with Ernestine Neal as the sole objector.

The record was left open to allow Objector Three Creeks Water Company witness Loren Tucker to testify and be cross examined telephonically. Simultaneous briefs from parties to the permit application were received on the issue of adverse affect to existing rights outside their period of appropriation and use. Witness Tucker's

testimony was received June 20, 2002, and the record in the matter was thereafter closed.

APPEARANCES: PERMIT APPLICATION 41C-11339900

Applicant appeared at the hearing by and through counsel, John E. Bloomquist. Dan Pence, wildland management consultant; Gene Collins, Ranch Manager, Three Creeks Ranch of Wyoming; and Reid Rosenthal, Managing Member, Three Creeks Ranch of Wyoming; testified for the Applicant on the permit application.

Objector Three Creeks Water Company (TCWC) appeared by and through counsel W. G. Gilbert, III. Frank Hardy; Charles Wood; Dan Schulz; Don Gillam; Jean Shipp; Scott Payne, KirK Environmental, LLC; Randy Huffsmith, P.E., CDM; and Judge Loren Tucker, testified for the Objector. Dan Pence was called to testify by the Objector.

EXHIBITS: PERMIT APPLICATION 41C-11339900

Both Applicant and Objector TCWC offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered eight exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-A8.

Applicant's Exhibit A1 is a map comprised of the Old Baldy and Sheridan USGS Topographic Maps.

Applicant's Exhibit A2 is a document listing the place of use land descriptions along the Marsh Ditch.

Applicant's Exhibit A3 is a document describing May 13, 2002 Nugget Creek flow measurements.

Applicant's Exhibit A4 is a copy of a Department of Natural Resources and Conservation's (Department) Nugget Creek water right index.

Applicant's Exhibit A5 is a copy of a Department's Wisconsin Creek water right index.

Applicant's Exhibit A6 is a copy of a Stipulation for Settlement, Montana Water Court Case No. 41C-251 involving Three Creeks Ranch Company and Three Creeks Water Company.

Applicant's Exhibit A7 is a copy of a Closing Order, Montana Water Court Case No. 41C-251 involving Three Creeks Ranch Company and Three Creeks Water Company.

Applicant's Exhibit A8 is a copy of an aerial photo showing Nugget Creek, the point of diversion, and the Marsh Ditch.

Objector offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit B, D, E, and F. Objector offered no other exhibits.

Objector TCWC's Exhibit B is a topographic map showing portions of Nugget Creek, Wisconsin Creek, and Marsh Ditch.

Objector TCWC's Exhibit D is a seven page copy of a website discussing the property management plan of Three Creeks Ranch.

Objector TCWC's Exhibit E is a copy of a six page document entitled *Three Creeks Ranch Property Evaluation and Management Recommendations*.

Objector TCWC's Exhibit F is a seven page copy of the Applicant's project plan for Three Creeks Ranch.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT: PERMIT APPLICATION 41C-11339900

General

1. Application for Beneficial Water Use Permit 41C-11339900 in the name of Three Creeks Ranch of Wyoming and signed by Reid Rosenthal was filed with the Department on October 13, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 224.4 gallons per minute (gpm) up to 3.4 acre-feet (af) of water per year from Nugget Creek. The water is to be diverted at a point in the NE¼SW¼SE¼ of Section 2, Township 4 South, Range 5 West, Madison County, Montana. The proposed period of diversion is October 20 to April 20, inclusive, of each year. The proposed means of diversion is a headgate. The proposed use is stock use. The proposed place of use are portions of a ditch locally known as the Marsh Ditch that flow through the NE¼SW¼SE¼, SE¼SW¼SE¼ of Section 2; in the NE¼NE¼SE¼, SW¼NE¼SE¼, NW¼SE¼SE¼, SW¼SE¼SE¼ of Section 10; in the NE¼NW¼NE¼, NW¼NW¼NE¼, SW¼NW¼NE¼, SE¼NE¼NW¼, NE¼SE¼NW¼, NW¼SE¼NW¼, SW¼SE¼NW¼, SE¼SW¼NW¼, NE¼NW¼SW¼, NW¼NW¼SW¼ of Section 11; in the NW¼NE¼NE¼, NE¼NW¼NE¼, SE¼NW¼NE¼, NE¼SW¼NE¼ of Section 15 all in Township 4 South, Range 5 West, Madison County, Montana. The proposed period of use is October 20 to April 20, inclusive, of each year. (Department file, testimony of Dan Pence)

Physical Availability

4. Applicant measured flows in the Marsh Ditch when all of Nugget Creek was turned into Marsh Ditch using a stopwatch and float. The headgate diverting from Nugget Creek had an estimated ten gpm leakage during the tests. Applicant measured .998 cubic feet per second (cfs), or 447.9 gallons per minute (gpm), on May 13, 2002. Visually the flow in Nugget Creek May 13, 2002 appeared slightly lower than when the headgate was visited October 9, 2001. The May 13, 2002, flows also appeared visually similar to November and December 1999 Nugget Creek flows. (Department file, testimony of Dan Pence)

5. The flow estimates were made immediately prior to and just after the intended period of use. These are times when a typical stream would be experiencing declining flows after summer use and after winter low flows. Spring runoff in Wisconsin Creek, to which Nugget Creek is tributary, typically begins around May 1st. High flows in Wisconsin Creek typically occur after May 15th of each year. Applicant's measurements did not include high spring flows. (Testimony of Dan Pence, Charles Wood, Dan Schulz, Jean Shipp)

6. Objector has no flow measurements that contradict Applicant's flow estimates. (Testimony of Scott Payne)

Legal Availability

7. There are no water rights in Department Water Right Records for Nugget Creek during Applicant's period of use. Downstream water uses in Nugget Creek and Wisconsin Creek are for irrigation which does not occur during Applicant's proposed period of use. Downstream water rights indicate a period of use which includes April; however, irrigation does not begin until May when the water starts to flow in the creek. (Testimony of Dan Pence, Reid Rosenthal, Charles Wood)

8. The local district court responsible for administering water in Nugget Creek and Wisconsin Creek has not historically included water diverted into the Marsh Ditch under the control of the Wisconsin Creek ditch commissioner. (Testimony of Jean Shipp)

9. Applicant and Objector TCWC entered into a stipulation before the Montana Water Court wherein they agreed that water diverted into Marsh Ditch was not water tributary to Wisconsin Creek. Subsequently, Objector TCWC unconditionally withdrew it's objection in the Montana Water Court and the stipulation was not used by the court to modify the effected water right claims. (Testimony of Charles Wood)

10. Objector claims that the water diverted by this proposal is destined for storage in the banks of Nugget Creek and Wisconsin Creek at times Objector is not diverting water. Objector claims this bank storage will then supplement flows during low runoff periods, and less water will be stored because of Applicant's diversion. TCWC claims there will be an adverse affect from the diminished available bank storage. Applicant's proposal may affect bank storage. However, except for an eleven day overlap in period of diversion, the proposed diversion is outside Objector's period of diversion. During the eleven days of overlapping periods of use, the Objector is entitled to call for water. With the exception of the eleven day overlap Objector TCWC's rights are for summer irrigation from Wisconsin Creek and fall

outside the Applicant's period of use. (Testimony of Dan Schulz, Jean Shipp, Scott Payne)

Adverse Effect

11. The existing headgate that diverts water from Nugget Creek has been opened to stop diversion to Marsh Ditch by Applicant and predecessors. When the headgate is opened, water remains in Nugget Creek. Applicant intends to continue this practice if a legitimate call is received from a downstream senior right. Adverse affect can be prevented using this practice. (Department file, testimony of Dan Pence)

Adequacy of Appropriation Works

12. Applicant and predecessors have used the Marsh Ditch and headgate for the past seventy years to divert water for irrigation and some non irrigation season stock use. Some unmeasured ditch loss has occurred during these times and appears typical of the area. (Department file, testimony of Dan Pence, Reid Rosenthal)

13. The maximum capacity of the Marsh Ditch using the water velocity and water cross section in Applicant's May 13, 2002, measurements is 8.55 cfs, or 3837.2 gpm. (Testimony of Dan Pence)

14. Water has flowed the full length of Marsh Ditch from the point of diversion to the point of return near Wisconsin Creek. This is the proposed place of use. (Testimony of Dan Pence)

15. The water flowing in Marsh Ditch may freeze as other area ditches have in the past. Marsh Ditch forks in Section 11 to carry water westerly to Section 10 or southerly towards Wisconsin Creek. The slope of the Marsh Ditch is 2% above the fork and 17% below the fork. These slopes will help prevent water from freezing and damming the water causing it to overflow the ditch bank. Applicant will rotate the cattle to another pasture if and when water freezes in the ditch, and stop diverting into the Marsh Ditch. (Testimony of Dan Pence, Gene Collins, Charles Wood)

Beneficial Use

16. The proposed use of water is for non irrigation season stock use from the Marsh Ditch. Watering the livestock from the Marsh Ditch will allow Applicant to rotate their pasture use and rehabilitate the pastures from past over grazing. (Testimony of Dan Pence, Gene Collins, Reid Rosenthal)

17. Applicant applied for the volume of water Department standards show 200 head of stock will need in a six month period. The Department standard is .017 acre-feet per head per year. The flow rate requested is required to generate velocity and volume to carry the water through the Marsh Ditch. The flow rate requested (224.4 gpm) will produce the volume requested (3.4 af) in 3.43 days. (Department file, testimony of Dan Pence)

18. The volume requested includes 1.7 acre-feet of ditch loss. This volume was estimated by doubling the volume of water consumed by the stock. This volume of ditch loss is an estimate by the Applicant and equates to a 50% ditch efficiency; it has not been measured and is reasonable for the area. (Testimony of Dan Pence)

Possessory Interest

19. Applicant is the owner of the property which has been designated in the application as the place of use. (Department file)

Water Quality Issues

20. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure

21. This application lies within the Madison River basin closure and the Upper Missouri River basin closure areas. (Department file)

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

CONCLUSIONS OF LAW: PERMIT APPLICATION 41C-11339900

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Although the flow measurements are outside the period of use, they are taken at times the flows are expected to be low and representative of flows during the period of use. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 4, 5, 6.

4. The Applicant has proven that water can reasonably be considered legally available. Applicant's brief suggests Objector TCWC has no legally protectable interest to, in effect, control the basin during

periods outside the time when the Objector can divert and use water. Objector's brief suggests that they have legal standing and have expert testimony that the proposed use of water will remove water from the aquifer that supplies Objector's rights during the irrigation season. Applicant's argument is compelling. Montana's appropriation scheme is based upon the prior appropriation doctrine. Simply stated, junior must release water to senior when the water would reach senior's headgate **and** senior can put the water to use. McDonald v. State, 220 Mont. 519, 532, 722 P.2d 598 (1986), Raymond v. Wimsette, 12 Mont. 551, 560-561, 31 Pac. 537 (1892). In this matter Objector does have standing. However, Objector did not provide sufficient evidence this water is destined to their right at a time they can put it to use. Here any water 'released' by junior Applicant comes at times generally outside the Objector's period of diversion. 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. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 7, 8, 9, 10.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Applicant's plan is to remove the boards in the headgate if needed to allow water to flow down Nugget Creek to satisfy a call from a downstream senior right. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 11.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact Nos. 12, 13, 14, 15.

7. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit, and the quantity of water proposed to be used is reasonably necessary for the proposed beneficial use. Applicant here has requested a reasonable amount of water for 200 head of stock for a six month period, and that amount again for ditch losses. The

Objector's concern appeared to be that this application was requesting a flow in Marsh Ditch that would last the entire 180 day period of use. The volume requested will not allow that. The flow rate and volume is limited to the lesser of Applicant intent, the reasonable amounts needed for the proposed use, or the amount requested. In this case the amount requested is 224.4 gpm up to 3.4 af and is the upper limit of what can be diverted at the headgate on Nugget Creek. After 3.4 acre-feet has been diverted into Marsh Ditch, any additional diversion must cease. Mont. Code Ann. §§ 85-2-311(1)(d), 312(1). See Finding of Fact No. 16, 17, 18.

8. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact 19.

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Applicant is required to prove these criteria only if a valid objections is filed. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See, Finding of Fact 20.

10. The Madison River basin and Upper Missouri River basin closures both apply to this application. In both closure areas the closure provisions do not apply to applications for stock use; that is applications for stock use are allowed in spite of the closures. (Department file, Mont. Codes Ann.) Mont. Code Ann. §§ 85-2-341, 343. See, Finding of Fact 21.

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

PROPOSED ORDER: PERMIT APPLICATION 41C-11339900

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41C-11339900 is **ISSUED** to Three Creeks Ranch of Wyoming, LLC, to appropriate 224.4 gallons per

minute (gpm) up to 3.4 acre-feet of water per year from Nugget Creek. The water is to be diverted at a point in the NE¼SW¼SE¼ of Section 2, Township 4 South, Range 5 West, Madison County, Montana. The period of diversion is October 20 to April 20, inclusive, of each year. The means of diversion is a headgate. The use is stock use. The place of use is an off stream ditch locally known as the Marsh Ditch located in the NE¼SW¼SE¼, SE¼SW¼SE¼ of Section 2; in the NE¼NE¼SE¼, SW¼NE¼SE¼, NW¼SE¼SE¼, SW¼SE¼SE¼ of Section 10; in the NE¼NW¼NE¼, NW¼NW¼NE¼, SW¼NW¼NE¼, SE¼NE¼NW¼, NE¼SE¼NW¼, NW¼SE¼NW¼, SW¼SE¼NW¼, SE¼SW¼NW¼, NE¼NW¼SW¼, NW¼NW¼SW¼ of Section 11; in the NW¼NE¼NE¼, NE¼NW¼NE¼, SE¼NW¼NE¼, NE¼SW¼NE¼ of Section 15 all in Township 4 South, Range 5 West, Madison County, Montana. The period of use is October 20 to April 20, inclusive, of each year.

A. After 3.4 acre-feet have been diverted into Marsh Ditch under this appropriation, the diversion must cease.

1. **APPEARANCES: CHANGE APPLICATION 41C-19391600**

Applicant appeared at the hearing by and through counsel, John E. Bloomquist. Dan Pence, wildland management consultant; and Reid Rosenthal, Managing Member, Three Creeks Ranch of Wyoming; testified for the Applicant on the change application.

Objector Ernestine Neal appeared by and through counsel William A. Hritsco. Ernestine Neal, Scott Payne, KirK Environmental, LLC; and Randy Huffsmith, P.E., CDM; testified for the Objector.

EXHIBITS: CHANGE APPLICATION 41C-19391600

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered seven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit 9-15.

Applicant's Exhibit A9 is a twenty page copy of the change application.

Applicant's Exhibit A10 is a four page copy of a Closing Order, Montana Water Court Case No. 41C-251 involving Three Creeks Ranch Company and Three Creeks Water Company, and containing a copy of water right abstracts for the two rights subject to the change application.

Applicant's Exhibit A11 is a two page copy of a Department of Natural Resources and Conservation Nugget Creek water right index.

Applicant's Exhibit A12 is a one page copy of a general abstract for Neal's Water Right 41C-36781 00.

Applicant's Exhibit A13 is a three page copy of two letters.

Applicant's Exhibit A14 a-h is a series of copies of eight photographs.

Applicant's Exhibit A15 is six pages including copies of the Department file *FORM 606 CHECKLIST, CRITERIA ASSESSMENT REVIEW,* AND *NOTICE AREA* forms. The Exhibit *CRITERIA ASSESSMENT REVIEW* has been updated in the Department file.

Objector Neal offered one exhibit for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit A. Objector offered no other exhibits.

Objector's Exhibit ONA is one page containing copies of two photographs.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT: CHANGE APPLICATION 41C-19391600

General

1. Application for Change of Appropriation Water Right 41C-19391600 in the name of Three Creeks Ranch of Wyoming, LLC, and signed by Reid Rosenthal was filed with the Department on October 13, 2000.

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. The past use of the water being changed is irrigation between April 20 and October 19 at 4.0 cubic feet per second (cfs) and irrigation between May 1 to July 14 at 2.25 cfs on 202 acres in Section 10, Township 4 South, Range 5 West, Madison County, Montana. These flow rates have not been measured by the appropriator, but have been used by the Applicant and predecessors for some time using the existing headgate and ditch. (Department file, testimony of Dan Pence, Reid Rosenthal)

4. Applicant seeks to change the purpose of 4.0 cfs between April 20 and October 19 and 2.25 cfs between May 1 to July 14 up to 51.9 acre-feet from irrigation to fish, wildlife, and stock; to change a portion of the place of use to proposed pond area, and add storage in the 5.7 acre-foot pond which is located in the SW¼NE¼SE¼, in Section 10, Township 4 South, Range 5 West, Madison County, Montana. Applicant will remove 20.76 acres from irrigation in the SW¼NE¼SE¼ and in the

NW¼NE¼ all in Section 10, Township 4 South, Range 5 West, Madison County, Montana.

5. There is no evidence suggesting the historical use of the existing right is other than as indicated in the decree by the Montana Water Court. (Testimony of Dan Pence, Reid Rosenthal)

Adverse Effect

6. Applicant does not intend to change the historical operation of the headgate used to divert water under this proposal. (Department file, testimony of Dan Pence, Reid Rosenthal)

7. The historical means of diversion and conveyance to the proposed use are not intended to be modified or changed under the proposal. Applicant intends to add storage to the existing Marsh Ditch by widening it to 0.76 acres and deepening it to 12 feet. Any leakage at the diversion headgate will continue to flow down Nugget Creek. (Department file, testimony of Reid Rosenthal)

8. Objector Neal's water use is downstream of Applicant's point of diversion on Nugget Creek and is for irrigation of one-quarter acre.

9. Nugget Creek at Objector Neal's point of diversion has not dried up in thirty-seven (37) years; however, it almost dried up in the fall of 2001. (Testimony of Ernestine Neal)

10. Objector has no water right for fish and wildlife, but is concerned that the proposed change will use more water and will diminish flows in Nugget Creek for area fish and wildlife. (Testimony of Ernestine Neal)

11. The high sediment load Objector Neal saw in Nugget Creek came from road construction and not from upstream irrigation. (Testimony of Ernestine Neal)

12. Applicant calculated the volume of the proposed pond at 5.7 acre-feet and annual pond evaporation at 1.9 acre-feet. In one place two (2) acre-feet of pond evaporation was used to estimate total volume of 7.7 acre-feet to fill it and account for evaporation. Testimony at hearing was the pond volume is 7.7 acre-feet and evaporation expected is 1.9 acre-feet or 9.6 acre-feet to fill and account for evaporation;

but, the application clearly states the fill volume is 5.7 acre-feet. Thus, the potential annual volume to fill and account for evaporation in the pond is 7.6 acre-feet. (Department file, testimony of Dan Pence)

13. Applicant calculated the volume of the plant consumptive use of the historic irrigation of 20.76 acres to be 26.36 acre-feet. This is the volume available for new purposes. This amount is that required at the place of use and does not include ditch loss to get the water to the place of use. Although no one testified directly on this point, the Hearing Examiner has no reason not to believe that conveyance losses are the about the same under the proposal as they are for the historic irrigation use. Thus, there are 26.36 acre-feet available for the proposed new purpose. (Department file, testimony of Dan Pence)

14. The water available after deducting the pond fill volume and evaporation from that historically applied to irrigation of 20.76 acres is 18.76 acre-feet (26.36-7.6=18.76). (Testimony of Dan Pence)

Adequacy of Appropriation Works

15. The historic flow rate has not been measured; however, the capacity of the means of conveyance, the Marsh Ditch, has been estimated at 8.55 cubic feet per second, and has been adequate for the historic irrigation use of the Marsh Ditch. (Testimony of Dan Pence, Reid Rosenthal)

16. The proposed operation of the diversion works will not change from historic practices. (Testimony of Dan Pence, Reid Rosenthal)

17. Applicant's consultant did a feasibility study for the proposed pond site. The size of the proposed pond and ability to continue use of the Marsh Ditch for irrigation purposes was determined by this study. The study indicated the proposed pond will allow continued use of the Marsh Ditch when headgates, an overflow device, and seepage controls are a part of the final design. Seepage controls extend the ability of the pond to sustain fish during times water is not available for the pond. (Department file, testimony of Dan Pence)

18. There will be seepage from the pond sufficient to require a sealant or pond liner to prevent large losses from excessive seepage from the bottom of the pond. Although one witness said the proposed pond is in a "gumbo" area, it is not clear the witness has actually been to the pond site. Applicant and others state the pond will be in porous soils which will likely require some action to prevent excessive seepage from the pond. (Department file, testimony of Dan Pence, Reid Rosenthal, Jean Shipp, Dan Schulz)

19. The Applicant has consulted an engineer about using bentonite or a liner to prevent seepage. The engineer would need to visit the site to make a final recommendation. (Testimony of Dan Pence, Reid Rosenthal)

20. Applicant will use a siphon overflow device or headgate to put water from the pond back to the historic irrigation ditches below the pond site. (Testimony of Dan Pence)

Beneficial Use

21. Applicant intends to add a fifteen foot (15') deep, 0.76 acre storage pond in a portion of the Marsh Ditch for a fishery, 200 head of stock, and naturally occurring wildlife and waterfowl habitat. Hearing testimony is the pond will be twelve feet deep. The 15 foot depth found on the permit application "work copy" appears to be the number used to calculate the pond volume when the Department's pond volume formula is used (Surface area [.76 ac] * depth [15'] * shape factor [0.5] = 5.7 af). (Department file, testimony of Dan Pence)

22. The proposed stock use will be 200 head of stock drinking from the pond. The proposed wildlife and waterfowl use is by naturally occurring wildlife and waterfowl in the area. The proposed fishery use could be stocked fish or fish native to Nugget Creek. The pond will also make water available for fire suppression that otherwise may not exist. The volume for the collective proposed uses is 51.9 acre-feet; the volume was not broke down for the individual purposes. No volume was requested for the fire protection purpose in the application or at hearing. The Hearing Examiner notes the companion permit application

requests 3.4 acre-feet for 200 head of stock for a six month period at a flow rate of 224.4 gpm, and a volume of water for 200 head for six month's time is 1.7 acre-feet (200hd * .017 af/hd-yr * .5 yr = 1.7 acre-feet) and 1.7 acre-feet for delivery losses in the same system from the same ditch and pond. (Department file, testimony of Dan Pence [permit and change portions of the hearing])

23. Applicant states the pond use for preservation and restoration of westslope cutthroat trout from Nugget Creek will bring personal satisfaction; and, the pond will be aesthetically pleasing to the area. (Testimony of Reid Rosenthal)

24. Applicant has not obtained a Department of Fish, Wildlife and Parks fish pond stocking permit. Applicant believes such permit is not issued until after construction of the pond. (Testimony of Dan Pence, Reid Rosenthal)

25. Applicant has no association or affiliation with a governmental entity with the legal duty to protect natural fish or wildlife resources in the area. Montana Department of Fish, Wildlife and Parks, and the United States Fish and Wildlife Service were contacted by Applicant and found there was no interest in connecting Nugget Creek and Wisconsin Creek. It is not clear if the connection mentioned is through the Marsh Ditch, or in the natural channels of Nugget Creek and Wisconsin Creek. (Testimony of Dan Pence)

26. Applicant believes the time allowed to physically make an authorized change can be used to design a project. In other words this time can be used to determine what the pond will need as far as design requirements and type of fish it will support. Objector suggests that such information is required prior to any authorization to change, or actual construction of a pond. (Testimony of Dan Pence, Reid Rosenthal, Scott Payne, Randy Huffsmith)

27. Applicant's managing member has constructed nine ponds in this area that have sustained fish. Based on this experience, the pond proposed here will likely support fish. However, the pond must be constructed first, then designed to prevent seepage and create the

habitat, and then determine if the site will support fish. Additional experience is that turnover of the pond volume every seven (7) days will keep fish alive. In the event the required turnover rate is not available, the pond will lose some depth and will need an aerator to keep the fish alive. The seven day turnover rate is not mentioned or justified elsewhere in the record. Applicant has not created a hydrograph of flows available in the Marsh Ditch for the fishery use. Applicant stated that if there is not full season flow to the pond, it will lose some depth and will need an aerator to keep the fish alive. Applicant's design technique appears to be a 'trial and error' approach. (Testimony of Reid Rosenthal, Dan Pence)

28. In the event water is not available to provide the fishery with oxygen, temperature control, and a food supply, applicant will determine then if an aerating device and artificial food source can supply the fishery needs. Applicant does not know the amount of water needed for the proposed fishery use. (Department file, testimony of Dan Pence)

Possessory Interest

29. Applicant owns the property where the water is to be put to beneficial use. (Department file, testimony of Reid Rosenthal)

Water Quality Issues

30. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permitholder to satisfy effluent limitations of his permit

Basin Closure

31. This application lies within the Madison River basin closure and the Upper Missouri River basin closure areas. (Department file)

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

CONCLUSIONS OF LAW: CHANGE APPLICATION 41C-19391600

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.

2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence 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 of developments for which a permit or certificate has been issued be issued; except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402 (2) (a) through (g).

3. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses of developments for which a permit or certificate has been issued when less than 26.36 acre-feet are changed to new purposes. Applicant would

have the Hearing Examiner accept the Water Court decree as proof of the historic right, however, actual beneficial use is the basis, the measure and the limit of all rights. See McDonald v. State, 220 Mont. 519, 530, 722 P2d 598, 605 (1986). Here there is brief testimony of historical use and none to the contrary. Mont. Code Ann. § 85-2-402 (2)(a). See Finding of Fact Nos. 5, 6, 7, 11, 12, 13, 14.

4. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Typically preliminary design plans and specifications for the facilities proposed for use to divert, convey, and beneficially use the water are required. Occasionally a written narrative describing the construction and operation of the diversion works from the point of diversion to the place of use is accepted. The extent of information needed varies based upon project complexity. Here there is little in the way of preliminary design plans and specifications. Objector's professional consultants would have provided more in the way of preliminary design and specifications had this been their client. This project is not complex; simply stated, it creates a wide spot in an existing ditch. Applicant had a professional knowledgeable in ponds study the feasibility of this project. A licensed professional engineer knowledgeable in pond construction was contacted by telephone and will design the pond. A changed water right is not required to be nonconsumptive in closed basins. Here Applicant's pond consultant has stated the pond must be designed so water needed by the proposed fishery does not leak out of the pond. In addition, excessive seepage may take so much water existing appropriators could be adversely affected, or water is wasted. Excessive leakage or seepage must be prevented to be considered adequate and assure existing appropriators are not adversely affected and water is not wasted. A project changing an existing water right that is designed by a licensed engineer as described above meets the adequate means of diversion criteria in this instance. Mont. Code Ann. §§ 85-2-341, 342, 343, 402(2)(b). See Finding of Fact Nos. 15, 16, 17, 18, 19, 20, 31.

5. The Applicant has not proven by a preponderance of evidence that the flow rate and volume of water proposed to be used for the fishery or wildlife uses is the amount reasonably necessary (*See In The Matter of* Application for Permit 76H-106450, et seq., by Siebel, Final Order, (2002)) for the proposed beneficial use. The Applicant has not provided evidence to establish the amount of water reasonably necessary to be changed to the proposed purposes and the need for that amount of water to sustain a defined fishery, wildlife or waterfowl population. Applicant has the burden to produce a preponderance of evidence on a criterion even if the Department doesn't request it. If an application is correct and complete enough to notice, it does not mean there is adequate evidence to issue an authorization to change. In this case, Applicant relied in part on the Regional Office's Criteria Assessment to conclude there was adequate information for an authorization to issue. In addition, the Department has no guidelines on a way to compute the amount of water necessary for a fishery, wildlife, or waterfowl use. The Department's former 'Administrative Policy No. 20, and the draft "Pond Guidelines" were rescinded by the Water Rights Bureau Chief April 16, 2002. These former policies were replaced with the requirement that "the applicant must justify the need for the flow rate and volume of water requested for the proposed purpose in proving by a preponderance of evidence the Section 85-2-311 or Section 85-2-402 criteria." Here, Applicant has not justified the flow rate and volume reasonably necessary for the proposed fishery, wildlife, and waterfowl uses. Applicant offers that the pond must be constructed before the proof is available to show what is needed. Mont. Code Ann. § 85-2-402 (2)(c). See Finding of Fact Nos. 23, 26, 28, Conclusion of Law No. 10 below, and Memorandum.

6. The Applicant has proven by a preponderance of evidence that the flow rate and volume of water proposed to be used for the stock use is the amount reasonably necessary for the proposed beneficial use. The Applicant did not request an amount of water to be associated with the stock use by 200 head in the change application. The 3.4 acre-feet

ferreted out by the Hearing Examiner is less than the volume proposed for change in the public notice and is less than the amount available for a change in purpose. However, only 1.7 acre-feet is actually required at the pond site for consumptive use by stock, not the 5.7 acre-feet volume of the pond. Applicant believes 5.7 acre-feet are beneficial, yet, only 1.7 acre-feet have any proof on that point. Applicant believes water storage in a basin and ponds in general are aesthetically pleasing and beneficial to the whole basin, and is willing to remove sufficient acreage from irrigation to fill the pond and replace evaporation from the pond so other appropriators are not affected. Mont. Code Ann. § 85-2-402 (2)(c). See Permit Finding of Fact Nos. 17, 18, Change Findings of Fact Nos. 13, 14, 15, 23, 24 and Memorandum.

7. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402 (2)(c). See, Finding of Fact No. 29.

8. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. §§ 85-2-402 (2)(f), (g). See, Finding of Fact No. 30.

9. The Madison River basin and Upper Missouri River basin closures both apply to applications for water use permits in this area. The closures do not prohibit the Department from processing applications for changes of appropriation rights within the closed area for uses that are not exempt from the closure. Mont. Code Ann. §§ 85-2-341, 342, 343. See, Finding of Fact No. 31

10. The Department may approve an authorization subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of an authorization to change. The Applicant suggests many of the design specifics can be determined during the time the Department allows for construction of the project.

However, quantifying how much water is needed for a proposed beneficial use is required prior to authorization, or conditions must be offered which show the criteria are satisfied. Here, the Applicant has provided no term or condition that would satisfy the burden of establishing the beneficial use for the fishery and wildlife requested. Mont. Code Ann. § 85-2-408 (8).

11. The Department cannot grant an authorization to change an appropriation right unless the Applicant proves all of the §§ 85-2-402 (a-e) criteria by a preponderance of the evidence. Since Applicant has not proven all beneficial uses requested to which Applicant can put the water to use by a preponderance of the evidence, an authorization may not be granted as requested. However, there are conditions and limitations which can satisfy, the criteria for issuance of a limited authorization to change an appropriation water right. See Findings of Fact Nos. 19, 20, 22. Mont. Code Ann. § 85-2-402 (8).

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

PROPOSED ORDER: CHANGE APPLICATION 41C-19391600

Subject to the terms, conditions, restrictions, and limitations specified below, Application to Change Appropriation Water Right 41C-19391600 is hereby **GRANTED IN PART** to Three Creeks Ranch of Wyoming, LLC, to change water right Claim Nos. 41C-19391600 and 41C-19391900.

Applicant is authorized to change the purpose of 4.0 cfs between April 20 and October 19 and 2.25 cfs between May 1 to July 14 up to 3.4 acre-feet from irrigation to stock; to change a portion of the place of use to, and add storage in, the 5.7 acre-foot pond located in the SW¼NE¼SE¼, in Section 10, Township 4 South, Range 5 West, Madison County, Montana.

B. This authorization is limited to the amount of the historic use recognized by the department in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is

reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

C. Applicant will remove 20.76 acres from irrigation in the SW¼NE¼SE¼ and in the NW¼NE¼ all in Section 10, Township 4 South, Range 5 West, Madison County, Montana.

D. The storage pond must be designed by a licensed engineer knowledgeable in such matters to prevent seepage from the pond.

E. The operation of the point of diversion headgate must not be altered from historic practice except changes which diminish the burden on the source at the headgate.

MEMORANDUM: CHANGE APPLICATION 41C-19391600

In this application, the pond water is coming from an existing right, which carries the right to call the source according to its priority date. If a change in purpose is authorized, the priority of the changed purpose carries the same protection. If the ditch is widened to create a pond, and 'protection' or right to call the source is desired, the pond use must be beneficial. Widening the ditch to the extent that it can be called 'storage' requires application to change the existing right (by adding storage to an existing appropriation). To add storage Applicant must show prior appropriators are not adversely affected by the addition of storage. In a closed basin this is a difficult burden without make-up water from an outside source or removing some acreage from irrigation. When changing the purpose of an existing appropriation, the showing that the changed use is beneficial has the same proof requirements as any new appropriation. That includes showing the amount requested is the reasonable amount necessary for the proposed use without waste. Without this showing, the changed purpose cannot be granted.

The Hearing Examiner can find no requirement for a water use permit to widen a portion of a conveyance ditch thereby creating a pond within the ditch. However, the appropriator would not be able to

increase the amount of water diverted (flow rate, volume, or length of time water is diverted) to protect whatever purpose the pond serves.

In a closed basin the appropriator would need to make-up water for losses to evaporation and seepage from any ditch widening so the source is not burdened by the creation of the pond. This make-up water could come from land removed from irrigation or a source exempt from the closure such as groundwater.

Applicant has the burden to produce a preponderance of evidence on a criterion even if the Department doesn't request it. If an application is correct and complete enough to notice, or, the regional office's preliminary criteria assessment does not indicate a shortfall in the evidence provided, it does not mean there is adequate evidence to issue an authorization. In this case, applicant suggested the Regional Office's *Criteria Assessment* was an indication that there is information for an authorization to issue.

The Hearing Examiner realizes that in consolidating the hearings for the two applications the evidence in one section does not apply to the other section unless a reference is made. The Hearing Examiner believes it would be a waste of Department staff and Parties' resources to deny the stock portion of the change application when the flow rate and volume information needed to make a decision lies in the permit portion of the record. Because the amounts are less than what was in the public notice of the change application, no prejudice to the Objector and area water users should occur.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by September 30, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by October 21, 2002 , or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 6th day of September, 2002.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below by first class United States Mail on this 9th day of September, 2002.

THREE CREEKS RANCH OF WYOMING
LLC
%RANCHES OF THE WEST
PO BOX 710
SHERIDAN MT 59749-0710
c/o DONEY, CROWLEY,
BLOOMQUIST & UDA, P.C.
JOHN BLOOMQUIST
ATTORNEY AT LAW
PO BOX 1418
DILLON MT 59725

ERNESTINE H. NEAL
285 WISCONSIN CREEK ROAD
SHERIDAN MT 59749
c/o DAVIS, WARREN & HRITSCO
WILLIAM A. HRITSCO
ATTORNEY AT LAW
122 E. GLENDALE
P.O. BOX 28
DILLON MT 59725

THREE CREEKS WATER COMPANY
PO BOX 691
SHERIDAN MT 59749
c/o W.G. GILBERT, III
ATTORNEY AT LAW
15 SOUTH IDAHO STREET
PO BOX 345
DILLON, MT 59725-0345

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
PO BOX 201601
HELENA MT 59620-1601

SCOTT COMPTON, MANAGER
PORTER DASSENKO, WRS
BOZEMAN REGIONAL OFFICE
151 EVERGREEN DR, SUITE C
BOZEMAN MT 59715

Jill Wilkinson
Hearings Unit
406-444-6615