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

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IN THE MATTER OF APPLICATION)
TO CHANGE NO. 43A-30004089 TO)
CHANGE WATER RIGHT CLAIM NO.) FINAL ORDER
43A-057182 BY JAMIE A. LANNEN)

Pursuant to its authority under §§2-4-601 et seq., 85-2-310, 85-2-402, 85-2-408, MCA (references to MCA throughout this document are to 2007 statutes and Mont. Admin. R. 36.12.201 et. seq, and 36.12.501 et seq., and upon the request of Applicant Jamie A. Lannen, (Applicant) the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on October 29, 2009, to allow Applicant to show cause why the Application should not be denied under the terms of the Statement of Opinion (SOP) dated August 5, 2009.

The record was left open until December 3, 2009, to allow the Applicant to provide additional evidence in support of the Application. On December 3, 2009, Applicant's attorney, Marjorie Black filed a Motion for Extension of the Deadline to File Supporting documentation. Motion was granted until December 17, 2009, to allow additional evidence. This Final Order must be read in conjunction with the Statement of Opinion in this matter dated August 5, 2009.

APPEARANCES

Applicant Jamie A. Lannen appeared at the hearing by and through counsel, Marjorie Black.

EXHIBITS

Applicant offered three exhibits, A1 – A3, for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-A3. The following is a list of those exhibits:

A1: Reduced animal units (AUs) from 300 to 175. (Applicable to Change Application No. 30004089)

A2: Pictures taken by the Applicant of the riparian lands around the creek, new stock watering systems, and other improvements made to the property. Applicable to Permit Application No. 30004087 and Change Application No. 30004089)

1 **A3:** Chart with 2008 flow measurements taken with multiple flumes located on the creek.
2 (Applicable to Permit Application No. 30004087)

3
4 **GENERAL APPLICATION DETAILS**

5 The Change Application was submitted to change the place of use of year-round stock
6 drinking instream from East Fork Spring Creek and the purpose and place of use of year-
7 round ground water diverted by a spring box and used for domestic purposes. The Applicant
8 proposes to remove cattle from drinking direct from the stream to help protect the riparian
9 area in high impact spots, such as at the corral and calving locations, by adding 6
10 Henderson Stock Waterers (waterers) and adding water gaps at 2 reservoirs. The
11 Application was originally submitted to add 16' water tanks, however at the SC hearing, the
12 Applicant explained that the project would be changed to the 6 waterers. Also, the Applicant
13 proposes to eliminate the domestic use and change the purpose to stock water.

14
15 At the Show Cause Hearing (SC hearing) the Applicant reduced the AUs to a total of 175.
16 140 AUs will use water from 12/10 - 7/10 (214 days) and 35 AUs from 7/11 - 12/9 (152 days)
17 each year. (See Exhibit A) One AU uses .017 AF/year or .0000464 AF per day. (ARM
18 36.12.115)

- 19 • Applicant's Exhibit A shows that 140 AUs will use 2.38 AF from 12/10 - 7/10.
20 140 AUs will only use 1.39 AF during that period.
21 (140 AUs x 214 days x .0000464 AF/day = 1.39 AF/214 days)
- 22 • Applicant's exhibit shows that 35 AUs will use .60 AF from 7/11 - 12/9.
23 35 AUs will only use .25 AF from 7/11 – 12/9.
24 (35 AUs x 152 days x .0000464 AF/day = .25 AF/152 days).

25

Animal Units	Period of Use	Days	Applicant Figures	DNRC Figures
140	12/10 – 7/10	214	2.38 AF	1.39 AF
35	7/11 – 12/9	152	.60 AF	.25 AF

26
27 Water will be diverted into the waterers using a 24-inch diameter culvert set on end near the
28 upper reservoir. Water will be gravity fed at 15 GPM through a 2" pipeline to fill the 6 stock
29 waterers. Each waterer will have a float that controls the water level in the pan that allows
30 water to enter the pan when consumption by livestock lowers the water level.

1 The Department SOP found the Applicant has proven the Adequacy of the Diversion Works,
2 Beneficial Use, and Possessory Interest criteria. This is not a change for salvage water.
3 The Applicant was not required to prove the Water Quality criteria, because no valid
4 objections were received to Water Quality.

5
6 The SOP reflects that the Applicant did not prove the Historic Use or Adverse Effect change
7 criteria. These criteria were considered in the hearing held October 29, 2009, and the post-
8 hearing submissions.

9
10 The following documents were received by December 17, 2009, the date on which the
11 record was closed:

- 12 • Affidavit of Jamie A. Lannen signed by Jamie A. Lannen and dated November 30,
13 2009.
- 14 • Motion for Extension of Deadline to File Supporting Documentation dated December
15 3, 2009. The motion was signed by Marjorie Black, attorney for Applicant.
- 16 • Affidavit of Charles James Henderson signed by Charles J. Henderson and dated
17 December 17, 2009.
- 18 • Email from Jamie Lannen dated December 21, 2010 with subject stated as “stocking
19 rate and waterer questions”. Email states, “For the past forty years we have been
20 able to run around 120 aums on the property with the help of leasing of summer
21 pasture.”

22
23 By narrowing the reservoir access and installing the waterers it will reduce pond/stream
24 bank and vegetation degradation, improve the stream channel and riparian areas, improve
25 water quality and will facilitate better use of pasture areas.

26
27 Based on the evidence presented at the Show Cause Hearing and the close of the records,
28 the following findings and conclusions of law are rendered.

29
30 **Statement of Opinion Finding-Historical Use**

31 *The Applicant has not proven that the amount of water being changed for each water right*
32 *will not exceed or increase the flow rate historically diverted under the historic use, nor*
33 *exceed or increase the historic volume consumptively used under the existing use.*
34

1 **APPLICANT ARGUMENT**

2 (a.) The Applicant amended the original change application to include losses from
3 reservoir and waterer evaporation.

4 (b.) The Applicant is proposing to reduce the animal units (AUs) from 300 AUs that
5 consumed 4.55 AF/YR to 175 AUs that will consume 2.98 AF/YR. The Applicant states that
6 300 AUs was inflated based on the actual stocking rate of the property. This reduction in
7 AUs and stocking rate was determined by conducting a Range Land EKG (historical use,
8 range monitoring and forage production) to determine range land health over a five year
9 period. The EKG was completed by the Applicant who is student of agriculture production at
10 MSU and by Charlie Orchard who works for the NRCS.

11 (c.) The chart below reflects the Applicant’s determination of historic and proposed
12 consumed use.

13 **Table 1 - Applicant**

VOLUME ITEM	FULL YEAR (ac-ft/yr)	Dec 10 - Jul 10 (ac-ft)	July 11 - Dec 9 (ac-ft)
<i>HISTORIC WATER USE</i> <i>As shown on the Exempt Right Addendum (608B)</i>			
Stock - 76 head, year round – includes 1 horse	1.26	0.74	0.52
Stock - 335 head, 12/10 - 7/10	3.29	3.29	0
Domestic	1.00	0.58	0.42
TOTAL HISTORIC USE	5.55	4.61	0.94
<i>WATER USE</i> <i>Original Application</i>			
Stock – 300 head, year round	5.10	2.98	2.12
Evaporation	2.19	1.21	.98
TOTAL AS APPLIED FOR	7.29	4.19	3.10
<i>AMENDED WATER USE</i>			
Stock - 175 head, year round	2.98	2.38	.60
Evaporation – From surface of ponds	2.19	1.21	0.98
Evaporation from Waterers	.32		
TOTAL AMENDED	5.49	3.59	1.58

14
15 (d.) By designating pond access and installing the Waterers it reduces pond/stream bank
16 and vegetation degradation, improves stream channel and riparian areas, improves water
17 quality and will facilitate better use of pasture areas.

1
2 **FINDINGS OF FACT**

3 1. The Applicant determined the total surface evaporation from the ponds equals 2.19
4 AF and .32 AF from the Henderson Waterers.

5 2. The Applicant stated in his affidavit the following: "When the application was filed we
6 used a calculation of 300 head of cattle to consume 5.10 af/year. This calculation was
7 inflated from the actual stocking rate of the property, but was under the historic use.

8 However, since the calculation of evaporative has been added on the ponds it put us over
9 the historical rate. We have since recalculated the stocking rate to put us under the historic
10 use. The property will not sustain more than 175aums a year with proper management."

11 The Applicant appears to be saying that the historic use of the property could only support
12 175 AUs. Therefore, the historical use of 335 AUs would not be accurate.

13 3. The Applicant states that the property will not sustain more than 175 AUs, therefore
14 the historic use of the property would not be 335 AUs.

15 4. It is unknown if 175 AUs or 335 AUs were historically run on the property.
16 Additionally, an email received after the hearing states that 120 AUs have been run on the
17 property, which further confuses the number of AUs that were historically watered.

18
19 **CONCLUSIONS OF LAW:** The Applicant seeks to change an existing water right. The
20 "existing water rights" in this case are those as they existed prior to July 1, 1973, because
21 no changes could have been made to those rights after that date without the Department's
22 approval. §85-2-402(1), MCA; *Royston, supra*; cf. *General Agriculture Corp. v. Moore*
23 *(1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection)*. Thus, the focus in a
24 change proceeding is what those rights looked like and how they were exercised prior to
25 July 1, 1973. *E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833*
26 *P.2d 1120*. An applicant can change only that to which it has a perfected right. *E.g.,*
27 *McDonald, supra*; see also *In re Application for Water Rights in Rio Grande County 53 P.3d*
28 *1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic*
29 *use, may be injurious to other rights, it also simply does not constitute a permissible*
30 *"change" of an existing right)*.

31
32 In the present case there is no Statement of Claim filing. The Applicant instead claims an
33 exempt 1888, water right (exempt from the claim filing requirements of the adjudication).

1 Exempt water rights are a class of water rights that existed prior to July 1, 1973, and did not
2 have to be claimed during the filing period (ending April 30, 1982, and extended once to July
3 1, 1996), for the general water rights adjudication. Only stock watering and individual
4 domestic uses based upon instream flow or ground water sources were exempt from the
5 filing requirements of the adjudication. They could, however be voluntarily filed. § 85-2-222,
6 MCA. Developed springs are considered ground water. § 85-2-102(11), MCA, defines
7 "Developed spring" as meaning "any artificial opening or excavation in the ground, however
8 made, including any physical alteration at the point of discharge regardless of whether it
9 results in any increase in the yield of ground water, from which ground water is sought or
10 can be obtained or through which it flows under natural pressures or is artificially withdrawn."
11 Exempt rights not claimed in the adjudication can still be determined by courts to be valid
12 water rights, although the process and which court would make that determination is not
13 clear at this time.

14
15 In this case the exempt rights were not voluntarily claimed in the adjudication, but the
16 claimant filed a Notice of Water Right (DNRC Form 627, no longer used) with the
17 Department. The form simply put on record with the Department information about a
18 possible pre-July 1, 1973, water use. The Form 627 does not in and of itself prove the
19 existence of a historic exempt water right. The burden of proof of the existence and extent
20 of the historical exempt water right remains with the owner.

21
22 The Department in a change proceeding does not adjudicate the water rights claimed (only
23 a court can do that), but the Department will not grant a change unless the historic use of
24 the water rights and historic consumptive use are proven to the Department for the purposes
25 of the change proceeding. The grant or denial of an application for a change does not
26 determine the existence or nonexistence of vested rights in others, U.S. v. District Court of
27 Fourth Judicial Dist. in and for Utah County (1951), 121 Utah 1, 238 P.2d 1132, so that a
28 grant of permission for the change does not adjudicate priority rights but merely permits the
29 applicant to make the requested change as long as he does not interfere with the prior rights
30 of others. Whitmore v. Murray City (1944), 107 Utah 445, 154 P.2d 748. Any change
31 authorization, if granted, would be subject to and could not exceed any amount determined
32 by a court of competent jurisdiction.

1 Department administrative rulings have held that a water right in a change proceeding is
2 defined by actual beneficial use, not the amount claimed or even decreed. *In the Matter of*
3 *Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer,*
4 *December 13, 1991, Final Order ; In the Matter of Application for Change Authorization*
5 *No.G (W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.* A key element of an
6 evaluation of adverse effect to other appropriators is the determination of historic
7 consumptive use of water.

8
9 Consumptive use of water may not increase when an existing water right is changed. (*In*
10 *the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II*
11 *And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a*
12 *Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision*
13 *(2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision);*
14 *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co,*
15 *LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of*
16 *law in proposal for decision).*

17
18 In a change proceeding, the *consumptive* use of the historical right has to be determined:

19 In a reallocation [change] proceeding, both the actual historic consumptive use
20 and the expected consumptive use resulting from the reallocation [change] are
21 estimated. Engineers usually make these estimates. With respect to a reallocation
22 [change], the engineer conducts an investigation to determine the historic diversions and
23 the historic consumptive use of the water subject to reallocation [change]. This
24 investigation involves an examination of historic use over a period that may range from
25 10 years to several decades, depending on the value of the water right being reallocated
26 [changed].

27

28 When reallocating [changing] an irrigation water right, the quantity and timing of
29 historic consumptive use must be determined in light of the crops that were irrigated, the
30 relative priority of the right, and the amount of natural rainfall available to and consumed
31 by the growing crop.

32 Expected consumptive use after a reallocation [change] may not exceed historic
33 *consumptive* use if, as would typically be the case, other appropriators would be
34 harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow
35 of reallocated [changed] water is decreased so that actual historic consumptive use is
36 not increased.

37
38 The Applicant has not proven by a preponderance of the evidence the historic use of the
39 water right to be changed, in particular, the historic use of the number of stock (AUs) that

1 drank water from the UT, East Fork Spring Creek.

2
3 **Statement of Opinion Finding-Adverse Effect**

4 *The evaporation from the stock tanks is not taken into consideration. Although not outlined*
5 *in the change application, there would be 2.19 ac-ft/yr of evaporation from the surface of the*
6 *two reservoirs. Even though the Applicant states there will be no adverse effect there is no*
7 *supporting calculations or discussion to support the Applicant's conclusion.*
8

9 **APPLICANT ARGUMENT**

10 (a.) Waterers will evaporate less water than 16' stock tanks proposed in the original
11 change application.

12 (b.) Historical use claimed on the property is 1 household (1 af) and up to 335 cattle
13 (4.55 af). Original application was filed to water 300 cattle (5.1 af/year). When the
14 application was filed we used a calculation of 300 head of cattle to consume 5.10 af/year.
15 This calculation was inflated from the actual stocking rate of the property, but was under the
16 historic use. However, since the calculation of evaporative loss has been added on the
17 ponds it put us over the historical rate. We have since recalculated the stocking rate to put
18 us under the historic use. The property will not sustain more than 175 aums a year with
19 proper management.

20 (c.) The Applicant will eliminate the spring box that was used for domestic purposes at
21 30 gpm up to 1 AF.

22 (d.) The stock will drink from 2 water gaps, one at each pond and from the 6 Waterers.
23 The Waterers hold about 15 gallons of water and have minimal evaporative loss because
24 they are mostly covered. The Waterers are designed to resist freezing. A thermostat in the
25 Waterer allows water to flow into the pan when the temperature of the water drops below 34
26 degrees. Only a small amount of water is lost when the temperature drops below 34
27 degrees Fahrenheit and water is circulating in the pan. This amounts to approximately 20
28 gallons in a twenty-four hour period. The water that is not consumed by the animals leaves
29 the Waterer through a drain and seeps into the ground through a 6' to 8' length of perforated
30 pipe.

31
32 **FINDINGS OF FACT**

33 1. The domestic water will no longer be used. The water used in the house is

1 considered 100% consumed because, any unconsumed domestic water would return to
 2 ground water. Had the water not been diverted via a spring box for domestic use, the spring
 3 water would have flowed into the UT, East Fork Spring Creek.

4 2. An Affidavit from Charles James Henderson, the designer of the Henderson
 5 Waterers, supports the efficiency of the Waterers.

6 3. The Applicant's affidavit in the matter of No. 43A-30004089explains that 140
 7 AUs will drink from Dec 10 - July 10 and 35 AUs from July 11 - Dec 9. Applicant's exhibit
 8 does not reflect accurate calculations. Applicant did not identify what portion of the .32 AF
 9 evaporation would occur from Dec 10 – Jul 10 (56.3 %) or July 11 - Dec 9 (43.8 %). For the
 10 purposes of this Order, the Department used the same percentage allocated to each period.
 11 Therefore, .18 AF evaporates from Dec 10 – Jul 10 and .14 AF evaporates from July 11 –
 12 Dec 9 from the Waterers. Using AUs and period of use from Exhibit A, and using .017
 13 AF/year or .0000464 AF per day per AU (See ARM 36.12.115), the following is found.

14 **Table 2 - Department**

Animal Units – Historic Use	Period of Use	Days	Applicant Exhibit - AF	DNRC Determination - AF
140	12/10 – 7/10	214	2.38	1.40 AF
35	7/11 – 12/9	152	.60	.25 AF
Evaporation				
Ponds	12/10 – 7/10	214	1.21	1.21
	7/11 – 12/9	152	.98	.98
Waterers	12/10 – 7/10	214	Not Determined	.18
	7/11 – 12/9	152	Not Determined	.14
Stock Water Consumption	12/10 – 7/10	214	3.59	2.79
	7/11 – 12/9	152	1.58	1.37
Domestic Addition	12/10 – 7/10	214	.58	.58
	7/11 – 12/9	152	.42	.42
Total Consumption Equals Stock Water Consumption minus Domestic Addition				
	12/10 – 7/10	214		2.21
	7/11 – 12/9	152		.95

15
 16 4. If actual historic use is 175 AUs, the Applicant will exceed historic use by 1.51 AF.
 17 Total annual historic consumptive use (1.40+.25+1 = 2.65) minus proposed annual
 18 consumptive use (2.79+1.37=4.16) equals 1.51 AF greater annual consumptive use.

19
 20 **CONCLUSIONS OF LAW:** The Applicant bears the affirmative burden of proving that
 21 proposed change in appropriation right will not adversely affect the use of the existing water

1 rights of other persons or other perfected or planned uses or developments for which a
2 permit or certificate has been issued or for which a state water reservation. §85-2-402(2)(a),
3 MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the*
4 *Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.,*
5 *Proposal for Decision, adopted by DNRC Final Order (2005).*

6
7 Prior to the enactment of the Water Use Act in 1973, the law was the same in that an
8 adverse effect to another appropriator was not allowed. *Holmstrom Land Co., Inc., v.*
9 *Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied,*
10 *(1980), 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575,*
11 *129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not*
12 *change his diversion to a point upstream of the defendants because of the injury resulting to*
13 *the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (appropriator*
14 *was entitled to move his point of diversion downstream, so long as he installed measuring*
15 *devices to ensure that he took no more than would have been available at his original point*
16 *of diversion); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator*
17 *of water appropriated for placer mining purposes cannot so change its use as to deprive*
18 *lower appropriators of their rights, already acquired, in the use of it for irrigating purposes);*
19 *Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right*
20 *for placer mining purposes the water was turned into a gulch, whereupon the plaintiff*
21 *appropriated it for irrigation purposes; the defendant then changed the place of use of his*
22 *water right, resulting in the water no longer being returned to the gulch - such change in use*
23 *was unlawful because it absolutely deprived the plaintiff of his subsequent right).*

24
25 The cornerstone of an evaluation of adverse effect to other appropriators is the
26 determination of historic use of water. One cannot determine whether there is adverse
27 effect to another appropriator until one knows what the historic water right is to be changed.
28 It is a fundamental part of Montana and western water law that the extent of a water right is
29 determined by reference to the historic beneficial use of the water right. *McDonald;*
30 *Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).* The
31 Colorado Supreme Court has repeatedly addressed this same issue of historic use and
32 adverse effect. E.g., *Application for Water Rights in Rio Grande County, 53 P.3d 1165,*
33 *1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d*

1 46, 55 -57 (Colo., 1999); *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217, 1223
2 (Colo. 1988). The Colorado Supreme Court has consistently explained:

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

7
8 ... it is inherent in the notion of a “change” of water right that the property right itself can
9 only be changed and not enlarged. (citation omitted). The appropriator of native water
10 may not enlarge an appropriation without establishing all of the elements of an
11 independent appropriation, which will necessarily have a later priority date (citation
12 omitted) ...

13
14 ... diversions are implicitly limited in quantity by historic use at the original decreed point
15 of diversion...

16
17 ...we have explained this limitation by noting that “over an extended period of time a
18 pattern of historic diversions and use under the decreed right at its place of use will
19 mature and become the measure of the water right for change purposes.” (citation
20 omitted). The right to change a point of diversion is therefore limited in quantity by the
21 historic use at the original point of diversion. (citations omitted) “Thus, a senior
22 appropriator cannot enlarge the historical use of a water right by changing the point of
23 diversion and then diverting from the new location the full amount of water decreed to
24 the original point of diversion, even though the historical use at the original point of
25 diversion might have been less than the decreed rate of diversion.”

26
27 FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

28 *Application for Water Rights in Rio Grande County*, 53 P.3d at 1169-1170.

29
30 Consumptive use of water may not increase when an existing water right is changed. *E.g.*,
31 *In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II*
32 *And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change*
33 *a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (DNRC*
34 *Final Order 2003)*. Applicant must provide evidence of historical amount consumed and the
35 amount to be consumed under the proposed change. *In the Matter of the Application of*
36 *Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No.*
37 *41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC Proposal for Decision 2003),
38 *application subsequently withdrawn*); *In The Matter of Application To Change A Water Right*
39 *No. 43B 30002710 By USA (Dept. Of Agriculture – Forest Service) (DNRC Final Order*
40 *2005)*; *In The Matter of Application No. 76H-30009407 To Change Water Right Nos. 76H-*

1 108772 And 76H-1-8773 by North Corporation (DNRC Final Order 2008).

2
3 In a change proceeding, it must be emphasized that other appropriators have a vested right
4 to have the stream conditions maintained substantially as they existed at the time of their
5 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908);
6 Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins,
7 Selected Problems in the Law of Water Rights in the West 378 (1942).

8
9 It is the applicant's burden to produce the required evidence, and not doing so constitutes a
10 failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by*
11 *MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005); *East Bench*,
12 *supra*.

13
14 The Applicant has not shown why the change application should not be denied under the
15 terms specified in the Statement of Opinion issued by the Department August 10, 2009.

16
17 The Applicant has not proven that the proposed change in appropriation right will not
18 adversely affect the use of the existing water rights of other persons or other perfected or
19 planned uses or developments for which a permit or certificate has been issued or for which
20 a state water reservation has been issued. §85-2-402(2)(b), MCA

21
22 **FINAL ORDER**

23 Therefore, Application to Change No. 43A-30004089 by Jamie A. Lannen is **DENIED** for
24 the reasons specified in this Order and in the Statement of Opinion.

25
26 **NOTICE**

27 A person who has exhausted all administrative remedies available within the agency and
28 who is aggrieved by a final decision is entitled to judicial review under the Montana
29 Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial
30 review under this chapter must be filed in the appropriate district court within 30 days after
31 service of the final order. (Mont. Code Ann. § 2-4-702)

32
33 If a petition for judicial review is filed and a party to the proceeding elects to have a written

1 transcript prepared as part of the record of the administrative hearing for certification to the
2 reviewing district court, the requesting party must make arrangements for preparation and
3 payment of the written transcript. If no request for a written transcript is made, the
4 Department will transmit only a copy of the audio recording of the oral proceedings to the
5 district court.

6

7 Dated this 19th day of May 2010.

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15

/Original signed by Terry Eccles/
Terry Eccles, 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 **FINAL ORDER** was served upon all parties listed below on this 19th day of May 2010, by first-class United States mail.

MARJORIE BLACK – ATTORNEY
PO BOX 684
BOZEMAN MT 59771-0684

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615

CHANGE APPLICATION STATEMENT OF OPINION

Application No.: 30004089 43A by Jamie A. Lannen

Date: June 17, 2008

Final Decision Maker: Terry Eccles, Regional Manager

GRANT APPLICATION: The findings and conclusions show that the criteria have been met.

X DENY APPLICATION: The findings and conclusions do not show that the criteria have been met.

MODIFY APPLICATION: The findings and conclusions show the criteria have been met, however application modifications are required.

The following criteria must be met by an applicant. Complete this form if no objections were received to an application or if the objections were settled.

Application Details: Application is to change the place of use of an existing stock and domestic water right from an upper reservoir that is located where two forks of an unnamed tributary of East Fork Spring Creek join together and the location of the upper reservoir will be diverted to seven stock tanks, (size of tanks is stated to be 16-foot in diameter) and 2 on-stream reservoirs. The Applicant proposes to Change CHG 30004089 43A an exempt water right of 30 GPM up to 5.55 acre/feet. Water currently runs through three on stream ponds, with capacities of 1.0 & 8.8 acre/feet. These reservoirs will be used for stock water, fisheries and waterfowl. A flow of 15 GPM will be diverted from the upper pond into a 2" pipeline used to fill the seven off stream stock tanks. The use period is proposed to be January 1 to December 31. The Applicant also proposes to change the purpose of the domestic water use to a stock use. It is proposed that 300 head of cattle consume 5.10 ac-ft/yr.

Water will be diverted to the stock tanks via a 2 inch diameter plastic line with a control valve. The proposed use is for stock watering using a series of seven off-stream stock tanks and two on-stream reservoirs to keep the cattle from directly accessing water from the stream channel and riparian areas and facilitate better use of pasture areas. Flow rate into the pipeline will be 15 gpm and flow into the reservoirs will be 15 gpm. The reservoirs are also the subject of application for permit # 30004087 43A.

Historic Use: The applicant must prove the amount of water being changed for each water right will not exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use.

FINDINGS OF FACT: The Applicant has claimed historic use of 1 household (1.0 af) and up to 335 cattle (4.55 acre/feet) from unnamed tributary of East fork Spring Creek located in SESWNE, Sec 25, Twp 2N, Rge 9E, Park County, at a rate of 30 gpm up to a total of 5.55 acre/feet total usage since 1888. A Form 627 was filed December 23, 1963 with the Department on Water Right Number 43A-E-057182-00 confirms this priority date.

The claimed exempt right #43A-E-057182-00 was exempt from the claim filing requirements of the adjudication and was not voluntarily claimed by the owner in the adjudication, but the claimant did file with the DNRC a Notice of Water Right (DNRC Form 627, no longer used). Applicant is the grandson of the person who filed the Form 627 and has personal knowledge of the past use. A copy of a ground water filing made with the Park County Clerk and Records Office in 1963 was also submitted identifying the source and uses of the water from the springs.

It is calculated that 300 head of cattle consume 5.10 ac-ft/yr. The 1984 filing lists a diversion rate of 30 gpm, up to 1.00 acre/feet/ year for domestic use and up to 4.55 acre/feet/year for stock use. While the stock watering use is year round, the volumes associated with the periods of the year vary. For the period from December 10 to July 10, 3.29 acre/feet was consumed by livestock that were probably wintered and calved in the area of the ranch headquarters. Additionally, 0.74 of 1.26 acre/feet year round stock use occurred in that time period (1.26 acre/feet (213 days/365 =0.735 =>0.74 acre/feet)/ The remaining 0.52 acre/feet of stock use occurred from July 11 to December 9. In a similar manner, the year round, in-house, domestic use would be split 0.58 acre/feet in the December 10 to July 10 period and 0.42 acre/feet for the remainder of the year. The consumptive uses associated with the historic use are presented in the top portion of Table 1.

Although not outlined in the change application, there would be 2.19 ac-ft/yr of evaporation from the surface of the two reservoirs. The stock water consumptive use and the water lost to pond evaporation are presented in the following Table.

Historic and Planned Volumes of Water Consumed

VOLUME ITEM	FULL YEAR (ac-ft)	Dec 10 to Jul 10 (ac-ft)	July 11 to Dec 9 (ac-ft)
HISTORIC WATER USE			
Stock - 76 head, year round	1.26	0.74	0.52
Stock - 335 head, 12/10 - 7/10	3.29	3.29	
Domestic	1.00	0.58	0.42
TOTAL HISTORIC USE	5.55	4.61	0.94
PLANNED WATER USES			
Stock 300 head, year round	5.10	2.98	2.12
Evaporation	2.19	1.21	0.98
TOTAL PLANNED USE	7.29	4.19	3.10

Under the new stock water delivery system there would be a consumptive use of 7.29 acre/feet/year, (see Table 1). The consumptive use proposed for change is greater than the historic consumptive use. This does not account for any seepage through the dames which form the reservoirs.

The historical use was clearly presented as seasonal use, with the larger portion of the use in the winter and spring. The pattern of use based upon historical use was not discussed so it is not known if the proposed change conforms to the historical consumptive volume limits for each of the two historical diversion periods.

I find the historical use was seasonal use, with the larger portion of the use in the winter and spring. The pattern of use proposed by the change does not conform to the historical consumptive volume limits for each of the two historical diversion periods. Even though there is evidence that there is historical use and is demonstrated by the documents filed with the change application the proposed change exceeds the historical use therefore has **not** proven that the amount of water being changed for each water right exceeds or increases the flow rate greater than historically diverted under the historic use, and exceeds or increase the historic volume consumptively used under the existing use.

CONCLUSIONS OF LAW: In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

Montana's change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

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

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)("A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops. Carriage losses are usually added to the amount consumed by the crops."); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston (1991), 249 Mont. 425, 816 P.2d 1054 (applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980), 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063;

¹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat.

§ 41-3-104 states:

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

Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, Final Order (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order (1992).

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State (1996), 220 Mont. 519, 722 P.2d

598. As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

In the present case there is no statement of claim involved, but instead the applicant claims an exempt 1888 water right (exempt from the claim filing requirements of the adjudication). Exempt water rights are a class of water rights that existed prior to July 1, 1973, and did not have to be claimed during the filing period (ending April 30, 1982, and extended once to July 1, 1996) for the general water rights adjudication. Only stock watering and individual domestic uses based upon instream flow or ground water sources were exempt from the filing requirements of the adjudication. They could be voluntarily filed, however. § 85-2-222, MCA. Developed springs are considered ground water. § 85-2-102(11), MCA, defines "Developed spring" as meaning "any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn." Exempt rights not claimed in the adjudication can still be determined by courts to be valid water rights, although the process and the court to make that determination is not clear at this time

In this case the exempt rights were not voluntarily claimed in the adjudication, but the claimant did file with the DNRC a Notice of Water Right (DNRC Form 627, no longer used). The form with an affidavit simply attempts to put on record with the DNRC some evidence of a claim of historic water use (the law at this point is unclear on just how and in which court these exempt rights not voluntarily filed can actually be adjudicated). The Form 627 does not in and of itself prove the existence of an historic exempt water right. The burden of proof of the existence and extent of the historical exempt water right remains with the owner. The Department in a change proceeding does not actually adjudicate the water rights claimed (only a court can do that), but the Department will not grant a change unless the historic use of the water rights and historic consumptive use are proven to the agency for the purposes of the change proceeding. The grant or denial of an application for a change does not determine the existence or nonexistence of vested rights in others, U.S. v. District Court of Fourth Judicial Dist. in and for Utah County (1951), 121 Utah 1, 238 P.2d 1132, so that a grant of permission for the change does not adjudicate priority rights but merely permits the applicant to make the requested change as long as he does not interfere with the prior rights of others. Whitmore v. Murray City (1944), 107 Utah 445, 154 P.2d 748. Any change authorization, if granted, would be subject to and could not exceed any amount determined by a court of competent jurisdiction.

In the present case the applicant has **not** proven by a preponderance of the evidence the amount of water being changed for each water right will not exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use. Without adequate information on historical use, the Department cannot issue a change in appropriation water right. Proposed Decision, *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change number 41H 30000806 by Montana Golf Enterprises, LLC (November 19, 2003)* (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002) __ Colo. __, 53 P.3d 1165. It is the applicant's burden to produce this evidence of historical use, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order; *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H108772 and 76H-108773* (Final Order January 2008), by North Corporation).

Adverse Effect: The applicant must prove 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.

FINDINGS OF FACT: The system was designed by an engineer with the USDA Natural Resources Conservation Service (NRCS) out of the Big Timber office who has experience with these types of stock watering systems. The proposed use is for stock watering using a series of off-stream stock tanks and two on-stream reservoirs. The purpose is to keep the cattle from directly accessing water from the stream channel and riparian areas and facilitate better use of pasture areas. The amount being changed is based on claimed historic stocking rates and the proposed amount is within DNRC Administrative Rule standards (ARM 36.12.115). The amount was appropriately calculated based on the number of cattle to be using the watering system. The volume of use is based on 15

gallons/head/day and the flow rate of 15 gallons/minute is reasonable to supply the water to the tanks using 2 inch diameter pipe. The remainder of the flow of the existing right will continue from the unnamed creek into the reservoirs.

However, under the new stock water delivery system there would be a consumptive use of 7.29 ac-ft/yr (see the table in Historic Use) and that consumptive use proposed for change is greater than the historic consumptive use. This use also does not account for any seepage through the dams which form the reservoirs. Although it is likely there will be seepage from the channel it is unlikely that seepage would stay in the confines of the channel and alluvial gravels along the unnamed tributary of the East Fork Spring Creek. At some point downstream, the seepage maybe available to a downstream water user(s) however there is no proof or discussion in the application. The evaporation from the stock tanks is also not taken into consideration.

Even if seven large stock tanks (16-foot diameter) are used, the additional area between the reservoirs and the stock tanks would only increase by 0.03 acre/feet of evaporation. Although not outlined in the change application, there would be 2.19 ac-ft/yr of evaporation from the surface of the two reservoirs. (US Dept. of Agriculture, Soil Conservation Service, Montana Tech. Note: Environment No. 7, *Evaporation Pond Design for Agricultural Wastewater Disposal*, February 1974, Fig. 2, shows the mean annual evaporation from shallow lakes and reservoirs, near Clyde Park, to be 35 in/yr. Fig. 4, Sheet 9 of the same publication indicates that the average annual precipitation in the same area is 14 in/yr. The net reservoir evaporation would be 21 in/yr (1.75 ft/yr) [35 in/yr – 14 in/yr = 21 in/yr]. The two reservoirs have a combined surface area of 1.25 ac, resulting in a 2.19 ac-ft/yr loss of water from surface evaporation (1.75 ft/yr * 1.25 ac = 2.187 ... => 2.19 ac-ft/yr).

In review of the historic use and comparing the proposed use there will be additional burden on the source. Any water that is not consumed by stock will be returned to the source prior to any downstream users. A private agreement was made to settle an objection and includes conditions for prevention or mitigation of any adverse effects. The objector does not divert water directly from the source on the application but rather downstream of where it flows into another stream. In Table 1, it shows an increase in volume in a full year of use, historic being 5.55 acre/feet and proposed being 7.29 acre/feet. If the figure of 90% (DNRC standard for calculating return flow in domestic use) return flow from the domestic use is assumed to occur, the historical consumptive use would fall to 4.85 acre/feet.

Based upon calculations performed in a report from Jim Beck to Kerri Stasheim concerning discussing adverse effect and in review of the change application there is no evidence supporting a discussion that there will be no adverse affect. Even though the Applicant states there will be no adverse effect there is no supporting calculations or discussion to support the Applicants conclusion.

I find that in the present case the applicant has **not** proven by a preponderance of the evidence the amount of water being changed for each water right will not exceed or increase the flow rate. Based upon Department calculations and the Applicant failing to supply evidence proving no adverse effect then the Applicant has failed to meet the criteria as outline in Mont. Code Ann. § 85-2-402(2)(a)

CONCLUSIONS OF LAW: In a change proceeding, as discussed in more detail in the prior conclusion of law, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942).

¹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

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

It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005); *East Bench, supra*.

Applicant has not 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 or developments for which a permit or certificate has been issued or for which a state reservation has been issued. Mont. Code Ann. § 85-2-402(2)(a)

Adequacy Of Appropriation Works: The applicant must prove, except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

FINDINGS OF FACT: Water will be diverted the developed springs via a 24-inch diameter culvert buried on end with a control valve supplying a 2-inch diameter plastic line which distributes water to the seven tanks 16-feet in diameter. The system was designed by an NRCS engineer and was designed for rotational use and each tank can supply water for 150 cattle. This system is controllable and allows only the amount needed to be diverted. The on-stream reservoirs already exist and were in place prior to 1973 but not filed on under the general adjudication process. The reservoirs have culverts in place as spillways to allow by-pass flows.

CONCLUSIONS OF LAW: Applicant has proven that the proposed means of diversion, construction and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).

Beneficial Use: The applicant must prove the proposed use of water is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use.

FINDINGS OF FACT: The proposed use is for stock watering using a series of off-stream stock tanks and two on-stream reservoirs. The purpose is to keep the cattle from directly accessing water from the stream channel and riparian areas and facilitate better use of pasture areas. The amount being changed is based on historic stocking rates and is within DNRC Administrative Rule standards (ARM 36.12.115). The amount was appropriately calculated based on the number of cattle to be using the watering system. The volume of use is based on 15 gallons/head/day and the flow rate of 15 gallons/minute is reasonable to supply the water to the tanks using 2 inch diameter pipe. The remainder of the flow of the existing right will continue from the springs into the reservoirs.

CONCLUSIONS OF LAW: Applicant has proven that the proposed use of water is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use. Mont. Code Ann. § 85-2-402(2)(c).

Possessory Interest: The applicant must prove, except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, 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.

FINDINGS OF FACT: The applicant signed and had the affidavit on the application form notarized affirming the applicant has 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.

CONCLUSIONS OF LAW: 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 also ARM, 36.12.1802

Salvage Water: If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e).

Water Quality Issues: The applicant must prove that the water quality criteria have been met only if a valid objection is filed. The water quality of a prior appropriator will not be adversely affected or the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

No objections relative to water quality or the ability of a discharge permit holder to satisfy effluent limitations of the permit holder were filed against this Application.

Public Notice: The Application was properly noticed pursuant to Mont. Code Ann. §85-2-307.

Environmental Assessment: The Environmental Assessment prepared by the Department for this Application was reviewed and is included in the application file.