

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

IN THE MATTER OF APPLICATION NO.)
76H-30005041 TO CHANGE WATER RIGHT)
NOS. 76H-2106-00, 76H-2112-00, 76H-15928-00,)
76H-19708-00 BY TOWN OF PINESDALE)

FINAL ORDER

The Proposal for Decision (PFD) in this matter was entered on May 1, 2009, after hearing and pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, Montana Code Annotated (MCA)), the contested case provisions of the Montana Administrative Procedure Act (MAPA) (Title 2, chapter 4, part 6, MCA), and the administrative procedural rules for contested case hearings (Admin. R. Mont. 36.12.201, *et seq.*). The PFD proposed to deny Application No. 76H-30005041 to Change Water Right Nos. 76H-2106-00, 76H-2112-00, 76H-15928-00, 76H-19708-00 and implied Water Right Claim No. 76H-30010068¹ by the Town of Pinesdale. Applicant filed timely exceptions to the PFD on June 4, 2009. No objector filed exceptions to the PFD. Consideration and hearing on the Exceptions were assigned to Hearing Examiner Martin, who passed away. Applicant waived hearing on the Exceptions. Consideration of the PFD and the Exceptions for final decision-making in this matter was assigned to this Examiner. This Final Order is rendered after full consideration of the Record and Applicant's Exceptions.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its Final Order: reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. Strom v. Logan, 2001 MT 30, ¶23, 304 Mont. 176, ¶23, 18 P.3d 1024, ¶23. Only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision-making process. Admin. R. Mont. 36.12.229(2).

¹ Implied Water Right Claim No. 76H-30010068 was generated by the Water Court from Water Right Claim No. 76H -2106, as part of the 2005 Master's Report in Water Court Case No. 76HF-355. (Department File).

Pursuant to Admin. R. Mont. 36.12.229, exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention. See *In the Matter of the Application for Beneficial Water Use Permit No. 14295-g41F by Yolanda Blakely*, DNRC Final Order (1985) (no portion of the “exceptions” filed by applicant specifically sets forth what part of the decision is being excepted to. They are therefore accorded little attention). I note that with limited exception, Applicant did not refer to specific portions of the record to support its exceptions other than to refer generally to prefiled testimony and hearing testimony.

I have reviewed the entire record in this matter including all prehearing conferences and the hearing in this case, and find as follows.

PRELIMINARY MATTERS

Applicant proposes to change three irrigation water rights and two domestic use rights to municipal use within the Town’s boundaries. Municipal use includes all of the types of uses which a municipality would have such as domestic, irrigation, commercial, fire fighting, public buildings, cemeteries etc. E.g., *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (Proposal for Decision, adopted Final Order 1985). Generally, no volume is decreed by the Montana Water Court for irrigation water rights. §85-2-234, MCA. Consequently, the irrigation Water Right Claims in this case are limited by the Water Court not to exceed the “amount put to historical and beneficial use.” This amount must be quantified in any change, especially so when changing from a use like irrigation, where only so much water can be taken and used by a field, to municipal which generally has constant needs. Id. While Applicant repeatedly states that it will take no more water than it has historically, the Applicant must prove what that historical amount of water was. It is the failure to do this that is the primary flaw in this Application.

Previous Applications by the Town

At the outset, it is important to put this particular Change Application in context. This Change Application involves five Water Right Claims, filed in the on-going water rights adjudication before the Water Court. These Water Right Claims were filed for rights perfected as

of June 30, 1973,² because after that date any changes in existing water rights or new appropriations had to be approved by the Department under the Water Use Act. Title 85, Chapter 2, Parts 3 and 4, MCA. The Water Right Claims in this case are: 76H-2106-00, 76H-2112-00, 76H-15928-00, 76H-19708-00 and implied Water Right Claim 76H-30010068. Some of these rights were subject to previous changes authorized by the Department as follows.

- Change Authorization G15928-76H (1990) - Water Right Claims 76H-15928 and 76H-19708 (4th rights Sheafman Creek) were changed in combination with 76H-17858 and 76H-19709 (1st rights Sheafman Creek) from two separate 20 acre parcels to irrigate a single 40-acre parcel (Heckathorn Ditch) – the “40 acre parcel” at issue in this change. See Abstracts for Water Right Claims 76H-15928-00, 76H-19708, 76H-17858 and 76H-19709. The Change was generally an acre for acre change in place of use. The Change also included Water Right Claim No. 76H-15930 for a change in the place of use and point of diversion of stockwater. Water Right Claims 76H-17858 and 76H-15928 historically irrigated a single 20-acre parcel and Water Right Claims 76H-19709 and 76H-19708 irrigated a separate 20-acre parcel. The new 40-acre parcel would be irrigated under all four irrigation Water Right Claims. The Department approved the flowing change:
 - 20 Miners Inches “M.I.” (.5 cfs), 10 M.I. (.25 cfs) each, up to 162.75 acre-feet (diverted) jointly for Water Right Claims 76H-15928 and 76H-19708; and
 - 13.3 Miners Inches (.3325 cfs) up to 84.92 acre-feet (diverted) jointly for Water Right Claims 76H-17858 and 76H-19709. 6.7 Miners Inches (.17 cfs) of Water Right Claims 76H-17858 and 76H-19709 were not changed and would remain in the Burke Ditch to offset adverse effect to other ditch users.
 - The Change was subject to the following conditions among others.
 - “Appropriator shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.”
 - “Appropriator shall maintain an adequate flow measuring device at or near the headgate on the new point of diversion (Upper Heckathorn Ditch), and shall record each date on which water is diverted pursuant hereto, the rate at which water is diverted, and the length of time water is diverted on that date. Appropriator shall supply such records to the Department on demand.”
 - “This Authorization is limited to the amount of 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 (Water Court), this authorization will be limited to the lesser amount.”
 - The Water Rights are subject to the Final Order.

² There are some limited exceptions on perfection, not applicable in this case.

Proposal for Decision (PFD) (June 8, 1989), Final Order (February 5, 1990), *In the Matter of Application for Change of Appropriation Water Right No. G15928-76H* by Samuel T. and Virginia Allred (Department File, FOF 10). A Notice of Completion that this Change Authorization was completed was filed by the Allreds and Unified Industries.³

- Change Authorization 76H-15930 (January 1993) - Water Right Claims 76H-15930, -17858 and -19709 were changed to municipal use with a new point of diversion. Water Right Claim 76H-15930 for stockwater was changed for .0625 gpm (.0001393 cfs) and .1014 acre-feet. Water Right Claims 76H-17858 and -19709, both for irrigation, were changed to 149.23 gpm (.3328 cfs) and 84.92 acre-feet.⁴ *In the Matter of the Application for Change of Appropriation Water Right 015930-76H* by Unified Industries (1993) (Department File, FOF 10).
- Change Authorization 76H-15930-01 (December 1993) - Water Claims 76H-15930, -17858 and -19709 were changed to add a point of diversion for municipal use to the Town's infiltration gallery. (Department File, FOF 10)

In this Application, Applicant seeks in part to change the point of diversion (POD), purpose of use from irrigation to municipal, and the place of use of Water Right Claims 76H-15928-00 and 76H-19708-00 (4th rights Sheafman Creek) from irrigation of the *40-acre parcel* approved under Change Authorization G15928-76H (1990) to the Town's infiltration gallery (POD) for municipal use within the Town's boundaries.

Consequently, the Applicant is limited to the amount approved for these Water Rights Claims in the 1990 Change Authorization G15928-76H (for the *40-acre parcel*) as having met the criteria under §85-2-402, MCA. Although Applicant amended up the flow rates (combined .67 cfs) of these Water Right Claims after the 1990 Change and the Water Court reviewed and approved these amendments, these changes do not automatically alter the Department's Change Authorization. Only the Department can approve changes in water rights after June 30, 1973. §§85-2-401(4) and -402, MCA. See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054. The original filings for these Water Right Claims also exceeded the amount approved by the Department for change under §85-2-402, MCA (including the criterion of lack of adverse effect

³ Admin. R. Mont. 36.12.221(4).

⁴ The Change Authorization Abstract is not clear that the entire rights were changed to municipal use. This may have caused some confusion in the PFD in this case. However, the Final Order (December 1993) is clear that the entirety of the rights were changed to municipal use.

to other appropriators),⁵ after substantial testimony including an acknowledgement by the then Owner (applicant Allred) that the original flow rates for the irrigation claims in the change application “may be overstated.” (Change Authorization G15928-76H, PFD, FOF 9, Department File). Thus, the 20 M.I. (.5 cfs) and 162.75 acre-feet diverted set the outer limit of any change that could be approved for these water rights under this Application, assuming all applicable criteria and analyses are met. Applicant tried a similar argument in *In the Matter of the Application for Change of Appropriation Water Right 015930-76H by Unified Industries* (1991), for the Sheafman Creek first rights and was denied for the same reason.

The Town of Pinesdale appears to have been before the agency on numerous occasions for permits and changes, primarily in 1990s. Most of these permits and changes involve the same source of water at issue in this case, Sheafman Creek. As explained below, the record in this case is inconsistent and replete with general conclusions rather than actual specific evidence. In an effort to better understand the context of this case, I take official notice of the following permit decisions for the Town of Pinesdale: *In the Matter of Application for Beneficial Water Use Permit Nos. 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale* (1991) and *In the Matter of Application for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale* (1993).⁶ Admin. R. Mont. 36.12.221(4).⁷ Although I do not take official notice of these full files, I note that these files contain substantially more information on the water source and uses than presented in this case.

Use of the Montana Irrigation Guide and the Department’s New Appropriation Standards

The issue of Applicant’s calculation of “historic” volumes for change under the Water Right Claims in this Application arises repeatedly in the Exceptions. The Application uses both the 1988 Montana Irrigation Guide and the Department’s New Appropriation Standards (new permits) Admin. R. Mont. 36.12.115. Rather than address this issue under each Exception, I elect to address it at the outset.

Applicant refers repeatedly to a “Department supplemental volume standard of 1.84 acre-foot per acre.” There is no such “Department standard,” for a diverted or consumed volume for historic use. Conclusion of Law (COL) 14 of the PFD, to which the Applicant did not take

⁵ Water Right Claims 76H-15928 – 10.8 M.I. (.27 cfs) and 76H-19708 – 11.5 M.I. (.2875 cfs).

⁶ Department decisions are found at http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

⁷ While this rule generally provides the opportunity to object to official notice, I find that there is no prejudice in this case because these are official decisions of the Department involving the Town’s water rights and have been a matter of public record since issued.

exception, further explained that the Department has no legal standard in a water right change proceeding for assigning a volume for historic consumptive use, because the inquiry is fact specific. After questions raised by Department Hydrologist Eric Chase at the hearing as to the origination of this standard, Applicant consultant Karl Uhlig (Uhlig), testified that the 1.84 af/ac is derived from the 1988 Montana Irrigation Guide (Exhibit A-14) for Ravalli County using the consumptive use value for pasture grass under full service irrigation (April 9-October 30) and including precipitation.⁸ See also Eric Chase Memorandum Application 76H-30005041, Town of Pinesdale (February 27, 2008), Department file. This calculation is for full service irrigation and is not a supplemental standard for use when multiple water rights are mingled, nor is there any specific supplemental standard. This calculation assumes optimal conditions, irrigation practices, and water availability. The Montana Irrigation Guide is not a Department standard. It is a guide that applicants have used in the past to calculate crop consumption where evidence otherwise indicates that the conditions are optimal such that the requisite conditions exist for applying the guide. See e.g., *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, (DNRC PFD, Final Order 2005); see also *Orr v. Arapahoe Water and Sanitation Dist.* 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); *Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”). In addition, applicants are not entitled to claim that amount of crop consumption attributable to precipitation. An applicant may claim only that amount of consumption attributable to the water diverted for irrigation purposes. Applicant and Objectors testified that the fourth rights for Sheafman Creek proposed for change, Water Right Claims 76H-15928 and 76H-19708, are out of priority by the end of July, i.e. water is not available for these rights beyond the end of July. E.g., Hearing Track 5, Uhlig (end of July); Darlene Gramza Hearing Track 10 (end of June); Hearing Track 8 Tom Allsop (rights can last “getting into June and July”); Hearing Track 16, Applicant Counsel (rights only runs couple of months for the purposes of ditch loss...). In addition, the Department previously found in a contested proceeding based on substantial testimony and analysis of Sheafman Creek flows in the Town’s application for a new permit:

...There is not enough flow in Sheafman Creek to satisfy these two rights (the first and second decree rights) after July 25th through the remainder of the irrigation season, including all of October....

⁸ Applicant has explained this calculation in varying ways, explained *infra* under various Exceptions. Applicant in its last iteration at hearing claimed that it took a 50% factor of the 1.84 af/ac as a “supplmental standard.” There is similarly no authority to take a 50% factor and call it a supplemental standard for historic use.

In the Matter of Application for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale (1993), FOF 27 and 30, PFD, adopted by Final Order.

With respect to even the first rights for Sheafman Creek, the Department also previously held:

*...only one-quarter of the first rights (40 miners inches) was dependably available in the creek for full service irrigation every year, another 60 miner's inches (or only 100 miner's inches total) was ordinarily available later than August 15 each year, and water was ordinarily available to satisfy the full first right only until August 1 each year.*⁹

In the Matter of the Application for Change of Appropriation Water Right 015930-76H by Unified Industries (1992), Final Order at pp. 4-5. The facts in the Record, including admissions by the Applicant, do not indicate the optimal conditions necessary to apply the Guide.

Applicant also uses the Department's New Appropriation Rules to calculate in part (40 acres of "full service" irrigation) the amount of water it asserts should be changed under the South Fork of Cow Creek Water Right Claim 76H-2112. Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.3; PFD FOF 41. Although the Applicant doesn't specifically cite to the Rule, it appears to be Admin. R. Mont. 36.12.115 for Contour Ditch Efficiency 60%, Design Slope .75%. It must be emphasized that the volumes in this Rule are diverted volumes, not consumed volumes. These Rules are for the purpose of new permits not a calculation of historic use diverted or consumed. Again, the Department has no standard for historic diverted or consumptive use as all historic use is different. PFD, COL 14. The remainder of the 98 acres (58 acres) under Water Right Claim 76H-2112 is calculated using the 1.84 acre-foot/ acre figure for an asserted "supplemental standard" for consumption. There is no information in the record that indicates that the application of these formulas is supported by the actual facts for the South Fork of Cow Creek. The Applicant is mixing apples and oranges in its calculations of volumes by commingling diverted volumes and consumed volumes (diverted will almost always be more than a consumed volume).¹⁰ In addition, Applicant stated that "[t]he reality of the South Fork of Cow Creek is that there are sufficient flows during spring runoff periods and later in the season, flows decrease significantly." September 8, 2005 Letter from Karl Uhlig to DNRC [Uhlig Letter] at p. 5; see also Prefiled Testimony of Karl Uhlig at pp.8-9; see also Water Right Claim 76H-2106 Claim File, Statements of Talbot and Burt (South Fork Cow Creek out by the end of July) and Heckathorn (not sufficient water out of South Fork Cow Creek

⁹ The total of the first Sheafman Creek Right is 160 miners inches. *In the Matter of the Application for Change of Appropriation Water Right 015930-76H by Unified Industries* (1992). The Department further found that in that case, "that after the high run-off period, water could not enter the Heckathorn Ditch except in the rare case of excessive precipitation which did occur in October of 1990, when a rain storm occurred and doubled the flow of the creek." *Id.* Final Order at p. 5.

¹⁰ Applicant originally provided a calculation for Water Right Claim 76H-2112 of a "consumed volume" of 1.84 af/ac for 145 acres, after the Water Court Master Report issued. 9/8/05 Uhlig Letter p.2, 4.

to irrigate fields).

Applicant's premise from which it moves forward to calculate the volumes for change in this case is faulty. It is built upon a premise of full service irrigation where the evidence in the file indicates that there was no such full service irrigation. While it is clear that the Applicant has water rights which can be changed, the historic use amount claimed is not supported in this Record.

I encourage Applicant to review the Claim File for the South Fork of Cow Creek Water Right Claims 76H-2112 and -2106, because they contain historically relevant information that can be used to support the actual historic use of the water from the South Fork of Cow Creek. I also encourage Applicant to find the diversion records required to be kept for Change Authorization G15928-76H (1990) for the Sheafman Creek rights and spend more time evaluating exactly how these were used under the 1990 Authorization.

Upon review of the Record, I note that the PFD refers to the "1998" version of Montana Irrigation Guide. The actual version used and submitted as Exhibit A-14 is the "1988" version. The PFD will be corrected to reflect the 1988 version.

This explanation supplements the findings already made by the Hearing Examiner (HE) as further explained below.

APPLICANT'S EXCEPTIONS

Applicant provides a number of general exceptions at the outset. These exceptions make no reference to specific evidence in the file or authority for the exceptions and thus, will not be considered and are deemed denied.

I have, however, reviewed the general Exception that the HE limited the issues to be heard at hearing. At hearing, the HE posed the question of limiting the issues at the hearing to the Parties. (Hearing Track 2). Applicant responded that he thought that it should probably be limited to adverse effect (§85-2-402(2)(a), MCA). The HE noted also that she had questions on the water rights. At the Prehearing Conference the HE also reminded Applicant that it must prove all of the criteria (§85-2-402(2), MCA) and that if Applicant believed there was sufficient information in the file to address the criteria, the hearing could be limited. The HE stated generally that she saw issues with adverse effect, but that she does not generally like to limit a hearing. She indicated that she might address her other issues in the Prehearing Order but she did not. Applicant variously asserts, as explained below, that it had no knowledge of the elements that it needed to prove such as how all of the water rights worked together historically to irrigate certain parcels, diverted volumes of rights, and consumed volumes of rights. However, these

elements are all traditional elements of a change application and an adverse effect analysis. E.g., *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (1985). The burden remains with Applicant to prove all criteria for a change. Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054. In addition, the Department's contested case decisions on change applications are available on the Department's website.

A classic form of "adverse effect" is expansion of the historic water right through a change. To evaluate "adverse effect" one must know the characteristics of the historical use including, purpose, flow, volume, pattern of diversion, etc. E.g., *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (1985); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (1991); see also Admin. R. Mont. 36.12.1902-1903 (2005). 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*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision* (DNRC Final Order 2003). Without evidence of the amount of actual historical use diverted and consumed, the Department cannot issue a change in appropriation water right. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC PFD (2003), application subsequently withdrawn); *In The Matter of Application To Change A Water Right No. 43B 30002710 By USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 To Change Water Right Nos. 76H-108772 And 76H-1-8773 By North Corporation* (DNRC Final Order 2008). These requirements are not new and should not have caused surprise.

Addressed below are the Applicant's specific exceptions in the order presented by Applicant.

Exception 1 to Finding of Fact No. 2

2. *This Application was put on hold for the Applicant to pursue its water right claims through the Montana Water Court process for objections to a preliminary decree. The Water Court issued a Masters Report for these and other water rights on March 17, 2005. Due to the age of this*

Application, the information presented is at times contradictory and inconsistent as further indicated below. (Department file)

Applicant contends that this Finding of Fact (FOF) is in error because there was no request by the Applicant to put the Application on hold and that such delay adversely affected the Application and violated applicable timelines.

I find that competent substantial evidence supports this FOF. Witness for the Applicant, Uhlig testified at hearing that the reason for the delay in processing the Application was the Water Court case involving the Water Right Claims at issue this case. (Hearing Track 4). There is also a Memorandum to the Hearings Unit (March 2006) by Department Water Rights Specialist Patrick Ryan that explains that this case was postponed because of an active Water Court case. It is incredulous that Applicant would have waited seven years from 1998 to 2005, when the Water Court's Master Report issued and processing resumed, without insisting that processing continue. As for the assertion that the Application was delayed "in violation of applicable statutes and regulations," these "statutes and regulations" are not cited and not addressed. Regarding timelines in the Water Use Act, see generally Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181. A review of the record also reveals that Applicant made significant changes to the Application during its pendency including but not limited to the purpose of use requested for change and the calculation of the volumes requested for change. This FOF will not be changed.

Exception No. 2. to FOF No. 7 (excerpt).

7. The Town has four creeks that flow through town, including Sheafman Creek, Cow Creek, Sage Creek and Sheridan Gulch...

Applicant objects that "Cow Creek" should read "South Fork of Cow Creek." Applicant is correct. This appears to be an inadvertent omission. The PFD reveals that the HE clearly understood that the correct creek was "South Fork of Cow Creek." I note that at times Applicant's witnesses also made the same omission in testimony. This FOF will be corrected.

Exception No. 3 to FOF No. 10 (pg. 6, indent 2)(excerpt).

Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change are used in combination with seven other water rights (Water Right Claim Nos. 76H-15930 (stock water), 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-152102 (multiple domestic), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). The Application does not describe how all of these Water Right Claims are used in combination to irrigate the asserted 40 acres or break out the consumptive use of each of these water rights on the irrigated 40 acres parcel.

Applicant objects to this finding and asserts paraphrased as follows:

- Each of these matters was addressed at “hearing” and in the “prefiled testimony.”
- 76H-19706 (4th right)[*presumably 76H-19708*] was relocated to *40-acre parcel* in 1990; 76H-2609, -2614, and -2619 whose place of use (POU) includes the *40-acre parcel* was not used there but rather on the remaining 58 acres associated with those rights via the Heckathorn Ditch; “First rights 76H-17858 and 76H-19709 and 76H-15928[*actually a fourth right used for irrigation and subject of this change Application*] are now used exclusively for municipal purposes.”
- Point of the Applicant is that the first rights are being used entirely for municipal purposes.
- 76H-15830 is a stockwater claim and not used for irrigation.
- 76H-151102 [*presumably 76H-152102*] is multiple domestic and is not used for irrigation.
- All of the Sheafman Creek water rights listed have properly been authorized for use and have been used in other locations or for other purposes since the 1990 and 1993 Change Authorizations.
- Since 1990 and 1993, 76H-19708 and 76H-15928 plus the “South Fork Cow Creek irrigation rights” are the only water rights used to irrigate the *40-acre parcel*.
- The Missoula field office understood how these rights were used because they raised no such concerns in the course of their review.

I find that the HE’s confusion was understandable. All of these rights share the *40-acre parcel* in their places of use (POU) on their respective Water Right Claims at some point.

Change Authorization No. 76H-15928 specifically moved the Sheafman Creek first rights, 76H-17858 and 76H-19709 to irrigate the *40-acre parcel* with the fourth rights Water Right Claim 76H-15930 (stock right) was also moved to the *40-acre parcel* in 1990. The 1993 Change Authorization 76H-15930 changed Water Right Claims 76H-17858, 76H-19709, and 76H-15930 to municipal use and moved the place of use to the Town, based on the language in the Final Order. However, the Change Authorization Abstract improperly continued to list irrigation as a purpose of Water Right Claims 76H-17858 and 76H-19709, along with municipal.¹¹ Water Right Claims 76H-152102 (multiple domestic) and 76H-15930 (stock) as domestic and stock rights are not factors in the historic analysis of irrigation. The POUs for Water Right Claims 76H-15928, 76H-19708, 76H-2609, 76H-2614, and 76H-2619 remain on the *40-acre parcel*, along with the South Fork of Cow Creek Water Right Claim 76H-2112. A review of the record reveals conflicting information and testimony.

- Applicant stated that the *40-acre parcel* would continue to be irrigated with 76H-2609, -2614 and -2619, from Sheafman Creek. Specifically, in discussing what will happen after

¹¹ Applicant did not except to that portion of FOF 10, page 6, above and in the first indent, which found that all four of the irrigation water rights in the 1990 Change Authorization are used to irrigate the *40-acre parcel*.

the POUs for 76H-19708 and 76H-15928 are changed from the *40-acre parcel* to the municipal infiltration gallery, Uhlig explained:

*Remembering that there are other more junior, Sheafman Creek water rights used in the Heckathorn Ditch system that serve the 40-acre place of use located in Sections 28 and 33, during higher creek flows, the field will continue to be irrigated. The water rights W152102, W002619, W002614 and W002609 will continue to serve the place of use indicated on **Map 1**.*

Uhlig Letter at p. 5 (Emphasis added). “Map 1” indicates the current “POU for 76H-19708 and 76H-15928,” including the *40-acre parcel* and an additional parcel to west (never again referenced in the record as part of the POU for 76H-19708 and 76H-15928). This is consistent with the reference in the Original Application (Unified Industries) Supplement Attachment A, under a), p. 1, which discusses Water Right Claims 76H-15928, -152102, -2619, 2614 and -2609 together as diverted through the upper Heckathorn Ditch.

- Applicant explained:

After the 1990 change was authorized for moving the place of use for the two 4th rights to the 40 acres described on the attached abstract, these two water rights were commingled with several junior water rights and therefore remained supplemental.

Uhlig Letter at p. 4.

- Applicant explained:

The entire 145-acre field (South Fork of Cow Creek POU later changed to 98 acres and including the 40-acre parcel for Sheafman Creek 4th water rights) will be removed from irrigation by means of the South Fork of Cow Creek. Portions of the field will only be irrigated during the high spring water period by using the junior Sheafman Creek water rights discussed above.

Uhlig Letter at p. 6.

- Applicant’s predecessors in interest (Allreds and Unified Industries) filed a Notice of Completion indicating that the *40-acre parcel* was served by the 1st (76H- 17858 and 76H-18709) and 4th (Water Right Claims 76H-15928 and 76H-19708) rights of Sheafman Creek in compliance with the Change Authorization G15928-76H (1990).
- The Base Map and Map 1 provided by Applicant clearly indicate that parts of this “*40-acre parcel*” are covered by a parking lots, buildings, and significant trees and are not irrigated. As the focus of Applicant’s Change Application on the Sheafman Creek 4th water rights is exclusively their use since the 1990 change on the *40-acre parcel*, these aerial photos undercuts Applicant’s contention that the full *40-acre parcel* was irrigated.¹²

¹² I note that the NRIS 1995 aerial photo shows the same issues. There is no need to take official notice of the photo for the purposes of this decision. However, Applicant should be prepared to address the obvious discrepancies in any future application.

- Department Hydrologist Eric Chase also understood that Water Right Claims 76H-15928 and 76H-19708 irrigated the 40-acre parcel with “other more junior Sheafman Creek water rights.” January 4, 2008 Memorandum, Application 76H-30005041 Town of Pinesdale, Eric Chase Surface Water Hydrologist.

- Applicant stated in Supplemental Pre-filed Testimony:

The volume available by retiring the 98 acre historic place of use (76H-2112 – S.F. Cow Creek irrigation right) was initially calculated as though these acres were all supplementally irrigated by other water rights. In fact, however, approximately 40 acres are fully served exclusively by S.F. Cow Creek water, only with the remaining 58 acre being served by both S.F. Cow Creek and Sheafman Creek water.

Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.3. “Map 2 Cow Creek Irrigation” and the “Base Map” in the record both indicate that the POU for S.F. Cow Creek Water Right Claim No. 76H-2112 of 98 acres includes the 40-acre parcel for Water Right Claims 76H-15928 and 76H-19708. There is no delineation on either map of the “40 acres are fully served exclusively by S.F. Cow Creek water” or the “remaining 58 acres being served by both S.F. Cow Creek and Sheafman Creek water.” Assuming *arguendo*, Applicant intended to remove 40 acres of “full service” irrigation within the 98 acres POU for Water Right Claim 76H-2112, excluding the 40-acre parcel POU for Water Right Claims 76H-15928 and 76H-19708, this acreage is not delineated on any map submitted by Applicant.

- Applicant stated in Supplemental Pre-filed Testimony:

Secondly, although combined with other rights listing the Upper Heckathorn Ditch on paper, 76H-15928-00 and 76H-19708-00 were effectively full service (irrigation) rights on those 40 acres in the years after the 1990 change authorization. The rights previously used on that 40 acre piece continued to be used to the full extent allowed by their priority dates, and conveyed via the Upper and Lower Heckathorn Ditches, but were only used on historically irrigated lands adjacent to the 40 acre piece. The pre-1973 use of these two water right claims was to irrigate 40 acres¹³ and the volume associated with those lands should be available for relocation to the infiltration galleries. If the DNRC’s supplemental volume standard of 1.84 af/ac¹⁴ is used to estimate the volume for relocation, those 40 acres would effectively make available 40 ac x 1.84 af/ac=73.6 af.

Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.2, 10. The “historically irrigated lands adjacent to the 40 acre piece” is not identified and the entire 40-acre parcel is subsumed within the 98-acre POU for 76H-2112. See Map 2 and Base Map. This statement, at least with respect to the junior Sheafman Creek Water Right Claims W152102, W002619, W002614 and W002609, contradicts Applicant’s statement that 58 acres of the 76H-2112 POU was full service irrigation and that the 40-acre parcel was supplemental.

At this point Applicant claims full service irrigation on the 40 acres with only the fourth

¹³ Again, the fourth rights Water Right Claims 76H-15928 and 76H-19708 were used in combination with the first rights 76H- 17858 and 76H-18709 to irrigate two separate 20 acre parcel for a total of 40 acres. See discussion of Change Authorization G15928-76H (1990), supra.

¹⁴ See supra discussion of 1.84 af/ac “standard,” as the Montana Irrigation Guide calculation of consumptive use for full service irrigation (April 9-October 30), including precipitation.

rights Water Right Claims 76H-15928 and 76H-19708, which contradicts the statement that other rights serve the *40-acre parcel*, the Applicant's claim in this Exception that South Fork of Cow Creek Water Right Claim 76H-2112 served the *40-acre parcel* and counsel's claim under Exception to FOF 21 that the fourth rights provide only 50% of the water for those acres.

- The Application as amended 5/19/05 by Karl Uhlig provides for 36.8 acre-feet for change of the fourth rights, Water Right Claims 76H-15928 and 76H-19708, as explained in 9/12/05 Uhlig Letter p. 4, to be based on 20 acres x 1.84 =36.8, of consumptive volume not diverted volume. Compare 73.6 acre-feet (consumptive) of the Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.2, 10, quoted above
- No records of diversions for Water Right Claims 76H-15928 and 76H-19708 were submitted into the record to explain how water was used on the *40-acre parcel* since 1990. I acknowledge that Applicant testified that it asked the District Court for the records of the Water Commissioner and was told that there were none. See also Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.5. However under the terms of Change Authorization G15928-76H (1990), Applicant was required as a condition of that change to maintain measurement records. Measurement records would have provided evidentiary support for Applicant's claims.
- In the 1990 Change, Applicant intended to irrigate the *40-acre parcel* with at least all four irrigation rights, Water Right Claims 76H-15928, 76H-19708, 76H- 17858 and 76H-18709. FOF 10, PFD, *In the Matter of Application for Change of Appropriation Water Right No. G15928-76H by Samuel T. and Virginia Allred* (Department File, FOF 10)
- The Missoula Regional Office reviewed the Application to determine whether the Applications was "correct and complete" under §85-2-302, MCA, i.e. there was sufficient information to move the Application forward. The Regional Office did not evaluate the Application for the legal conclusion that Applicant had proven all of the applicable criteria under §85-2-402, MCA by a preponderance of the evidence. See also June 13, 2005 Letter from Patrick Ryan pp.4-5 (in noting additional information necessary, "[w]hile lack of adequate responses to the criteria will not delay publication of this application (i.e. moving it forward for processing), before approval, the criteria must be proven.") It also appears from the above discussion that much of the contradictory information arose after the Application file was forwarded to the Hearings Unit.

I find that the FOF should be clarified to remove the reference to Water Right Claims 76H-152102 (multiple domestic) and 76H-15930 (stock), which are not part of an irrigation analysis. I find that there is competent substantial evidence to support the remainder of the FOF. Applicant did not present a consistent explanation as to how this 40-acre parcel was or will be irrigated. Moreover, as explained in the **Preliminary Matters**, Applicant used formulas (under evolving theories from consumption to diverted volumes) to estimate water usage that had no basis in fact. This portion of the FOF will be clarified to read:

Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change were or are used in combination with five other water rights (Water Right Claims 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). Applicant's explanation as to how all of these water rights were used on the 40-acre parcel varied during the course of the proceeding. The Applicant does not consistently describe how all of these Water Right Claims were used in combination to irrigate the asserted 40 acres or provide the historic consumptive use of

each of these water rights on the irrigated 40-acre parcel.

Exception No. 4 to FOF No. 10 (pg. 6, indent 2) - continued

The asserted combined consumptive volume attributed to these two Water Right Claims is calculated as 36.8 acre-feet. The Applicant did not provide information about the historic diverted volume.

Applicant objects to this finding and asserts paraphrased as follows:

- The Department did not request data on consumptive use volume but rather on historical beneficial use by flow rate and volume.
- The 9/8/05 Uhlig Letter identified the historic consumptive volume of 36.8 acre-feet and a flow rate of 300.7 gpm for the fourth rights, Water Right Claims 76H-15928 and 76H-19708. The Regional office did not request further information.
- The Department did not request or inquire into annual or historic diverted volume prior to or at hearing.
- Patrick Ryan’s Criteria Assessment review stated that:

The applicant has demonstrated the extent of historical use and is requesting no more than that use ... Changing the affected water rights’ ... would not affect the water rights of others. ...

- The Environmental Assessment found no significant impacts.

Again, I understand the HE’s confusion. After review of the Record, however, I find that this finding is not supported by competent substantial evidence in that the asserted “diverted” and the “consumed” volume in the case of this change is the same. This FOF will be corrected. It appears from the record that Applicant intends to consume the entire amount of water diverted under Water Right Claims 76H-15928 and 76H-19708 into the municipal system. See PFD FOF 30 (Not excepted to by Applicant). The Applicant’s volume requested for the change of these two rights is primarily reported based on a consumed volume under the 1988 Montana Irrigation Guide (although the volume varies from 36.8 to 73.6 acre feet). In addition, Mr. Chase indicated in his review of the Application that Applicant appears to intend to have a “zero loss system.” Eric Chase Memorandum Application 76H-30005041, Town of Pinesdale, pg. 2 (February 27, 2008)(“In addition, the applicant can change their entire historically diverted volume, however, the applicant can only divert up to the historically consumed volume amount as the new diversion works is a zero loss system.”); Testimony of Eric Chase Hearing Track 15; *cf.* Testimony of Karl Uhlig Hearing Track 16 (36.8 acre-feet is the diverted volume). Applicant further provided no calculation of the consumptive new use so as to indicate that a consumed volume for the new municipal (lawn and garden) use would be less than that diverted. I can only conclude that the Applicant intended the consumed and diverted volume to be one and the same.

Change applications generally include a diverted volume because most beneficial uses are not 100% consumptive. See Change Authorization G15928-76H (1990). In brief, a consumptive use volume is a well-settled, fundamental component of the analysis of adverse effect to other appropriators under §85-2-402(2)(a), MCA, because a change in existing water rights cannot increase the historic consumption of the existing water right. An increase in consumption of an existing water right is an impermissible expansion of an existing right. PFD, COL Nos. 9-16; see also Mont. R. Admin. 36.12.1902 (The amount of water being changed for each water right cannot 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.) An analysis of consumptive use and historic use is particularly important when changing an irrigation right (limited by the acreage's ability to take water) to a municipal right (which can be taken virtually at anytime). E.g., *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (1985)(change analysis evaluating water right claims as fleshed out by historic use¹⁵, including flow, diverted volume, consumptive use, and pattern of use in change of irrigation right to municipal right.). An increase in consumptive use is a new appropriation. Id. Featherman v. Hennessy (1911), 43 Mont. 310, 115 P. 983; see also Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (increase of use amounts to a new appropriation).

See supra under Exception No. 3 a discussion of the Regional Office's responsibilities under "correct and complete" determination under §85-2-302, MCA.

Finally, the Environmental Assessment (EA) evaluates potential adverse environmental impacts; it does not evaluate the relevant criteria under §85-2-402, MCA, for a change, and thus is not persuasive. The evaluation under the EA as to the physical environment in particular has no bearing on whether one is legally entitled to a change in existing use.

This portion of the FOF will be revised to read:

The asserted combined consumptive volume attributed to these two Water Right Claims is calculated as 36.8 acre-feet. The Applicant did not provide information about the historic diverted volume of these water rights as used on the 40-acre parcel. However, the Applicant intends to consume the full amount of the water diverted. (Department file)

Exception 5, FOF 11:

Applicant objects to the table summarizing Sheafman Creek Water Right Claims 76H-15928 and 76H-19708, on the grounds that the place of use reflects the original rights not as

¹⁵ All of the Water Right Claims for irrigation in this case include a flow rate and the standard remark under "Maximum Volume" of "The total volume of this water right shall not exceed the amount put to historical and beneficial use." See also Westenberg testimony, Hearing Track 8.

changed in 1990. I find that Applicant is correct and the FOF will be revised to clarify the Water Right Claims as originally claimed and as changed in 1990:

Original WR Claim #	Place Of Use	Priority Date	Volume	Flow Rate	Point of Diversion	Period of Diversion	Purpose (Total Acres)
15928	E2NWNW SEC 26, T7N, R21W Ravalli	6/1/1883	Amount put to historical and beneficial use.	179.52 gpm (.40 cfs)	NESENW SEC 27, T7N, R21W (Burke Ditch)	April 1 - Oct 31	Irrigation (20 ac; Supplemental with 17858)
19708	W2NENW SEC 26, T7N, R21W Ravalli	6/1/1883	Amount put to historical and beneficial use.	121.18 gpm (.27 cfs)	NESENW SEC 27, T7N, R21W (Burke Ditch)	April 1 - Oct 31	Irrigation (20 ac; Supplemental with 19709)

WR Claim # Change 1990	Place Of Use	Priority Date	Volume (Combined for both Rights)	Flow Rate	Point of Diversion	Period of Diversion	Purpose (Total Acres)
15928	35 acres SESE Sec. 28 T7N R21W Ravalli and 5 acres NENENE Sec. 33 T7 RN 21 Ravalli	6/1/1883	162.75 acre-feet diverted (combined)	10 Miners Inches (.25 cfs)	SWNENW SEC 28, T7N, R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (Changed with Water Right Claims 76H-17858 and - 19709) Subject to Final Order
19708	35 acres SESE Sec. 28 T7N R21W Ravalli and 5 acres NENENE Sec. 33 T7 RN 21 Ravalli	6/1/1883	162.75 acre-feet diverted (combined)	10 Miners Inches (.25 cfs)	SWNENW SEC. 28 T7N R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (Changed with Water Right Claims 76H-17858 and - 19709) Subject to Final Order

Sources: Exhibit A-3 and Final Order in Change Authorization G15928-76H (1990).

Exception 6, FOF 10, “South Fork of Cow Creek” (page 9, first full indent):

The Application states that the “place of use” is to be changed but other information in the record appears to indicate change in the “point of diversion.” The intent simply isn’t clear based on the information submitted.

Applicant objects that there is no proposed change in point of diversion based on the Application and the 9/8/05 Uhlig Letter.

I find that Applicant is correct, based on the cited information and testimony of John

Westenberg at hearing. The language in this FOF will be stricken.

Exception 7, FOF 10, “South Fork of Cow Creek” (page 10, above the table):

It does not appear Applicant provided any information on diverted volumes in this Application.

Applicant objects to this FOF on a similar basis to Exception 4: not identified in deficiency letter, not previously raised or inquired into at hearing.

See generally the discussion under Exception 4. In addition, the calculation for the South Fork of Cow Creek appears to be particularly problematic. As explained in the **Preliminary Matters**, Applicant used the Department’s diverted water standards for new permits in Admin. R. Mont. 36.12.115 to calculate the volume for the change for 40 acres under 76H-2112 (alleged full service) of 116.8 acre-feet, and the 1988 Montana Irrigation Guide consumptive use for full service irrigation on 58 acres under 76H-2112 (alleged supplemental use) of 107.7 acre-feet for a total of 223.5 acre-feet/year. Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.3. This calculation combines diverted volumes and consumed volumes for a single volume for change. The proposed new use is municipal, primarily lawn and garden as similarly proposed for the Sheafman Creek rights. However, the point and method of diversion for this right does not change and it is diverted through open ditch to the Knack pond and then to the municipal system.

Applicant did not provide a total consumed or diverted volume for the full 98 acres. Further there is no testimony or evidence in the record to support that the historical facts of the use of this Water Right Claim support the use of the 1988 Montana Irrigation Guide as explained in the **Preliminary Matters**. The Department’s New Appropriation standards are never a substitute for historic use. As the applicable law recognizes and as Applicant’s consultant recognized at hearing, 1973 (July 1, 1973) is the turning point in water law.(Westenberg Testimony Hearing Track 9) As of July 1, 1973, anyone wishing to change an existing water right had to obtain approval from the Department under §§85-2-401 and 402, MCA. Water Right Claim 76H-2112 has not previously been changed and, thus, the focus of this right is as it looked pre-July 1, 1973. Water Right Claim 76H-2112 is limited to that “put to historical and beneficial use,” no specific volume is specified by the Water Court. While formulas and guides may be used in the calculation of the relevant volumes, there must be a historical factual basis to apply a particular formula or guide. In this case, no one with any knowledge of the actual use of Water Right Claim 76H-2112 prior to July 1, 1973 provided information or testimony, nor was any empirical data of the use prior to July 1, 1973 submitted. Applicant submitted a mixed calculation in a vacuum based on the 1988 Montana Irrigation Guide and new permit rules. As

the HE recognized, while a parcel may be irrigated, it may not have been irrigated with full service irrigation or irrigated with optimal conditions. PFD COL 14.

Further, unlike the Sheafman Creek rights, it is unclear what Applicant intended for the volumes – whether the diverted amount would be fully consumed. See Response to Exception 4. All of the use is essentially the same municipal use, Applicant’s calculation of the volume includes both diverted and consumed formulas, for which there was no factual support.

I find that this FOF is supported by competent substantial evidence and will not be changed.

Exception 8, FOF 21:

..., the Applicant estimates the combined total volume available for Water Right Claim Nos. 76H-15928 and 76H-19708, using 22.15 inches (1.84 acre-feet) to be 73.6 acre-feet on the total 40-acre place of use (40 acres x 1.84 acre-feet). Mr. Chase stated that 1.84 acre-feet is approximately full-service

Applicant objects to this FOF on the following basis:

- In “1998,” the “supplemental volume standard” was 1.84 acre-feet/acre.
- If the FOF is correct, the Applicant never intended to claim full service irrigation. “[B]oth Sheafman Creek and South Fork of Cow Creek rights provide water to the 40 acre parcel. Therefore, the contribution of the Sheafman Creek right is only 50% of that total, or 36.8 acre-feet.” Applicant never intended to claim a full service volume.
- Applicant’s estimated volume was not identified in the Department’s 6/13/05 deficiency letter.
- Mr. Chase first commented on this issue in his second Memorandum.
- “This issue was addressed by Applicant, and evidence presented at hearing.”

A review of the Record reveals the following:

- The Applicant’s explanations as to how Water Right Claims 76H-15928 and 76H-19708 were used on the 40-acre parcel since 1990 varied widely as explained in response to Exception 3: including with other “junior” Sheafman Creek rights (Uhlig Letter pp. 4-5); January 4, 2008 Memorandum, Application 76H-30005041 Town of Pinesdale, Eric Chase Surface Water Hydrologist; S.F. Cow Creek supplemental on 58 acres (not delineated) Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.3.; essentially full service irrigation of 73.6 acre-feet, Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.2, 10 (“76H-15928-00 and 76H-19708-00 were effectively full service (irrigation) rights on those 40 acres in the years after the 1990 change authorization”). Mr. Uhlig’s testimony at hearing on rebuttal did little to clarify the use of the 1.84 acre-feet/ acre other than to summarily take 50% of the 1.84 af/ac consumptive volume and multiply it by 2 based on a new efficiency factor of 50% with no previous reference in the record, then reduce that volume to 36.8 acre-feet. He previously explained in the 9/8/05 Uhlig Letter at p.4, that the 36.8 acre-feet was the consumed volume and not a diverted volume.
- Mr. Chase responded in his second Memorandum to the 73.6 acre-feet Sheafman Creek calculation supplied by Westenberg and Uhlig in their Supplemental Pre-filed Testimony.
- The Sheafman Creek 4th rights are out of priority by the end of July. E.g., Hearing Track 5,

Uhlig (end of July); Darlene Gramza Hearing Track 10 (end of June); Hearing Track 8 Tom Allsop (rights can last “getting into June and July”); Hearing Track 16, Applicant Counsel (rights only runs couple of months for the purposes of ditch loss...); *In the Matter of Application for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale* (1993), FOF 27 and 30, PFD, adopted by Final Order.

- The Department has no supplemental volume standard as explained in the **Preliminary Matters**.
- Application of the 1.84 acre-feet calculation is inappropriate for the reasons explained in the **Preliminary Matters** in that there is no factual basis to indicate that the assumptions for the use of the 1988 Montana Irrigation Guide have been met as the fourth water rights are out of priority by the end of July, not October 30 as assumed for the purposes of the Guide.
- Applicant’s application of formulas is further inconsistent. Applicant asserts in this Exception that the Sheafman Creek water rights supply 50% of the water for the 40-acre parcel and calculate a volume of 36.8 acre-feet (whether it is claimed to be diverted or consumed at this point is not clear) and asserts (at times) that the South Fork of Cow Creek water right 76H-2112 provides the remaining portion of the water on these 40 acres. (Testimony Karl Uhlig, Hearing Track 16). In calculating the amount of water for change for 76H-2112, Applicant multiples 1.84 af/ac x 58 acres (the number of acres for which 76H-2112 is asserted to be “supplemental”/ not full service irrigation and including the *40-acre parcel*) for a total of 106.7 acre-feet. Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p. 3. Using this calculation, the volume for the 40 acre-parcel under 76H-2112 is 73.6 acre-feet (1.84 af/ac x 40). Thus, under one 50% “supplemental” calculation, the volume for the *40-acre parcel* is 36.8 acre-feet (Sheafman 4th rights) and under the other 50% “supplemental” calculation for the same property, the volume is 73.6 acre-feet (S.F. Cow Creek 76H-2112), with all of the water rights to be changed to the same “municipal” use.

The challenged language is a direct quote from Applicant’s Supplemental Pre-filed Testimony. Applicant’s theory of the case appeared to evolve, change and contradict itself through the course of the processing of this Application. I find that the language in this FOF is supported by competent substantial evidence but the FOF should be further clarified to read:

...,in Supplemental Pre-filed Testimony, the Applicant estimated the combined total volume available for Water Right Claim Nos. 76H-15928 and 76H-19708, using 22.15 inches (1.84 acre-feet) to be 73.6 acre-feet on the total 40-acre place of use (40 acres x 1.84 acre-feet), based on the 1988 Montana Irrigation Guide, assuming full service optimal irrigation (April 9-October 30). Mr. Chase stated that 1.84 acre-feet is approximately full-service irrigation. Applicant later provided a volume of 36.8 acre-feet as a “diverted volume” at hearing and has previously identified this amount as a “consumptive volume.”

The use of the 1988 Montana Irrigation Guide is not supported by the facts of record. The Montana Irrigation Guide standard used by the Applicant was for irrigation April 9 through October 30. The Sheafman Creek 4th rights are out-of-priority by the end of July. The standard selected by the Applicant also improperly includes consumptive use attributable to precipitation to which an applicant is not entitled. Applicant has not presented and the record does not contain facts that support the application of the Montana Irrigation Guide. The facts of record demonstrate that this Guide is not properly applied as asserted by the Applicant.

I further find that additional COLs should be added:

#The Montana Irrigation Guide is a guide which can be used under certain circumstances to estimate the consumptive use of a crop for an irrigation season. The Montana Irrigation Guide is not a Department standard. The Montana Irrigation Guide assumes optimal conditions, irrigation practices, and water availability and a full growing season. To use the Guide, an applicant must demonstrate that the facts surrounding the appropriation mirror the assumptions of the Guide, i.e. optimal conditions, full growing season and optimal water availability. An applicant is not entitled to claim that amount of consumption attributable to precipitation but only that associated with the appropriation.

#Applicant did not demonstrate that the requisite factual conditions exist to apply the Montana Irrigation Guide to the Sheafman Creek 4th rights.

Exception 9, FOF 23 (excerpt):

*I find there is no evidence in the record as to what portion each of these water rights plays to irrigation of the whole. [Applicant further testified that Water Right Claim Nos. 76H-15928 and 76H-19708 are out of priority in July. I find Applicant provides no historic evidence to support the use of the MT Irrigation Guide for Water Right Claim Nos. 76H-15928 and 76H-19708, based on the use of nine water rights providing irrigation to the same 40-acre parcel (post-1990 Change Authorization)]¹⁶ *The previous change authorized in the Allred case appears to have addressed the historical diverted volume (162.75 acre-feet), but not the consumed amount of each right.**

Applicant objections to the italicized language in this FOF on the basis of: the exceptions on Sheafman Creek rights on pgs 3-4 of its Exceptions and the changes effected in 1990 and 1993; the Department not requesting this data, only the amount put to beneficial use in relation to the most recent change authorizations; and findings in the Allred change case have no relevance to the requirements for this change.

See Responses to previous Exceptions. The Applicant's submissions and testimony on how Water Right Claim Nos. 76H-15928 and 76H-19708 were used on the *40-acre parcel* since 1990 is not clear from the Record. See Response to Exception 3. The findings of the Allred change, Change Authorization G15928-76H (1990), are not irrelevant as the authorization under that change application sets the outer limit of what could be authorized under this Application assuming the §85-2-402, MCA, criteria are met. The Change Authorization represents the extent of the water rights that could have been used on the *40-acre parcel*, which Applicant now seeks to change.

I find that competent substantial evidence supports this FOF, but that the FOF should be clarified to substitute "five" for "seven" and "seven" for "nine" of the water rights in light of Exception 3.

¹⁶ Applicant does not except to that portion of FOF 23 in brackets, within the language quoted by the Applicant in its exception.

Exception 10, FOF 24 (excerpt):

However, Applicant has not provided evidence of the historic diverted flow and historic consumptive use for each of the water rights listed for this 40-acre parcel which collectively irrigate the same 40-acre parcel or an explanation as to how these water rights were used.

Applicant objects to this FOF and states that consumptive volume estimates were never identified as a requirement prior to hearing or by the Department.

Through the course of these Exceptions, Applicant has claimed that it was not aware that it was required to provide diverted or consumed volumes, which would leave no volume requirements for the rights proposed for change. As previously explained and set forth in COLs 9-16, historic consumptive use is a fundamental and long-standing part of any change analysis. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (beneficial use is the basis, measure, and limit of the use); 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 441, 666 P.2d 215, 222 (Water rights limited to the amount of water actually put to a beneficial use, despite the amount of water diverted or claimed under a notice of appropriation); see also In re Water Rights in Rio Grande County, 53 P.3d 1165, 1169 (Colo. 2002); Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999). One cannot expand a water right as historically exercised so as to bootstrap a new use of water with an early priority date. See Admin. R. Mont. 36.12.1902 (The amount of water being changed for each water right cannot 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.); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1998)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right); *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (1985)(change analysis evaluating water right claims as fleshed out by historic use, including flow, diverted volume, consumptive use, and pattern of use in change of irrigation right to municipal right; cannot bootstrap a new use of water through a change.); *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 PFD); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, Proposal For Decision (2003) (Final Order adopted PFD).

The analysis of consumptive use is particularly important in a change in purpose because the amount of water is no longer tied to its historical limitation of the particular beneficial use, i.e. a change from irrigation to municipal can allow an expansion of historic use because the water use is no longer limited to the use of the historical acreage (ex. pattern of irrigation, amount of water a crop can use) but water could be taken anytime the flow is available for a municipal use. E.g. City of Bozeman. It should also be noted that while Applicant may make a distinction between municipal lawn and garden and municipal drinking water supplies, there is no distinction in water law. Municipal use is simply a single type of use including all of the traditional kinds of traditional beneficial water uses by communities like municipalities, including domestic use, lawn and garden, parks, firefighting, commercial, public buildings, industrial, etc.

Applicant must show what portion the water rights proposed for change historically played in the irrigation of the *40-acre parcel* to demonstrate that the new and different use will not be an expansion. As set forth in Exception 3, it is not clear how the *40-acre parcel* was irrigated, even though Change Authorization G15928-76H (1990) required the Applicant to keep records. The sum of the water rights cannot exceed irrigation of the whole of the *40-acre parcel*. Applicant bases its analysis upon the premise that this *40-acre parcel* and the asserted other 58 acres for Water Right Claim No. 76H-2112 received full service irrigation (April – October) when the record is clear that none of the irrigation water rights, Sheafman Creek or South Fork of Cow Creek, were available for that entire period or even past July.

While this Application was submitted (1998) prior to the Department's rules on "correct and complete" information to be provided with an application, the analysis of consumptive use is a long-standing facet of a change application as explained above. E.g. City of Bozeman. In addition, the Department rules expressly requiring consumptive use analysis were promulgated in 2005 and put Applicant on further notice that such an analysis is required. E.g., Admin. R. Mont. 36.12.1902. Moreover, most of the confusion in the record occurs after the Application moved to the Hearing's Unit and is of the Applicant's own making as explained above.

I find that this FOF is supported by competent substantial evidence and it will not be changed.

Exception 11, FOF 25-26 (excerpt):

25. *Given the lack of evidence in the record as to how the nine water rights have been used on the 40-acre parcel that is currently the place of use for Water Right Claim Nos. 76H-15928 and 76H-19708,* [the Department turns to the 1990 Change Authorization 76H-1592899 as a basis for evaluating the change sought in this case. In that Change Authorization, the Department authorized the change of Water Right Claim Nos. 76H-15928 and 76H-19708 (4th rights) for a combined total of 20 miners inches (.5 cfs) and 162.75 acre-feet of diverted volume, and Water

Right Claim Nos. 76H-17858 and 76H-19709 (1st rights) for 13.3 miners inches (.3325 cfs) and 84.92 acre-feet of diverted flow, all to irrigate the current single 40-acre parcel. The combined flows and diverted volumes are presumably split equally between the rights. Again, Water Right Claim Nos. 76H-17858 and 76H-15928 were historically supplemental on one 20-acre parcel and Water Right Claim Nos. 76H-19709 and 76H-17908 were historically supplemental on another 20-acre parcel. This change involved a change in location of irrigation and did not specify a consumptive use for each right as to its historic share of each 20 acre-parcel irrigated. While this Change Authorization provides a basis for the change of Water Right Claim Nos. 76H-15928 and 76H-19708 (4th rights) for a combined total of 20 miners inches (.5 cfs) and 162.75 acre-feet of diverted volume, because of the nature of the change with combined (1st and 4th) rights changed and continued irrigation, there is no basis to calculate a consumptive use for the individual rights proposed for change based on the Change Authorization.

26. I cannot determine whether this proposed change will create an expansion of Water Right Claim Nos. 76H-15928 and 76H-19708 because I cannot determine from the record the historic consumptive use of these Claims pre-1990 or post-1990 use.]¹⁷ *Given that the Water Right Claims share the same 40-acre parcel of use, the Applicant intends to continue irrigating the 40-acre parcel, and evidence of the historical consumptive use of these Claims is not in the record, I cannot conclude the historical basis of the Water Right Claims to be changed or that there will not be an adverse effect from expansion of the historical use Water Right Claims to be changed.*

Applicant objected to the italicized excerpt of the FOFs on the grounds that there is no reference that the Applicant would continue to irrigate the *40-acre parcel*, the change at issue is to change the purpose not to expand present usage and consumptive or historic volume estimate were never identified by the Department.¹⁸

The 9/8/05 Uhlig Letter states under the heading “Acreage Removed from Irrigation” in relevant part:

*Remembering that there are other more junior, Sheafman Creek water rights used in the Heckathorn Ditch system that serve the 40-acre place of use located in Sections 28 and 33, during higher creek flows, the field will continue to be irrigated. The water rights W152102, W002619, W002614 and W002609 will continue to serve the place of use indicated on **Map I**.*

Uhlig Letter at p. 5 (Emphasis added). “Map 1” indicates the current “POU for 76H-19708 and 76H-15928,” including the *40-acre parcel* and an additional parcel to west (never again referenced in the record as part of the POU for 76H-19708 and 76H-15928). This is consistent with the reference in the Original Application (Unified Industries) Supplement Attachment A, under a), p. 1, which discusses Water Right Claims 76H-15928, -152102, -2619, 2614 and -2609 together as diverted through the Upper Heckathorn Ditch. Applicant never disavowed this explanation and continues to rely on the Uhlig Letter in support of its other Exceptions.

¹⁷ Applicant did not except to this portion of the FOFs.

¹⁸ Applicant did not object to FOF 35 reiterating failure to prove historic use and lack of adverse effect for the proposed change of the Sheafman Creek water rights. See also FOF 41 (continue to irrigate 40-acre parcel).

Applicant points to no reference in the record where it states that it will not irrigate the *40-acre parcel*.

While Applicant states that there is no intent to expand the current use of the Sheafman Creek water rights 76H-19708 and 76H-15928 and I note that the Applicant repeatedly states in testimony that no more water will be diverted that has been diverted/used historically, the question is what was diverted/used historically. It is not clear from the Record exactly what has been diverted or consumed historically by these water rights. Applicant was required by Change Authorization G15928-76H (1990) to “record each date on which water is diverted pursuant hereto, the rate at which water is diverted, and the length of time water is diverted on that date.” No such records were submitted or appear to have been maintained. As explained in previous Responses to Exceptions, Applicant has various explanations as to what water rights were or were not or are being used on the *40-acre parcel* and estimates at different times in the record various volumes (36.8 and 73.6 acre-feet for Sheafman Creek rights) as either diverted and/or consumed based on the Montana Irrigation Guide (Exhibit A-15). As previously explained, the Guide is premised on optimal conditions for plant growth and full service irrigation (April 6-October 30)¹⁹, and Applicant, among other things, acknowledges the water rights are out of priority by the end of July. See Response to Exceptions 3 and 10.

I find that competent substantial evidence supports the challenged language in the FOF, but that the first sentence should be clarified by substituting “seven” for “nine” water rights.

Exception 12, FOF 27 (excerpt):

Applicant agreed to leave 45 gpm (.10035 cfs) in Sheafman Creek for downstream users, to compensate for the estimated 15-20% ditch loss under this change. This reduces the flow rate allocated between both Claims to 255.7 gpm (300.7 gpm – 45 gpm) (.57 cfs). However, at most, Applicant has a combined total of .5 cfs based on Change Authorization No. 76H-1592899 which would result in a combined total of approximately .4 cfs, available for change.

Applicant objects to the findings in this excerpt that has only .4 cfs of flow rate to change as opposed to .57 cfs (.67 cfs of the original claims minus 45 gpm [.1 cfs] left instream for adverse effect) on the grounds of:

- Change Authorization G15928-76H (1990),
- The amendment in 1996 of the Water Right Claims before the Water Court
- DNRC water right abstracts of the Change Authorization in the database
- Water Master’s Report on Water Right Claims 76H-19708 and 76H-15928
- Public Notice of the Application

¹⁹ Again, Applicant’s reference to the Guide improperly uses the volume including precipitation. See supra —.

- This finding retroactively amends/contradicts the Department's 1990 Change Authorization
- Department review was based on the assumption that the combined flow rate for these rights in the Database of .67 cfs was correct.

The Final Order in Change Authorization G15928-76H (1990) is the controlling document for the purposes of the authorization to change Water Rights Claims 76H-19708 and 76H-15928 to the *40-acre parcel*. See discussion under **Preliminary Matters**. The abstracts for the Change Authorization clearly state that it is subject to the Final Order. The purpose of the database is notice only. As Applicant's consultant Westenberg recognized in testimony at hearing, there are sometimes mistakes in the database. The database contains hundreds of thousands of water rights. The amendment of Water Right Claims 76H-19708 and 76H-15928 in the database after the 1990 change to reflect amendments made to the original claim was such a mistake. Only the Department can authorize the change of a water right after June 30, 1973, §§85-2-401 and-402, MCA. The Water Court has authority to adjudicate water rights as they existed prior to July 1, 1973. The Water Court has no authority to authorize a change of that water right after June 30, 1973. §85-2-212, *et seq.*, MCA. Thus, amendment of the Claims and the ultimate adoption of the Master's Report regarding the Claims cannot increase what the Department has approved under §85-2-402, MCA. Applicant tried a similar argument in *In the Matter of the Application for Change of Appropriation Water Right 015930-76H by Unified Industries* (1991), for the Sheafman Creek first rights and was denied for the same reason.

The fact is that Applicant has at most, assuming that the relevant criteria were met, 20 Miners Inches (.5cfs) to change from the *40-acre parcel*. It is well settled that a Department's change authorization has no effect on the underlying original rights. *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(Department's change process only addresses the water right holder's ability to make a different use of that existing right). In this case, these claims retain a combined flow rate of .17 cfs at the original places of use as originally filed. No evidence as to how these rights were used as originally filed was presented by Applicant in this Application, and the focus of the Application was the change of these rights from the *40-acre parcel* under the 1990 Change Authorization. This finding of .4 cfs (.5cfs [1990 Change Authorization] - .1 cfs [proposed to leave instream for adverse effect]) of flow from the 1990 Change Authorization and does not conflict with its holdings.

The 1990 Change Authorization authorized up to 162.75 acre-feet of diverted volume and 20 Miners Inches (.5 cfs) under Water Right Claims 76H-19708 and 76H-15928 (4th rights) used in combination with 13.3 Miners Inches (.3325 cfs) up to 84.92 acre-feet Water Right Claims 76H-

19709 and 76H-15858 (1st right) to irrigate that 40-acre parcel. A consumptive amount is not specified as the change was an acre for acre change in irrigation. It further appears from the record that the Applicant now proposes to consume all of the water diverted from Sheafman Creek under a municipal use. See Exception 4.

I find that this FOF is supported by competent substantial evidence and will not be changed. However a Conclusion of Law should be added to clarify why this Application is limited by the previous change. This new COL will read:

Only the Department can authorize the change of a water right after June 30, 1973, §§85-2-401 and-402, MCA. The Water Court has authority to adjudicate water rights as they existed prior to July 1, 1973. The Water Court has no authority to authorize a change of that water right after June 30, 1973. §85-2-212, et seq., MCA. Thus, amendment of Water Right Claims and the ultimate adoption of a Master's Report or decree regarding the Claims cannot increase what the Department has approved under §85-2-402, MCA. It is further well-settled that a Department's change authorization has no effect on the underlying original rights. In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(Department's change process only addresses the water right holder's ability to make a different use of that existing right); see also, U.S. v. District Court of Fourth Judicial Dist. in and for Utah County (1951), 121 Utah 1, 238 P.2d 1132.

Given that the use of the Sheafman Creek water rights on the 40-acre parcel after the 1990 Change Authorization cannot be determined from the record due to conflicting and unsupported information as to how the parcel was actually irrigated, the question becomes can the Department evaluate the §85-2-402 MCA criteria based on its previous 1990 Change Authorization. Applicant, however, has not made any argument regarding this previous change authorization or how some measure of the change herein requested could be authorized on that basis. Such argument would necessarily include discussions of irrigation, consumptive use, the new municipal use and adverse effect. I cannot at this juncture present any such analysis *sua sponte*. Even if such arguments were successful, this Application on the Sheafman Creek water rights nevertheless fails due to the lack of evidence regarding the new beneficial use.

Exception 13, FOF 29 (excerpt):

I find there may be a change in the return flow of the water rights proposed for change. If the return had been apparent in the Cow Creek drainage, but now will be returned to the Sheafman Creek drainage, there could be adverse effect to downstream Cow Creek users.

Applicant objects to this excerpt of the FOF on the grounds that:

- It submitted evidence that there had been no flow return flow to “Cow Creek” and the South Fork of Cow Creek is used entirely by the Town of Pinesdale and does not flow beyond the community

- The Application would not relocate all of the South Fork of Cow Creek water to the Sheafman drainage. Most homes to be served as a result of this Application are in the South Fork of Cow Creek drainage.
- No “Cow Creek” user objected to the Application.
- The Department did not raise return flows in its review.
- Department expert Eric Chase testified at hearing that returns on the South Fork of Cow Creek were not a problem.

After reviewing the Record, I find that this finding in FOF 29 is not supported by competent substantial evidence in the record. Applicant is the only water user on South Fork of Cow Creek before it disappears within the community’s boundaries. Mr. Chase also testified that would be no adverse effect based on return flows to the South Fork of Cow Creek. With respect to the assertions of Applicant above, I note that Applicant did not specify in the Record (as opposed to counsel argument in the Exceptions) as to specific portion of the Town that would be served by the change other than generally within the Town’s boundaries, including Sheafman Creek and South Fork of Cow Creek drainages.

This portion of the FOF is stricken and replaced with the following:

I agree and find that there will be no adverse effect based on relocation of return flows for the new use.

Return flows are a critical analysis in any change application. Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; see also Admin R. Mont. 36.12.1903. Applicant’s assertion that it did not know that it needed to analyze return flows is not credible. While I find no adverse effect based on return flows, return flows are but one facet of the change analysis. Applicant has not established the amount of water available for change because it has not proven that amount of water “put to historical and beneficial use.”

Exception 14, FOF 38 (excerpt):

However, a review of an NRIS map of the area, of which I take judicial notice, appears to show that the stream resurfaces approximately 1.5 miles downstream.

Applicant objects to this finding on the grounds that: the South Fork of Cow Creek and “Cow Creek” are two different water courses; the water course that “resurfaces” is actually Cow creek; HE should take judicial notice that these two water courses have historically operated under separate district court decrees; and Pinesdale owns all of the water rights on South Fork of Cow Creek and has historically diverted all of its flow.

I find that this finding is not supported by competent substantial evidence and will be

stricken. See Water Right Claim File for Water Right Claim 76H-2112, 1974 DNRC Letter (Rodriguez), NRIS. I note, however, that Applicant's Base Map labels the portion asserted as "Cow Creek" as "South Fork of Cow Creek," and Uhlig testified that the "South Fork of Cow Creek" resurfaces down below the Town, referring to the asserted "Cow Creek." (Hearing Track 4). This finding is stricken.

Exception 15, FOF 42 (excerpt):

While the Applicant provides calculations, Applicant has not provided actual evidence of the diverted and historic consumptive volumes for Water Right Claim No. 76H-2112, and the consumptive use for each of the water rights used to irrigate these 98 acres. [Mr. Chase found from the IWR program that the consumptive use for full-service on 98 acres is 172.5 acre-feet. However, 58 of the 98 acres are not full-service but supplemental.]²⁰ Applicant has not provided evidence as to how Water Right Claim No. 76H-2112 was used with the other nine supplemental rights from Sheafman Creek that cover 40 acres of the same place of use.

Applicant objects to this portion of the FOF on the grounds that:

- These matters were addressed in previous exceptions, at hearing and pre-filed testimony.
- Regional office understood the interrelationship among these rights.
- These issues were not addressed in the Department's deficiency letter nor in pre-hearing submissions by Eric Chase
- Applicant provided updated volume calculations in the Supplemental Pre-filed Testimony.

I find that there is competent substantial evidence to support this finding, but it should further clarified. As seen in the Response to previous exceptions, particularly Exceptions 3 and 8, Applicant has offered various and conflicting information as to how the *40-acre parcel* within the 98-acre parcel for Water Right Claim 76H-2112 was irrigated and with what water rights. Under various submissions in the file, explained above, Applicant has stated that the *40-acre parcel* is irrigated by: Water Right Claims 76H-19708 and 76H-15928 (4th rights) and Water Right Claims 76H-19709 and 76H-15858 (1st rights)(1990-1993); Water Right Claims 76H-19708 and 76H-15928 as essentially full service; also with junior water rights Water Right Claims W002619, W002614 and W002609; with Water Right Claim 76H-2112. The Applicant used the 1988 Montana Irrigation Guide and the Department's new appropriation rules (new permits) Admin. R. Mont. 36.12.115 with no foundation for applying those rules as explained in the **Preliminary Matters**. Applicant stated that "[t]he reality of the South Fork of Cow Creek is that there are sufficient flows during spring runoff periods and later in the season, flows decrease significantly." Uhlig Letter at p. 5; see also Prefiled Testimony of Karl Uhlig at pp.8-9; see also Water Right Claim 76H-2106 Claim File, Statements of Talbot and Burt (South Fork Cow Creek

²⁰ Applicant did not except to this portion of the excerpt.

out by the end of July) and Heckathorn (not sufficient water out of South Fork Cow Creek to irrigate fields). In addition, Water Right Claim 76H-2112 was adjudicated in the Water Court as it existed pre-July 1, 1973. There have been no authorized changes since that time. The volume of the Claim is limited to the amount put to “historical and beneficial use” as of that date. Based on the foundation laid for the Applicant’s witnesses, none of these witnesses has any knowledge of how the 98 acres under Water Right Claim 76H-2112 was actually historically irrigated nor did they provide a factual foundation for the use of any of the formulas used to calculate the asserted volume. Applicant’s own information indicates that “[t]he reality of the South Fork of Cow Creek is that there are sufficient flows during spring runoff periods and later in the season, flows decrease significantly,” which undercuts a claim of full service irrigation on any of the 98-acre parcel. 9/8/05 Uhlig Letter at p. 5.

On April 20, 2009, the Water Court issued another Masters Report for Water Right Claim 76H-2112, which was adopted May 20, 2009, after the date the PFD in this matter issued. I take official notice of the Water Court’s Master’s Report and accompanying abstract in support of the Response to this Exception. Admin. R. Mont. 36.12.221(4).²¹ The Post Decree Abstract contains the same Supplemental Rights Remark as the Abstracts submitted by Applicant (e.g., Exhibit A-16) for this Water Right Claim which provides that the POU for Water Right Claim 76H-2112 shares overlapping POU with 25 other irrigation Water Right Claims, including those previously referenced 76H-2609, -2614, and -2616. This Remark states in relevant part:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

There is no information in the Record to explain how these overlapping supplemental water rights are used relative to acreage at issue for Water Right Claim 76H-2112.

As for Applicant’s specific exceptions, Applicant does not specifically identify where this information is addressed in the Record. The Regional Office’s responsibilities are explained supra. As illustrated above, Applicant’s theory of its case changed slightly with each submission and most of the conflicting information arose after the Application was forwarded to the Hearings Unit. Again “correct and complete” under §85-2-302, MCA, so as to go to public notice is

²¹ While this rule generally provides the opportunity to object to official notice, I find that there is no prejudice in this case because these are official decisions of Water Court involving the Town’s water rights and are a matter of public record.

simply a threshold level of information to evaluate an Application; it doesn't mean an Applicant has provided sufficient information to prove the applicable criteria. Mr. Chase stated in his first Memorandum (January 4, 2008) with regard to the 40-acre parcel and Sheafman Creek water rights that Applicant's use of the 1.84 acre-feet/ acre volume is slightly higher than full service irrigation for the area and "[since] the water rights are part of supplemental group the actual historic use may not have supplied full service irrigation." He goes on to state his understanding that Applicant has indicated that these rights are measured but Applicant provided no records of measurement.²² Mr. Chase notes similar issues with Water Right Claim 76H-2112. In his second Memorandum (February 27, 2008), Mr. Chase questions the 1.84 acre-feet/acre volume, discusses the difference between historic diverted volume and consumed volume and suggests that Applicant review their current amendments and modifications to flow rates and volumes. The "updated" calculations in the Supplemental Prefiled Testimony suffer from the same inconsistencies explained above and contradict later hearing testimony and assertions by Applicant in these Exceptions, e.g. Water Right Claims 76H-19709 and 76H-15858 – 36.8 af consumed (not diverted)[Uhlig Letter], 73.6 af consumed [Supplemental Pre-filed testimony], 36.8 diverted [Uhlig Hearing Testimony], and 36.8 acre-feet consumed [Exceptions 4 and 8].

The FOF should be clarified and split into two FOFs as follows:

42A. Applicant is using the 1.84 acre-feet per acre figure derived from the 1988 NRCS irrigation standards from the Montana Irrigation Guide in two different ways in this Application. For the Sheafman Creek Water Right Claims, Applicant determined the historic consumptive volume for the supplemental rights using 1.84 acre-feet per acre. For the South Fork of Cow Creek, it appears the Applicant has calculated a "historic" diverted volume using 2.92 acre-feet per acre for full-service irrigation (40 acres under Water Right Claim No. 76H-2112) using the Department's New Appropriation standards Admin. R. Mont. 36.12.115 (new permits) and uses 1.84 acre-feet per acre for supplemental irrigation rights "historically" diverted (58 acres under Water Right Claim No. 76H-2112). While the Applicant provides calculations, Applicant has not provided actual evidence of the diverted and historic consumptive volumes for Water Right Claim No. 76H-2112, and the consumptive use for each of the water rights used to irrigate these 98 acres. Water Right Claim 76H-2112 further contains a Remark that its POU overlaps with 25 other irrigation water rights (including 76H-2609, -2614 and -2619):

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE

The Applicant provided no information too explain the use of any of these supplemental water rights relative to the 98 acres at issue for Water Right Claim 76H-2112. (Exhibit A-16).

²² These water right were to be measured according to the condition on Change Authorization G15928-76H, but do not appear from the record to have been measured.

Mr. Chase found from the IWR program that the consumptive use for full-service on 98 acres is 172.5 acre-feet. However, 58 of the 98 acres are asserted as not full-service but supplemental. Applicant has not provided evidence as to how Water Right Claim No. 76H-2112 was used with the other seven supplemental rights from Sheafman Creek that cover 40 acres of the same place of use or those rights listed as supplemental by the Water Court. Further Applicant has not established a factual basis of optimum irrigation (premised on irrigation April through October) for the application of the Montana Irrigation Guide. The Sheafman Creek fourth rights are out of priority by the end of July and the South Fork of Cow Creek rights do not provide water through October. Uhlig Letter at p. 5; see also Prefiled Testimony of Karl Uhlig at pp.8-9; see also Water Right Claim 76H-2106 Claim File, Statements of Talbot and Burt (South Fork Cow Creek out by the end of July) and Heckathorn (not sufficient water out of South Fork Cow Creek to irrigate fields)(Department File, Hearing Record). Applicant provided no testimony or information from anyone with actual knowledge of the historic use of Water Right Claim No. 76H-2112. I find no basis in the record to be able to conclude what “the amount put to historic and beneficial use” is under Water Right Claim 76H-2112. (Department file, Hearing Record)

42B. *Further, Applicant has not explained how Water Right Claim No. 76H-2112 was used in relation to the other five Water Right Claims (Nos. 76H-2106, -2108, -2109, -2110, and -2111) which form the basis for the multiple use remark on the Temporary Decree for the single June 1, 1901 water right. The multiple use remark limits the combined flow rate to 1.25 cfs and a pond capacity of 2.8 acre feet. (Department file; Hearing Record)*

An additional COL should be added as follows.

The Department’s New Appropriation standards Admin. R. Mont. 36.12.115 are not measures of historic beneficial use. These standards are to be applied in new permit proceedings only and provide for an amount which a new appropriator may be allowed an opportunity to perfect under a new appropriation. Historic use is that amount of water actually put to historic and beneficial use. Again, the actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case Rio Grande County; In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.; Orr; Weibert. Further, where multiple water rights irrigate a parcel, it is impossible to know that a change will not exceed the historic use of any particular appropriation without some way of differentiating the contributions of the various rights involved; in such cases, calculation of the productivity and needs of the acreage alone can never be sufficient to determine the historic use of a single right. Rio Grande.

Exception 16, FOF 43 (excerpt):

I find the Applicant did not present evidence to support the calculation of consumptive volume of Water Right Claim No. 76H-2112 for the proposed new municipal lawn and garden irrigation uses, nor specified how the consumptive amount would be allocated for municipal purposes.

Applicant objects to this finding on the basis that it claims that this information was never raised in the file review or at hearing or ever requested.

I have already addressed the need for consumptive use information in all change applications and the need to ensure that the consumptive use of new uses do not exceed that of historic uses. See Responses to previous Exceptions; see also PFD COLs 9-16.

Applicant must further provide information to support that the amount of water requested for the change will be beneficially used. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *aff'd on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518 (addressing proof of beneficial use criterion under a permit, which is similar to beneficial use criterion under a change); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; see also, *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (Proposal for Decision, adopted Final Order 1985)(discussion of municipal use needs for the City of Bozeman); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, DNRC Final Order (2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 By Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); *Statement of Opinion, Change Application No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond). See also Response to Exception 7.

I find that this FOF is supported by competent substantial evidence and it will not be changed.

Exception 17, FOF 47 (excerpt):

Staff expert Mr. Chase disagrees with the Applicant, finding the proposed new configuration of Sam's Pond would require a total of 16.11 acre-feet (8.45 acre-feet proposed expansion + 2.8 acre-feet for existing pond dimensions = 11.25 acre-feet + 4.86 acre-feet per year for evaporative losses). Water Right Claim Nos. 76H-2110 (fish and wildlife) and 76H-2108 (recreation) are multiple uses of the same water right and cover the initial fill of Sam's Pond, or 2.8 acre-feet. By using Water Right Claim Nos. 76H-2110 (2.8 acre-feet) and 76H-30010068 (12.0 acre-feet), which rights are already dedicated for the pond, Mr. Chase opined the Applicant would be 1.31 acre-feet short of being able to fill the reservoir and account for evaporation losses each year (16.11 – (2.8 acre-feet + 12.0 acre-feet)).

Applicant objects that the new configuration of the pond would require 16.11 acre-feet and the pond would be 1.31 acre-feet short of filling the reservoir. Applicant bases its objections on the grounds:

- The finding that the baseline water right for the pond is limited to 2.8 acre-feet historic capacity. Water Rights 76H-2106, -2108, -2109, -2110 and -2112 all share the pond. Only 76H-2108 and 76H-2110 list a volume that might suggest a 2.8 acre-feet limitation and does not identify evaporation.
- The Department's finding of a 4.86 acre-feet of evaporative loss is incorrect by combining historic and new losses, and "as shown at hearing" only 2.6 acre-feet of evaporative loss would result.
- The increased volume and surface area represent a yearly operation of 11.04 acre-feet which would be covered by 12 acre-feet of 76H-30010068.
- Mr. Chase indicated at hearing that it was appropriate to include pre-1973 evaporative losses from the pond as part of the baseline calculation.

The Multiple Use Remark on these claims provides in part:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME DIVERSION, CONVEYANCE, AND STORAGE STRUCTURES, THEREBY LIMITING THEIR TOTAL COLLECTIVE FLOW AND VOLUME TO THE AMOUNTS HISTORICALLY DIVERTED CONVEYED AND STORED BY THESE STRUCTURES SPECIFICALLY THE RIGHTS ARE LIMITED TO A COMBINED FLOW RATE OF 1.25 CFS AND A POND CAPACITY OF 2.8 ACRE FEET. 2106-00, 2108-00, 2109-00, 2110-00, 2112-00, 30010068

All of these water rights are already authorized to use Sam's pond (Westenberg Testimony Hearing Track 8; Statements of Claim), including Water Right Claims 76H-2106 and -30010068. The specific language of the above Remark was adopted at Applicant's request as part of a Stipulation in Water Court Case No. 76HF-355. Only the purpose and POU for these claims are proposed for change. Changing the purpose and the POU for these Claims will not "add" additional water for use in an expanded Sam's pond because these water rights are already authorized to flow through the existing Sam's pond at the 2.8 acre-feet capacity. The Applicant provided no explanation in the Record as to how all of these multiple use water rights were used

and specifically how the pond was operated. Without explanation as to how the operation of an expanded Sam's pond will not expand the use of the water rights that already flow through Sam's pond, I cannot conclude that the expansion of Sam's pond will not expand the water rights that currently use the pond, including Water Right Claim 76H-2112. I do find, however, that the evaporation of the current size of Sam's pond would be part of the Water Right Claims currently flowing through the pond, such as Water Right Claim 76H-2106, -30010068, and 2112. Applicant must account for the increased capacity of the pond (8.45 acre-feet) and the evaporation attributable to the increase in the surface area of the pond (.8 acres). Accordingly, an expansion of Sam's pond would require an additional 11.04 acre-feet (8.45 acre-feet + (.8 acres x 3.24) acre-feet per year (evaporative rate loss/year)).

Upon review of the Record, I also note that Applicant proposal to account for one fill of the expanded pond appears unusual. Storage facilities storing water for uses like irrigation and municipal use typically fill and refill throughout the period of diversion as water is used to meet specific demands. Here Applicant appears to be asserting one fill to the expanded size and a drawdown to the current 2.8 acre-feet capacity. Applicant may want to reconsider the single fill for any future application.

I find that the last sentence of FOF 47 should be stricken, FOF 47 renumbered 47A and new FOF 47B should be added:

47B. Water Right Claims 76H-2106 and -30010068 each contains the following Multiple Use Remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME DIVERSION, CONVEYANCE, AND STORAGE STRUCTURES, THEREBY LIMITING THEIR TOTAL COLLECTIVE FLOW AND VOLUME TO THE AMOUNTS HISTORICALLY DIVERTED CONVEYED AND STORED BY THESE STRUCTURES SPECIFICALLY THE RIGHTS ARE LIMITED TO A COMBINED FLOW RATE OF 1.25 CFS AND A POND CAPACITY OF 2.8 ACRE FEET. 2106-00, 2108-00, 2109-00, 2110-00, 2112-00, 30010068

All of the listed water rights are already authorized to use Sam's pond (Westenberg Testimony Hearing Track 8; Statements of Claim), including Water Right Claims 76H-2106, -30010068, and 2112. Only the purpose and POU for these claims are proposed for change. Applicant proposes that the expansion of Sam's pond and the resulting additional evaporation will be offset through the change of Water Right Claims 76H-2106 and -30010068. Changing the purpose and the POU for these Claims will not "add" additional water for use in an expanded Sam's pond because these water rights are already flowing through Sam's pond at the 2.8 acre-feet capacity. The Applicant provided no explanation in the Record as to how all of these multiple use water rights were used and specifically how the pond was operated. Without explanation as to how the operation of an expanded Sam's pond will not expand the use of the water rights that already flow through Sam's pond, I cannot conclude that the expansion of Sam's pond will not expand the water rights that currently use the pond, including Water Right Claim 76H-2112. I do find, however, that the evaporation resulting from the current 2.8 acre-feet size of Sam's pond would be part of the Water Right

Claims currently flowing through the pond, such as Water Right Claim 76H-2106, - 30010068, or -2112. Accordingly, a future expansion of Sam's pond as herein proposed would require an additional 11.04 acre-feet for a single fill.

Exception 18, FOF 48 (excerpt):

I find the Applicant has not proven by a preponderance of evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued for the South Fork of Cow Creek.

Applicant objects on the ground that it is the only entity with water rights on the South Fork of Cow Creek and the water rights for Sam's pond are adequate and would account for evaporation.

FOF addresses Water Right Claim 76H-2106 and Implied Water Right Claim 30010068, only. It does not address Sam's pond. This finding is based on a lack of information in the Record as to the actual historic use of these water rights. I have reviewed the Water Right Claims file for Water Right Claim 76H-2106, from which the implied claim is derived. After review of this file, I find that this finding is not supported by competent substantial evidence in light of the historical information in Water Right Claim File 76H-2106. The historical information in this File was not put forward by Applicant and should have been. This available information had to be affirmatively sought out in review of this Case. This Claim File includes statements by those in the area who were historically served by the water under this Claim, including Talbot, Moe, Domestic Water Users (Gold, Allred, etc.), Gold/Scott/Weidow/Porter/Warren/Jessop, and Heckathorn. I find that there is evidence to support the historical use of Water Right Claim 76H-2106 (18 acre feet) and Implied Water Right Claim 30010068 (12 acre-feet) for use by 20 homes for multiple domestic use.

I find that this FOF should be stricken and replaced with the following:

*I find that the historic use (pre July 1, 1973) of Water Right Claim 76H-2106 (18 acre-feet) and Implied Water Right Claim 300010068 (12 acre-feet) for use by 20 households is supported by personal Statements in the Water Right Claim File for 76H-2106, including Talbot, Moe, Domestic Water Users (Gold, Allred, etc.), Gold/Scott/Weidow/Porter/Warren/Jessop, and Heckathorn. I further find that there is no adverse effect from the change in the place of use of these claims in that changes in any return flows would affect only the Town's appropriations as the sole appropriator on South Fork of Cow Creek.
(Department File)*

Exception 19, FOF 57 (excerpt):

Further, Applicant did not provide a basis that the flow rate and the amount of volume requested was necessary for the municipal use requested. I find the Applicant has not proven that the flow

rate and combined diverted volume are the amounts needed to sustain the proposed beneficial use for the Sheafman Creek Water Right Claims.

Applicant objects to this finding on the grounds that Town Representative Tom Allsop testified “extensively” and in detail about the Town’s needs, data, future growth and the need to use first rights for potable water and the 4th rights for lawn and garden.

The analysis of beneficial use is a two-step process. First, is whether the type of use is beneficial under §85-2-102(4), MCA. There is no question that the use proposed, municipal, is a beneficial use under the statute. The second inquiry involves proof that the amount of water (flow and volume) is necessary for beneficial use. While this is a long standing requirement of the permit and change processes (which share the same requirement for beneficial use), the case of Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518 [hereinafter Siebel], expressly requires under the beneficial use criterion that an applicant prove the amount necessary to sustain the beneficial use. *See also*, *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly* (Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009)(applicant failed to demonstrate that amount and flow rate of water necessary to sustain the beneficial use); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *see also* §85-2-312 (1)(a), MCA.(department . . . may not issue a permit for more water than . . . can be beneficially used without waste). See Response to Exception 16. This second evaluation is the one at issue in this Exception. The record reveals the following regarding the proposed new use of Sheafman Creek rights:

- *“This 4th right water would then be distributed to users within the town through the pipeline delivery system and used for lawn and garden purposes. . . The place of use for the 40 acres currently listed on the abstracts would be refined to indicate 39 acres, reflecting a reduction of 1 acre from the original 40 acres of lawn and garden located at specific home sites within a larger more generous legal land description.” Uhlig Letter at p. 2.*
- *“The Sheafman Creek infiltration gallery is the only area where flows from other Sheafman Creek water rights could be commingled with the lawn and garden system. There is a valve box immediately outside of the water treatment plant that separates the domestic water from the lawn and garden water.” Uhlig Letter at p. 3.*
- *“The town is growing and this point it is difficult to project how many individual homes will be supplied. Let it suffice that with the proper infrastructure, these water rights will be exercised to the extent available. . . The place of use is indeed the Town of Pinesdale and within the city limits. . . The total number of connections is very difficult to determine at this time because the Town has not yet set an upper limit on development.” Uhlig*

- Letter at p. 5.
- “[R]elocation of the two Sheafman Creek 4th rights ... will allow the town to utilize their existing water rights more efficiently, the 4th rights primarily for lawn and garden use and by doing so keep the 1st rights available for serving the potable water needs of the Town.” Pre-filed testimony of Karl Uhlig at p. 4.
 - “The Town is currently experiencing periodic water shortages related to peak demand times. This application is part of a plan to better manage the Town’s existing water rights and address periodic water shortages by relocating some water rights and adding some short term storage capability to the system.” Prefiled Testimony Karl Uhlig at p. 9-10.
 - “The Town of Pinesdale continues to grow and like all other communities with growth comes increasing demands upon public water supply and delivery system...” Prefiled Testimony Karl Uhlig at p. 10.
 - “Without approval (of this application) there could be times when the water quality of the water received by the Town occupants could be compromised because of the continuation of the period times when demands exceed supply of treated water available. This proposal addresses that problem, not by appropriating water, but by creating a small storage reservoir for purposes of moderating and/or regulating flows into the treatment facility.” Prefiled Testimony Karl Uhlig at p. 12; see also Prefiled Testimony Karl Uhlig at p. 13 (similar reference).
 - Town has two separate delivery systems, one for domestic and one for lawn and garden. Sheafman Creek water rights can be taken through either. Prefiled Testimony John Westenberg at p. 9.
 - Applicant had a Preliminary Engineering Report prepared in 2005 by Kadrmas Lee & Jackson, Exhibit A-11.
 - Projected Peak Day Demand for **2025 is 223,520 gallons per day** (gpd). Ch. II, p.3
 - **Current Daily Capacity 280,800 gpd** – Total Peak Capacity (with current water rights not including those subject to this Application)(with new 50 gpm well anticipated to later add 72,000 gpd). Ch. II, p.6
 - “The town of Pinesdale has the ability to provide 257,760 gallons per day of potable water as it is configured now. With the addition of the new well, the town will be able to provide 329,760 gallons per day of potable water. The town can provide an (sic) adequate amount of potable water well past the design year of 2025.” Ch. II, p. 8.
 - “These improvements will change the configuration of the system, but they will not change the water usage of the system. The intent of the master plan for the system is to provide fire flows to the school. The Pinesdale Water System Improvement project will provide the town with adequate fire storage and eliminate the troublesome Southwest Tank.” Ch. V, P. 2.
 - The Town is currently experiencing periodic water shortages related to peak demand times. This application is part of a larger plan to better manage the Town’s existing water rights and address periodic water shortages by relocating some water rights and adding some short-term storage capability to the system. Prefiled Testimony John Westenberg at p. 10.

- *“The Town of Pinesdale continues to grow and like all other communities with growth comes increasing demands upon public water supply and delivery system...”* Prefiled Testimony John Westenberg at p. 11.
- *“Without approval (of this application) there could be times when the water quality of the water received by the Town occupants could be compromised because of the continuation of the period times when demands exceed supply of treated water available. This proposal addresses that problem, not by appropriating water, but by creating a small storage reservoir for purposes of moderating and/or regulating flows into the treatment facility.”* Prefiled Testimony John Westenberg at p. 14.
- *“The place of use of these two water rights is 40 acres located within the Town’s limits. ... [after the municipal infiltration gallery] These two water rights would then be commingled with the Town’s existing rights and directed to a new reservoir located immediately west of the current water treatment plant. The reservoir would be used to store water during high flows for use during high demand periods. From the reservoir, water would be conveyed to the lawn and garden uses within the Town’s limits.”* Applicant’s Post Hearing brief at p.4
- Municipal use is beneficial. Change will allow Town to prioritize first rights for in-home uses and 4th rights and South Fork of Cow Creek water rights for lawn and garden. Applicant’s Post-Hearing Brief at p.11. *State v. Stuart*, 2001 MT 178 ¶ 22, 306 Mont. 189 ¶ 22, 31 P.3d 353 ¶ 22. (Statements of counsel are not regarded as evidence).
- Testimony of Tom Alsop (Hearing Tracks 6-7)
 - Working with the Pinesdale water system since 1997.
 - Testified mostly about the configuration of the water system.(Exhibit A-4)
 - When questioned by counsel as to whether the Town had done any “study” on projected growth, Mr. Allsop replied that a small “study” had been done for a grant and there was no growth beyond a “rule of thumb” of 20% for 40 or 50 years by DEQ (Department of Environmental Quality). Mr. Allsop then clarified that it was not a study but a formula used by DEQ.
 - Upon further questioning by Counsel, Mr. Allsop testified that the Town had not commissioned any studies and it had no “idea” what the “population growth is going to be up there.” Town has no official studies of growth.
 - The Town has no current plans to expand water system or change other water rights.
 - “Change is necessary to serve the current residents.” Change would provide for some small amount of normal growth.
 - Upon questioning by the HE, Mr. Allsop testified that the Town has 120 water hookups and around 760 residents.
 - When questioned about 2000 and 2006 Census data and projected growth by Objectors, Mr. Allsop responded that he didn’t know anything about it and it was news to him. Counsel testified during Mr. Allsop’s testimony no one has done any plans or studies, and no one really knows.
 - Mr. Allsop was not sure what water rights were currently going into the Sheafman Creek infiltration gallery. He deferred to another witness.
 - The Town is not currently treating lawn and garden water.
 - Counsel testified during Mr. Allsop’s testimony additional storage is for all water, culinary, lawn and garden.
 - Mr. Allsop testified that he would like to use the 4th right Sheafman Creek water “early in the year when it is available.” When questioned as to when “early in

- the year” is, he testified that last year there really wasn’t even a gallon but some years it lasts a “long time” as “getting into June and July.”
- HE Eggart and Department Expert Eric Chase specifically questioned Mr. Allsop as to future growth and if he knew how many home sites that Town had platted, and whether there is a plat that shows future Town development to give an idea of the future growth. The response was no. (Hearing Track 18).

I find that there is competent substantial evidence to support this finding. The entire Record is filled with gross generalities and no support for the volume of water and flow rates requested for change. An applicant must provide a direct correlation between the flow rate and volume and the needs proposed use. Siebel, supra. Mr. Allsop did not testify “extensively” as to the Town’s needs, but rather generally that it could use the water. The testimony in the record by the Town is virtually adamant that there are no studies on growth or needs of the Town. The Preliminary Engineering Report (Exhibit A-11) put forward by the Applicant states that the Town has sufficient water rights to meet its needs well past the design year of 2025 (based on analysis not including the rights proposed for change). If this were not the case, the Town provided no testimony to clarify this statement in the Report or evidence to contradict the analysis of its own consulting engineers. The Town’s evidence consisted of only general statements that the South Fork of Cow Creek water rights will be used throughout the Town’s boundaries. The Sheafman Creek water rights were to be used on 39 unidentified acres within the Town’s boundaries. While there was testimony generally that there were shortages, no further explanation was provided. Further evidence in the Record provided that the new storage was requested to alleviate peak shortages. Finally, it is clear from the Record that while improved efficiency is asserted as the purpose of the change, the Town is not currently treating the lawn and garden water and the Town may prioritize the use of First Sheafman Creek water rights as it chooses without the change. The Town must, as it has in the past, come forth with actual justification for the flow rate and amount of water for beneficial use in accordance with §85-2-402(2)(c), MCA.

The Town has successfully completed the Department’s process for permits and changes on multiple occasions and each required proof of the beneficial use of water. A review of those decisions reveals that the Town in the past brought forth specific evidence of the amount of water and flow rate required for particular purposes, such as lawn and garden and household use and the number of households to be served. See In the Matter of the Application for Change of Appropriation Water Right 015930-76H by Unified Industries (1993); In the Matter of Application for Beneficial Water Use Permit Nos. 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale (1991); In the Matter of Application for Beneficial Water Use Permit

74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale (1993). Such proof is usually made through agency standards such as the requirements of the Montana Department of Environmental Quality and the Department's new appropriation standards, Admin. R. Mont. 36.12.115, as applied to projected growth or use as previously used by the Town in other proceedings. *E.g., In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed, Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed, Montana River Action Network et al. v. DNRC et al.*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *City of Bozeman, supra; In the Matter of Application for Beneficial Water Use Permit Nos. 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale* (1991); *In the Matter of Application for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale* (1993). The Town has demonstrated that it is capable of successfully providing such proof in the past and yet has not done so in this case. I find that there is competent substantial evidence to support this finding and it will not be changed.

Applicant did not specifically except to Conclusions of Law 33-34, addressing the law of beneficial use applied in this case.

Exception 20, FOF 58

Applicant objects that "1.25 gpm" should read "1.25 cfs." Applicant is correct. This is a typographical mistake and it will be corrected.

Exception 21, FOF 58 (excerpt)

Applicant did not provide a basis that the flow rate and the amount of volume requested was necessary for the municipal use requested. I find the Applicant has not proven that the combined flow rate and volume are the amounts needed to sustain the proposed beneficial use for the South Fork of Cow Creek Water Right Claims.

Applicant objects to this FOF on the same grounds as Exception 19 FOF 57. This Exception is denied on the same grounds set forth in Exception 19 FOF 57.

EXCEPTIONS TO THE CONCLUSIONS OF LAW

With the exception of COLs 31 and 35 -37, Applicant objects to each and every COL and cites general grounds. Applicant provides no specifics or authority as to these Exceptions, except

to the extent explained below. Given the lack of authority and citations to the record, these general objections are not considered. Admin. R. Mont. 36.12.229.

Exception 23 to COL 1

The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in § 85-2-402, MCA.

Applicant objects to this COL on the grounds that §85-2-402, MCA states that the Department “shall approve” a change application if the applicant proves the requisite criteria.

This statement is simply a statement that the Department has the authority to make the requisite decision. A statement of the Department’s jurisdiction under which it acts is found in every Department decision, including the previous decisions involving the Town. This COL is correct and will not be changed.

Exception 24 COL 2

Generally an applicant can change up to the historic diverted flow rate and volume as limited by the historic consumptive use of the water right as long as the applicable criteria are met. Id.

Applicant objects that the citation to the case of Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 [hereinafter Royston] is misplaced.

In Royston, the Montana Supreme Court upheld the Department’s denial of a change application and the burden of proof on the applicant to prove the criteria in §85-2-402, MCA, including lack of adverse effect to other appropriators. The Court upheld the denial on grounds including the failure of the applicant to analyze return flow and to demonstrate that its proposed new diversion works were adequate. As part of the Court’s decision on return flow, it recognized the failure of the applicant to show in the record:

relative percentages of water, historically diverted but unconsumed, that evaporated, returned to Ross Fork Creek, or were lost to the creek through deep percolation or otherwise. The hearings examiner did find that due to the proximity to the creek of the acreage originally irrigated, most of the unconsumed water would have quickly returned to the creek, either on the surface or via subsurface routes under the original system of flood irrigation. The record indicates that because of the increased distance of the new places of use to the creek under the proposed sprinkler irrigation system that there would be significantly less immediate return flow to Ross Fork Creek. The record does not indicate how much immediate or delayed return flow would occur under the proposed system.

Royston (1991), 249 Mont. at 431-32, 816 P.2d at 1059-60. The underlying District Court decision similarly recognized the need to quantify historic diversions and consumptive use, stating:

However, the only information regarding historic depletion of water is given for June and July; no other information is provided to calculate the total volume annually diverted. Because the annual volume historically consumed has not been quantified, no protective condition limiting annual volume diverted could be placed on the change authorization. Thus, the hearing examiner properly held that the evidence would not sustain a conclusion of no adverse impact to the objectors.

In the Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston, Cause No. CDV 89-934, Montana First Judicial District, *Memorandum and Order* (August 20, 1990) at p.14. I find that the COL should be clarified to read in relevant part:

Generally an applicant can change up to the historic diverted flow rate and volume as limited by the historic consumptive use of the water right as long as the applicable criteria are met. The historic volumes diverted and consumed must be determined and evaluated in any change proceeding under §85-2-402, MCA. Id.

Exception 25 COL 3:

3. *Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).*

Applicant objects to the general COL on the ground that it is “illogical and absurd” to rely on Water Resources Survey in light of Water Court findings.

Water Resources Surveys are routinely relied upon in all facets of water rights. They are generally excellent pieces of information because they represent on-the-ground investigations of water rights as they existed pre-July 1, 1973. They are simply another piece of evidence to be considered. Applicant’s reaction to this COL is disproportionate to its purpose. The Ravalli County Water Resources Surveys were used in this case by the HE confirming that the historic places of use on the original (not changed) Water Right Claims for irrigation in this case were irrigated. Water Resources Surveys do not determine the extent of irrigation, but only that

particular property was irrigated (or some cases capable of irrigation). Nothing in these Surveys contradicted assertions made by the Applicant; they were simply another piece of evidence. This COL is correct and will not be changed.

Exception 26 COL 5:

Thus, the focus in this case is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120.

Applicant objects to this COL on the ground that it ignores the 1990 Change Authorization and the analysis in this Case was based on post-1990 analysis.

I find that this COL should be clarified. It is clear from the record that the HE recognized the Application in this case for the Sheafman Creek water rights seeks to change those water rights from the POU and purpose approved in the 1990 Change Authorization. As for the South Fork of Cow Creek water rights, and in particular the irrigation right Water Right Claim 76H-2112, this COL is on point. No change has been authorized for this water right post July 1, 1973. This right is limited to:

The total volume of this water right shall not exceed the amount put to historical and beneficial use.

Abstract Water Right Claim 76H-2112, Exhibit A-16. Thus, the COL is correct with respect the South Fork of Cow Creek water rights subject to this Application. Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120, recognizes that “existing” water rights are rights as they existed Pre-July 1, 1973. Applicant’s consultant Westenberg similarly recognized this concept and explained it at hearing. (Hearing Track 7); see also Supplemental Pre-filed Testimony of Karl Uhlig and John Westenberg at p.2. Because no change has been authorized for the South Fork of Cow Creek rights, the focus for those rights is how they looked pre-July 1, 1973. The COL will be clarified as follows:

Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case for the South Fork of Cow Creek are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. §§85-2-401 and -402, MCA. Thus, the focus in this case is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120. The Sheafman Creek water rights sought for change in this case are those as approved under Change Authorization G15928-76H (1990).

Exception 27 to COL 9.

An applicant can change only that to which it has a right. *E.g.*, McDonald v. State, (1986) 220 Mont. 519, 722 P.2d 598; see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo.,2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271 (1991) (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted). *The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, even if the water right was decreed in Montana’s adjudication. See McDonald* (beneficial use is the basis, the measure and the limit, irrespective of greater quantity attempted to be appropriated). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221, MCA, constitutes prima facie proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute prima facie evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. (See *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation, Final Order*, (2008)) *The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 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).²³

Applicant summarily objects to this COL on the grounds that it exceeds the Department’s authority, the cases relied upon do not support the conclusion, and the Department is bound by the Water Court findings on the Water Right Claims. Applicant provides no explanation as to how the cited water law authority does not support the COL, but only cites a general non-DNRC case on agency powers limited to those conferred by the Legislature.

I find that this COL is correct and it will not be changed. McDonald and Royston, discussed above, support this COL in addition to 100 years of western water law where beneficial use has always been the basis, the measure and the limit of a water right. *E.g.*, 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 666 P.2d 215 (Water rights are limited to amount of water actually put to beneficial use, despite amount of water diverted or claimed under notice of appropriation.); Jacobs v. City of Harlowton (1923), 213 P. 244, 245 -246 (beneficial use measure of a right); Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396; Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo.,2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). Irrigation water right claims are not

²³ Applicant objects only to the italicized portion of the COL.

decreed with a volume and are thus the irrigation water rights in this case are expressly limited to the amount put to “historical and beneficial use.” §85-2-234, MCA. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; In re Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson 990 P.2d 46, 55 -57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”); *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order.

Nothing in the Department’s change proceeding affects the underlying water right as determined by the Montana Water Court and the Department has not exceeded its jurisdiction. The Department evaluates a change application under §85-2-402, MCA. That amount not authorized for change by the Department remains as originally determined by the Water Court. 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; see also In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(Department’s change process only addresses the water right holder’s ability to make a different use of that existing right). The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., Id. The water rights in this case are not finally decreed by the Water Court. This COL is correct and will not be changed.

Exception 28 to COL 11 (excerpt)

A key element of historic use and an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water.

Applicant objects to this COL on the grounds that it asserts that Department Expert Eric Chase was satisfied with Applicant’s addressing consumptive use at hearing, with no specific cites to the record.

The basis of this Exception goes to a finding of fact, not as why this statement of the law is incorrect. Applicant presents no authority as to why this statement of law is incorrect. See Royston discussion, supra; see also responses to Exceptions on FOFs and the discussion of consumptive use, and the previous Response. This COL is correct and will not be changed.

Exception 29 COL 25

Applicant failed to calculate the consumptive use for the proposed new 98 acres of irrigation under the municipal use. (FOF 42)

Applicant objects to this COL on the grounds that it did not propose 98 acres of new lawn and garden irrigation but rather 39 acres of lawn and garden irrigation with 1 acre to account for evaporative loss from the pond.

This COL appears to be a finding of fact. I do not find that it is supported by substantial evidence. I understand the HE's confusion. The Sheafman Creek water rights proposed a specific number of acres (although specific acres were undefined) whereas the South Fork of Cow Creek Water Right Claim proposed only that the water will be used by the Town. The Record indicates only that the South Fork of Cow Creek water will be used generally for lawn and garden within the Town's greater lawn and garden system. The record does not specify any acres or specific location within the boundaries for this use. The record reveals that the Applicant has stated with respect to the amount of water for new, proposed municipal use of South Fork of Cow Creek water:

- *“The multiple domestic and irrigation rights will be routed into lawn and garden watering pipeline system and therefore, potentially distributed throughout the entire Town of Pinesdale.”* Uhlig Letter at p. 3.
- *“This proposal includes redirecting the irrigation water (2112) for use in the greater Town Lawn and Garden system...”* Prefiled Testimony Karl Uhlig at p. 4.
- *“.. only change to these (South Fork of Cow Creek) rights will be clarifying the place of use to the greater town ...”* Prefiled Testimony Karl Uhlig at p.5
- *“The Town is currently experiencing periodic water shortages related to peak demand times. This application is part of a plan to better manage the Town's existing water rights and address periodic water shortages by relocating some water rights and adding some short term storage capability to the system.”* Prefiled Testimony Karl Uhlig at p. 9-10.
- Water would be used in municipal lawn and garden water system. Applicant's Post-Hearing Brief at p.5.
- Municipal use is beneficial. Change will allow Town to prioritize first rights for in-home uses and 4th rights and South Fork of Cow Creek water rights for lawn and garden. Applicant's Post-Hearing Brief at p.11.

This COL will be stricken and a revised FOF will be added to FOF 58 and state

Applicant provided no information as to how the water under Water Right Claim 76H-2112 would be used under the new proposed use other than to explain that it would be used in the lawn and garden system within the Town's boundaries. (Department file, Prefiled Testimony Uhlig).

Exception 30 to COL 23-30

Applicant objects without specificity as to “[a]ll Conclusions on ‘Adverse Effect’ re South Fork of Cow Creek (#23-30). Applicant objects on the grounds that all water rights from the South Fork of Cow Creek are owned by Applicant, Cow Creek and South Fork of Cow Creek are separate water bodies, and the South Fork of Cow Creek does not join any other surface water sources and thus there can be no adverse effect to other users as it is the only user. Applicant provides not other information and cites no legal authority. I note that Applicant has objected to COL 23, in its favor, which I question due aerial photos submitted by Applicant depicting irrigation POU’s with houses, parking lots, roads, and trees.

Portions of this exception can be dispensed with summarily. Because Applicant cites to no legal authority I find no reason to reconsider any of the authority cited within these COLs. I have further agreed to Applicant’s exception that South Fork of Cow Creek and Cow Creek are two different water bodies.

It is impossible to conclude from the record the amount of water put to “historical and beneficial use” for Water Right Claim 76H-2112. No one with actual historic knowledge of exercise of the right pre-July 1, 1973 testified nor was any historically relevant (as it existed pre July 1, 1973) information provided as to the actual amount of irrigation. As explained in Responses to these Exceptions, Applicant’s explanation of historic use varied and changed through the course of the proceeding. The formulas used for the volume of the right had no factual basis and/or were inappropriate for historic use. To change a water right under §85-2-402, MCA, it is implicit that one must have a water right. An applicant must establish their water right for change. *E.g., McDonald, supra; see also In re Application for Water Rights in Rio Grande County* 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 *Water and Water Rights* at § 16.02(b) at p. 271 (1991)(issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-*

40A, 1339989-40A, and 50641-40A by Careless Creek Ranch (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right). Applicant has not done this. Applicant cannot bootstrap a new water right with a senior priority date in the guise of a change. E.g., In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H (Proposal for Decision, adopted Final Order 1985).

However, under the Responses above, I did find that Applicant had proven historic use of Water Right Claims 76H-2106 and -30010068. However, Applicant never explained potential impacts from changing the place of use and purpose to assess adverse effect for these water rights. I further revised the finding concerning Sam's pond and other findings based on the Responses to the Exceptions above, which should be addressed in these COLs. Accordingly the following COLs are revised as herein stated. To the extent specific COLs are not addressed, I find that they are correct and will not be changed.

COL 24 is revised to provide for two COLs and state:

24.A. Applicant failed to provide any historical factual evidence to support its proposed calculation of diverted flow and volume for the irrigated acres claimed under Water Right Claim 76H-2112. Applicant provided calculations using the Montana Irrigation Guide to determine irrigation water consumptive use requirements for Water Right Claim No. 76H-2112. The 40-acre parcel within the 98-acre place of use included at times seven Water Right Claims, including Water Right Claim Nos. 76H-19708 and 76H-15928 (Water Right Claim Nos. 76H-17858, 76H-19709, 76H-2609, 76H-2614, and 76H-2619). In addition, the Water Right Claim for 76H-2112 lists 23 other water rights with overlapping places of use for the Claim in a Supplemental Rights Remark, none of which were addressed by Applicant. Applicant further improperly used the Department's New Appropriation standards for new permits to calculate the asserted historic volumes for this right. Applicant offered no evidence of how this water right was historically used on that 40-acre parcel, or historical facts to support how this Water Right Claim was used on the remaining 58 acres. Mere calculations, in the absence of historical facts to support the propriety of the calculations, are insufficient. Applicant must establish that it has the water right that it seeks to change. McDonald, supra; 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 666 P.2d 215 (Water rights are limited to amount of water actually put to beneficial use, despite amount of water diverted or claimed under notice of appropriation.); Jacobs v. City of Harlowton (1923), 213 P. 244, 245 -246 (beneficial use measure of a right); Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. As eloquently explained by the Colorado Supreme Court, another prior appropriation state:

... change of use involves two primary questions: (1) What historic beneficial use has occurred pursuant to the appropriation that is proposed for change? and (2) What conditions must be imposed on the change to prevent injury to other water rights? Only when these questions are satisfactorily addressed may the water court turn to consideration of the terms for a decree approving the change of use.

These basic predicates for a change of use have their roots in nineteenth-century water rights law, which provided that: (1) the extent of beneficial use of the original appropriation limits the amount of water that can be changed to another use, and (2) the change must not injure other water rights.

By his legal appropriation of the amount of water sufficient for his original purpose he is entitled to that amount and may apply it to any of the beneficial uses he may see fit, as against other parties whose rights have accrued subsequently to his own, provided the amount of water taken by him is not thereby increased beyond that of his original appropriation, nor the rights of those coming later injured or impaired in any manner. See Clesson S. Kinney, A Treatise on the Law of Irrigation 375 (1894) (emphasis added).

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo.,1999); *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); *Featherman v. Hennessy* (1911), 43 Mont. 310, 115 P. 983 (increase in consumptive use amounts to a new appropriation); *Head v. Hale* (1909), 38 Mont. 302, 100 P. 222 (increase of use amounts to a new appropriation); Robert E. Beck, 2 *Water and Water Rights* at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted); *In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H* (Proposal for Decision, adopted Final Order 1985); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right. Applicant failed to establish the volume “put to historical and beneficial use,” for change. (Admin. R. Mont. 36.12.115; FOF 40-42)

24.B. Applicant did not provide information concerning the historic use of Water Right Claims 76H- 2106-00, 2108-00, 2109-00, 2110-00, 2112-00, 30010068 for the purpose of determining whether the proposed expansion of Sam’s pond will create an enlargement of these water rights and in particular 76H-2112, the unquantified irrigation right. All of these water rights are derived from the same historic right and share the Multiple Use Remark providing that they share the same diversion, conveyance, and storage structures. I cannot conclude that the proposed expansion of Sam’s pond will not expand the water rights historically used with this pond.

A new COL 25 inserted to read:

Applicant failed to specifically explain the proposed new use for the South Fork of Cow Creek water rights proposed for change and calculate the consumptive use for the proposed new municipal use. (FOF 42)

COL 27 is stricken and replaced with the following:

Because there is no other appropriator on the South Fork of Cow Creek other than the Town and the South Fork of Cow Creek goes underground within the Town’s boundaries, Applicant has proven that there would be no adverse effect to the use of 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 from the change of Water Right Claim No. 76H-2112. §85-2-402(2)(a), MCA. Nevertheless Applicant has not proven that “amount of water put to historic and beneficial use,” to be changed. Applicant may not bootstrap a new water use with a senior priority date and must go through the permit process under §85-2-311, MCA to obtain a new water right. Featherman v. Hennessy (1911), 43 Mont. 310, 115 P. 983; see also Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (increase of use amounts to a new appropriation); City of Bozeman, supra (FOF 29)

COL 29 will be revised to read:

The volume associated in the Preliminary Decree with Water Right Claim No. 76H-2106 is 18 acre-feet and the volume for implied Water Right Claim No. 76H-30010068 is 12 acre-feet. These volumes were likely based on the 1.5 acre-feet per household standard used in the claims examination process. These rights are supported by historic evidence in Water Right Claim File 76H-2106 and I find that there will be no adverse effect to 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 from the change in place of use of these water rights. (FOF 48).

COL 30 is revised to read:

Applicant has not proven by a preponderance of the evidence the proposed change in appropriation right for Water Right Claim. 76H-2106 and Implied Water Right Claim No. 76H-30010068 will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§ 85-2-402(2)(a), MCA; FOF 35-47).

EXCEPTION GENERAL CONCLUSIONS

Applicant concludes its Exceptions with general remarks. It asserts that it has followed the Department’s process and provided information as requested. Applicant further asserts that Mr. Chase testified that all of the criteria had been met subject to minor corrections. Applicant further concludes that the Department now purports to deny for failure to provide critical data that the Applicant did know it needed to provide.

Applicant’s dilemma is of its own making. It did provide information to the Department when requested. However, as illustrated above, virtually every submission from the Applicant was just slightly different than the one before with no single one identified as the correct one. Regardless of the varying versions, the critical failure of the Applicant was to elect to move forward with volume calculations that had no basis in fact. The Water Court did not adjudicate the volumes on these irrigation claims. The volumes are limited to the amount put to historical and beneficial use, which must be proven by the Applicant. The calculations for all of the irrigation rights were based on an assumption of full service irrigation (April 9-October 30) where the facts were that there was never a full season of irrigation under these water rights. These

rights are early season rights out of priority by the end of July, as testified to by Applicant. As for the beneficial use, Applicant has been through the Department's proceeding on numerous occasions and successfully demonstrated beneficial use with concrete evidence not general, conclusory statements.

A note about Mr. Chase's testimony: Mr. Chase testified on the basis of hydrology, assuming that the applicant had the rights it claimed and they were delivered in priority. Mr. Chase does not decide the legal issues nor apply the law to the facts. Most of the conflicts in the testimony arose as a result of Applicant's own submissions and the testimony at hearing (e.g. Sheafman Creek rights are out of priority by end of July).

WHEREFORE this Final Decision Maker enters the following:

ORDER

The PFD entered in this matter on May 1, 2009 is hereby adopted in part and revised in part. The PFD is revised as follows:

Global Change

All references to the "1998 Montana Irrigation Guide" will be replaced with references to the "1988 Montana Irrigation Guide."

FINDINGS OF FACT

FOF 7:

The first sentence is corrected to read:

The Town has four creeks that flow through town, including Sheafman Creek, South Fork of Cow Creek, Sage Creek and Sheridan Gulch.

FOF 10 (pg. 6, indent 2):

The second indent is revised to read:

- *Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change were or are used in combination with five other water rights (Water Right Claims 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). Applicant's explanation as to how all of these water rights were used on the 40-acre parcel varied during the course of the proceeding. The Applicant does not consistently describe how all of these Water Right Claims were used in combination to irrigate the asserted 40 acres or provide the historic consumptive use of each of these water rights on the irrigated 40 acres parcel. The flow-rate asserted for 76H-15928 is .40 cfs and the flow-rate asserted for 76H-19708 is .27 cfs, for a combined flow-rate asserted for the two Water Right Claims of .67 cfs (300.7 gpm). The asserted combined consumptive volume attributed to these two Water Right*

Claims is calculated as 36.8 acre-feet. The Applicant did not provide information about the historic diverted volume of these water rights as used on the 40-acre parcel. However, the Applicant intends to consume the full amount of the water diverted. The present use is authorized by DNRC under Change Authorization G15928-76H, issued on February 22, 1990, as more fully described below. (Department file)

FOF 11:

The Table in FOF is stricken and replaced with the following Tables:

Original WR Claim #	Place Of Use	Priority Date	Volume	Flow Rate	Point of Diversion	Period of Diversion	Purpose (Total Acres)
15928	E2NWNW SEC 26, T7N, R21W Ravalli	6/1/1883	Amount put to historical and beneficial use.	179.52 gpm (.40 cfs)	NESENW SEC 27, T7N, R21W (Burke Ditch)	April 1 - Oct 31	Irrigation (20 ac; Supplemental with 17858)
19708	W2NENW SEC 26, T7N, R21W Ravalli	6/1/1883	Amount put to historical and beneficial use.	121.18 gpm (.27 cfs)	NESENW SEC 27, T7N, R21W (Burke Ditch)	April 1 - Oct 31	Irrigation (20 ac; Supplemental with 19709)

WR Claim # Change 1990	Place Of Use	Priority Date	Volume (Combined for both Rights)	Flow Rate	Point of Diversion	Period of Diversion	Purpose (Total Acres)
15928	35 acres SESE Sec. 28 T7N R21W Ravalli and 5 acres NENENE Sec. 33 T7 RN 21 Ravalli	6/1/1883	162.75 acre-feet diverted (combined)	10 Miners Inches (.25 cfs)	SWNENW SEC 28, T7N, R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (Changed with Water Right Claims 76H-17858 and -19709) Subject to Final Order
19708	35 acres SESE Sec. 28 T7N R21W Ravalli and 5 acres NENENE Sec. 33 T7 RN 21 Ravalli	6/1/1883	162.75 acre-feet diverted (combined)	10 Miners Inches (.25 cfs)	SWNENW SEC. 28 T7N R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (Changed with Water Right Claims 76H-17858 and -19709) Subject to Final Order

Sources: Exhibit A-3 and Final Order in Change Authorization G15928-76H (1990).

FOF 10, “South Fork of Cow Creek” (page 9, first full indent):

The following statement is stricken.

The Application states that the “place of use” is to be changed but other information in the record appears to be indicate change in the “point of diversion.” The intent simply isn’t clear based on the information submitted.

FOF 21:

FOF 21 is revised to read:

Applicant testified that the Application was submitted in 1998; therefore, Applicant used the 1988 Natural Resources Conservation Service (NRCS) standards in the Montana Irrigation Guide for flood irrigation of pasture grass. The Montana Irrigation Guide provides calculations to estimate a maximum consumptive use using the Balaney-Criddle method. In Supplemental Pre-filed Testimony, the Applicant estimated the combined total volume available for Water Right Claim Nos. 76H-15928 and 76H-19708, using 22.15 inches (1.84 acre-feet) to be 73.6 acre-feet on the total 40-acre place of use (40 acres x 1.84 acre-feet), based on the 1988 Montana Irrigation Guide, assuming full service optimal irrigation (April 9-October 30). Mr. Chase stated that 1.84 acre-feet is approximately full-service irrigation. Applicant later provided a volume of 36.8 acre-feet as a “diverted volume” at hearing and has previously identified this amount as a “consumptive volume.”

The use of the 1988 Montana Irrigation Guide is not supported by the facts of record. The Montana Irrigation Guide standard used by the Applicant was for irrigation April 9 through October 30. The Sheafman Creek 4th rights are out-of-priority by the end of July. The standard selected by the Applicant also improperly includes consumptive use attributable to precipitation to which an applicant is not entitled. Applicant has not presented and the record does not contain facts that support the application of the Montana Irrigation Guide. The facts of record demonstrate that this Guide is not properly applied as asserted by the Applicant. (Department file; Supplemental Pre-filed Testimony of Uhlig and Westenberg; Hearing Testimony of Uhlig, Gramza, Allsop, Chase; Exhibit A-14)

FOF 23:

FOF 23 is revised to read:

Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change share in the past of currently the same 40-acre parcel place of use with five other water rights (Water Right Claim Nos. 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). I find there is no evidence in the record as to what portion each of these water rights plays to irrigation of the whole. Applicant further testified that Water Right Claim Nos. 76H-15928 and 76H-19708 are out of priority in July. I find Applicant provides no historic evidence to support the use of the MT Irrigation Guide for Water Right Claim Nos. 76H-15928 and 76H-19708, based on the use of seven water rights providing irrigation to the same 40-acre parcel (post-1990 Change Authorization). The previous change authorized in the Allred case appears to have addressed the historical diverted volume (162.75 acre-feet), but not the consumed amount of each right. (Department file; Hearing Testimony of Uhlig, Chase; Exhibit A-14; Allred Proposal for Decision, p. 28)

FOF 25:

The first sentence of FOF 25 is revised to read:

Given the lack of evidence in the record as to how the seven water rights have been used on the 40-acre parcel that is currently the place of use for Water Right Claim Nos. 76H-15928 and 76H-19708, the Department turns to the 1990 Change Authorization 76H-1592899 as a basis for evaluating the change sought in this case.

FOF 29:

FOF 29 is revised to read:

The proposed reservoir will have approximately a surface area of .52 acres, depth of 25 feet, and capacity of 5.2 acre-feet. During times when the reservoir is full and system demands do not exceed infiltration system capabilities, any excess water diverted by the two infiltration galleries will be returned immediately back to Sheafman Creek for downstream users. Applicant also asserts that the prior place of use for these rights was located in the South Fork of Cow Creek drainage, and any waste water possibly generated by this use would not have returned to Sheafman Creek. I agree and find that there will be no adverse effect based on relocation of return flows for the new use.

(Department file; Testimony of Uhlig, Westenberg, Chase; Exhibit A-11)

FOF 38:

FOF 38 is revised to read:

The South Fork of Cow Creek is an intermittent stream. Applicant states that it does not appear to flow beyond the Town's boundaries. The creek is dewatered before it crosses Mulberry Street, and there is no defined stream channel at the point where the drainage exits at Wildwood Lane, both within the Town's limits. All natural creek flows are diverted into the existing multiple domestic or irrigation systems. Applicant asserts that the Town is the only water right owner that could be affected by or benefit from the seepage from the ditches. No objections were filed on the Application to change the water rights located on the South Fork of Cow Creek. Objectors agreed at the hearing that they would not be adversely affected if the change for the water rights on the South Fork of Cow Creek were to be granted. (Department file; Testimony of Uhlig, Westenberg, Objectors)

FOF 42:

FOF 42 is revised to read:

42A. Applicant is using the 1.84 acre-feet per acre figure derived from the 1988 NRCS irrigation standards from the Montana Irrigation Guide in two different ways in this Application. For the Sheafman Creek Water Right Claims, Applicant determined the historic consumptive volume for the supplemental rights using 1.84 acre-feet per acre. For the South Fork of Cow Creek, it appears the Applicant has calculated a "historic" diverted volume using 2.92 acre-feet per acre

for full-service irrigation (40 acres under Water Right Claim No. 76H-2112) using the Department's New Appropriation standards Admin. R. Mont. 36.12.115 (new permits) and uses 1.84 acre-feet per acre for supplemental irrigation rights "historically" diverted (58 acres under Water Right Claim No. 76H-2112). While the Applicant provides calculations, Applicant has not provided actual evidence of the diverted and historic consumptive volumes for Water Right Claim No. 76H-2112, and the consumptive use for each of the water rights used to irrigate these 98 acres. Water Right Claim 76H-2112 further contains a Remark that its POU overlaps with 25 other irrigation water rights (including 76H-2609, -2614 and -2619):

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE

The Applicant provided no information too explain the use of any of these supplemental water rights relative to the 98 acres at issue for Water Right Claim 76H-2112. (Exhibit A-16).

Mr. Chase found from the IWR program that the consumptive use for full-service on 98 acres is 172.5 acre-feet. However, 58 of the 98 acres are asserted as not full-service but supplemental. Applicant has not provided evidence as to how Water Right Claim No. 76H-2112 was used with the other seven supplemental rights from Sheafman Creek that cover 40 acres of the same place of use or those rights listed as supplemental by the Water Court. Further Applicant has not established a factual basis of optimum irrigation (premised on irrigation April through October) for the application of the Montana Irrigation Guide. The Sheafman Creek fourth rights are out of priority by the end of July and the South Fork of Cow Creek rights do not provide water through October. Uhlig Letter at p. 5; see also Prefiled Testimony of Karl Uhlig at pp.8-9; see also Water Right Claim 76H-2106 Claim File, Statements of Talbot and Burt (South Fork Cow Creek out by the end of July) and Heckathorn (not sufficient water out of South Fork Cow Creek to irrigate fields)(Department File, Hearing Record). Applicant provided no testimony or information from anyone with actual knowledge of the historic use of Water Right Claim No. 76H-2112. I find no basis in the record to be able to conclude what "the amount put to historic and beneficial use" is under Water Right Claim 76H-2112. (Department file, Hearing Record)

42B. Further, Applicant has not explained how Water Right Claim No. 76H-2112 was used in relation to the other five Water Right Claims (Nos. 76H-2106, -2108, -2109, -2110, and -2111) which form the basis for the multiple use remark on the Temporary Decree for the single June 1, 1901 water right. The multiple use remark limits the combined flow rate to 1.25 cfs and a pond capacity of 2.8 acre feet. (Department file; Hearing Record)

FOF 47:

The last sentence of FOF 47 is stricken, FOF 47is renumbered 47A and new FOF 47B is added:

47B. Water Right Claims 76H-2106 and -30010068 each contains the following Multiple Use Remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME DIVERSION, CONVEYANCE, AND STORAGE STRUCTURES, THEREBY LIMITING THEIR TOTAL COLLECTIVE FLOW AND VOLUME TO THE AMOUNTS HISTORICALLY

DIVERTED CONVEYED AND STORED BY THESE STRUCTURES SPECIFICALLY THE RIGHTS ARE LIMITED TO A COMBINED FLOW RATE OF 1.25 CFS AND A POND CAPACITY OF 2.8 ACRE FEET. 2106-00, 2108-00, 2109-00, 2110-00, 2112-00, 30010068

All of the listed water rights are already authorized to use Sam's pond (Westenberg Testimony Hearing Track 8; Statements of Claim), including Water Right Claims 76H-2106, -30010068, and 2112. Only the purpose and POU for these claims are proposed for change. Applicant proposes that the expansion of Sam's pond and the resulting additional evaporation will be offset through the change of Water Right Claims 76H-2106 and -30010068. Changing the purpose and the POU for these Claims will not "add" additional water for use in an expanded Sam's pond because these water rights are already flowing through Sam's pond at the 2.8 acre-feet capacity. The Applicant provided no explanation in the Record as to how all of these multiple use water rights were used and specifically how the pond was operated. Without explanation as to how the operation of an expanded Sam's pond will not expand the use of the water rights that already flow through Sam's pond, I cannot conclude that the expansion of Sam's pond will not expand the water rights that currently use the pond, including Water Right Claim 76H-2112. I do find, however, that the evaporation resulting from the current 2.8 acre-feet size of Sam's pond would be part of the Water Right Claims currently flowing through the pond, such as Water Right Claim 76H-2106, -30010068, or -2112. Accordingly, a future expansion of Sam's pond as herein proposed would require an additional 11.04 acre-feet for a single fill.

FOF 48:

FOF 48 is stricken and replaced with the following:

I find that the historic use (pre July 1, 1973) of Water Right Claim 76H-2106 (18 acre-feet) and Implied Water Right Claim 300010068 (12 acre-feet) for use by 20 households is supported by personal Statements in the Water Right Claim File for 76H-2106, including Talbot, Moe, Domestic Water Users (Gold, Allred, etc.), Gold/Scott/Weidow/Porter/Warren/Jessop, and Heckathorn. I further find that there is no adverse effect from the change in the place of use of these claims in that changes in any return flows would affect only the Town's appropriations as the sole appropriator on South Fork of Cow Creek. (Department File)

FOF 58:

FOF 58 is revised to read:

Applicant is requesting a combined flow rate of 1.25 cfs up to a diverted volume of 251.66 acre-feet from the South Fork of Cow Creek for municipal use for Water Right Claim No. 76H-2112. Applicant provide no information as to how the water under Water Right Claim 76H-2112 would be used under the new proposed use other than to explain that it would be used in the lawn and garden system within the Town's boundaries. The volumes associated with the Preliminary Decree for Water Right Claim No. 76H-2106 is 18 acre-feet and Water Right Claim No. 76H-30010068 is 12.0 acre-feet. Applicant is also proposing to expand the existing irrigation reservoir surface of Sam's Pond to 1.5 acres, depth of 15 feet, and capacity of 11.25 acre-feet. Applicant did not provide a basis that the flow rate and the amount of volume requested was necessary for the municipal use requested. I find the Applicant has not proven that the combined flow rate and volume are the amounts needed to sustain the proposed beneficial use for the South Fork of Cow Creek Water Right Claims. (Department File, Hearing Record, Prefiled Testimony Uhlig).

CONCLUSIONS OF LAW

COL 2:

COL 2 is renumbered as COL 2.A. and the last sentence is revised to read:

The requirements of Montana's change statutes have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (applicant has the burden of proof at all stages before the Department and courts). Generally an applicant can change up to the historic diverted flow rate and volume as limited by the historic consumptive use of the water right as long as the applicable criteria are met. The historic volumes diverted and consumed must be determined and evaluated in any change proceeding under §85-2-402, MCA. Id.

A new COL 2.B. is added to state:

***2.B.** Only the Department can authorize the change of a water right after June 30, 1973, §§85-2-401 and -402, MCA. The Water Court has authority to adjudicate water rights as they existed prior to July 1, 1973. The Water Court has no authority to authorize a change of that water right after June 30, 1973. §85-2-212, et seq., MCA. Thus, amendment of Water Right Claims and the ultimate adoption of a Master's Report or decree regarding the Claims cannot increase what the Department has approved under §85-2-402, MCA. It is further well-settled that a Department's change authorization has no effect on the underlying original rights. In the Matter of Application to Change Appropriation Water Right No. 41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(Department's change process only addresses the water right holder's ability to make a different use of that existing right);); see also, U.S. v. District Court of Fourth Judicial Dist. in and for Utah County (1951), 121 Utah 1, 238 P.2d 1132.*

COL 5:

COL 5 is revised to read:

Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case for the South Fork of Cow Creek are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department's approval. §§85-2-401 and -402, MCA. Thus, the focus in this case is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120. The Sheafman Creek water rights sought for change in this case are those as approved under Change Authorization G15928-76H (1990).

COL 7:

An additional sentence is added to the end of COL 7 to state:

I also take official notice of In the Matter of Application for Beneficial Water Use Permit Nos. 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale (1991); In the Matter of Application for Beneficial Water Use Permit 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale (1993); Water Right Claim File for Water Right Claim 76H-2106; and the Water Master's Report for Water Court Case Nos. 76H-714 (April 20, 2009).

COL 14:

COL 14 is renumbered to read 14.A. and new COL 14. B. and 14.C. are added to state:

14.B. The Montana Irrigation Guide is a guide which can be used under certain circumstances to estimate the consumptive use of a crop for an irrigation season. The Montana Irrigation Guide is not a Department standard. The Montana Irrigation Guide assumes optimal conditions, irrigation practices, and water availability and a full growing season. To use the Guide an applicant must demonstrate that the facts surrounding the appropriation mirror the assumptions of the Guide, i.e. optimal conditions, full growing season and optimal water availability. An applicant is not entitled to claim that amount of consumption attributable to precipitation but only that associated with the appropriation.

14.C. The Department's New Appropriation standards, Admin. R. Mont. 36.12.115, are not measures of historic beneficial use. These standards are to be applied in new permit proceedings only, and provide for an amount which a new appropriator may be allowed an opportunity to perfect under a new appropriation. Historic use is that amount of water actually put to historic and beneficial use. Again, the actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case Rio Grande County; In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.; Orr; Weibert. Further, where multiple water rights irrigate a parcel, it is impossible to know that a change will not exceed the historic use of any particular appropriation without some way of differentiating the contributions of the various rights involved; in such cases, calculation of the productivity and needs of the acreage alone can never be sufficient to determine the historic use of a single right. Rio Grande.

COL 21:

COL 21 is renumbered to read 21.A. and a new 21.B. is added to state:

21.B. Applicant did not demonstrate that the requisite factual conditions exist to apply the Montana Irrigation Guide to the Sheafman Creek 4th rights. (FOF 21, 23, 24)

COL 24:

COL 24 is revised to provide for two COLs and state:

24.A. Applicant failed to provide any historical factual evidence to support its proposed calculation of diverted flow and volume for the irrigated acres claimed under Water Right Claim 76H-2112. Applicant provided calculations using the Montana Irrigation Guide to determine irrigation water consumptive use requirements for Water Right Claim No. 76H-2112. The 40-acre parcel within the 98-acre place of use included at times seven Water Right Claims, including Water Right Claim Nos. 76H-19708 and 76H-15928 (Water Right Claim Nos. 76H-17858, 76H-19709, 76H-2609, 76H-2614, and 76H-2619). In addition, the Water Right Claim for 76H-2112 lists 23 other water rights with overlapping places of use for the Claim in a Supplemental Rights Remark, none of which were addressed by Applicant. Applicant further improperly used the Department's New Appropriation standards for new permits to calculate the asserted historic volumes for this right. Applicant offered no evidence of how this water right was historically used on that 40-acre parcel, or historical facts to support how this Water Right Claim was used

on the remaining 58 acres. Mere calculations, in the absence of historical facts to support the propriety of the calculations, are insufficient. Applicant must establish that it has the water right that it seeks to change. McDonald, supra; 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 666 P.2d 215 (Water rights are limited to amount of water actually put to beneficial use, despite amount of water diverted or claimed under notice of appropriation.); Jacobs v. City of Harlowton (1923), 213 P. 244, 245 -246 (beneficial use measure of a right); Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. As eloquently explained by the Colorado Supreme Court, another prior appropriation state:

... change of use involves two primary questions: (1) What historic beneficial use has occurred pursuant to the appropriation that is proposed for change? and (2) What conditions must be imposed on the change to prevent injury to other water rights? Only when these questions are satisfactorily addressed may the water court turn to consideration of the terms for a decree approving the change of use.

These basic predicates for a change of use have their roots in nineteenth-century water rights law, which provided that: (1) the extent of beneficial use of the original appropriation limits the amount of water that can be changed to another use, and (2) the change must not injure other water rights.

By his legal appropriation of the amount of water sufficient for his original purpose he is entitled to that amount and may apply it to any of the beneficial uses he may see fit, as against other parties whose rights have accrued subsequently to his own, provided the amount of water taken by him is not thereby increased beyond that of his original appropriation, nor the rights of those coming later injured or impaired in any manner.

See Clesson S. Kinney, *A Treatise on the Law of Irrigation* 375 (1894) (emphasis added).

Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo.,1999); In re Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible "change" of an existing right); Featherman v. Hennessy (1911), 43 Mont. 310, 115 P. 983 (increase in consumptive use amounts to a new appropriation); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (increase of use amounts to a new appropriation); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application," (citations omitted); In the Matter of the Application for Beneficial Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-s41H (Proposal for Decision, adopted Final Order 1985); In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right. Applicant failed to establish the volume "put to historical and beneficial use," for change. (Admin. R. Mont. 36.12.115; FOF 40-42)

24.B. Applicant did not provide information concerning the historic use of Water Right Claims 76H- 2106-00, 2108-00, 2109-00, 2110-00, 2112-00, 30010068 for the purpose of determining whether the proposed expansion of Sam's pond will create an enlargement of these water rights and in particular 76H-2112, the unquantified irrigation right. All of these water rights are derived from the same historic right and share the Multiple Use Remark providing that they share

the same diversion, conveyance, and storage structures. I cannot conclude that the proposed expansion of Sam's pond will not expand the water rights historically used with this pond.

COL 25:

This COL is stricken and replaced with the following:

Applicant failed to specifically explain the proposed new use for the South Fork of Cow Creek water rights proposed for change and calculate the consumptive use for the proposed new municipal use. (FOF 42, 58)

COL 27:

COL 27 is stricken and replaced with the following:

Because there is no other appropriator on the South Fork of Cow Creek other than the Town and the South Fork of Cow Creek goes underground within the Town's boundaries, Applicant has proven that there would be no adverse effect to the use of 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 from the change of Water Right Claim No. 76H-2112. §85-2-402(2)(a), MCA. Nevertheless Applicant has not proven that "amount of water put to historic and beneficial use," to be changed. Applicant may not bootstrap a new water use with a senior priority date and must go through the permit process under §85-2-311, MCA to obtain a new water right. Featherman v. Hennessy (1911), 43 Mont. 310, 115 P. 983; see also Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (increase of use amounts to a new appropriation); City of Bozeman, supra (FOF 29, 38, 41, 42, 43)

COL 29:

COL 29 is revised to read:

The volume associated in the Preliminary Decree with Water Right Claim No. 76H-2106 is 18 acre-feet and the volume for implied Water Right Claim No. 76H-30010068 is 12 acre-feet. These volumes were likely based on the 1.5 acre-feet per household standard used in the claims examination process. These rights are supported by historic evidence in Water Right Claim File 76H-2106 and I find that there will be no adverse effect to 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 from the change in place of use of these water rights. (FOF 48).

COL 30:

COL 30 is revised to read:

Applicant has not proven by a preponderance of the evidence the proposed change in appropriation right for Water Right Claim. 76H-2106 and Implied Water Right Claim No. 76H-30010068 will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§ 85-2-402(2)(a), MCA; FOF 35-47).

Findings and Conclusions not specifically addressed remain unchanged.

FINAL ORDER

Application No. 76H-30005041 to change Water Right Numbers 76H-2106-00, 76H-2112-00, Implied Water Right Claim No. 30010068, 76H-15928-00, 76H-19708-00 by the Town of Pinesdale is hereby **DENIED**.

NOTICE

If all administrative remedies have been exhausted, including filing all exceptions to the Proposal for Decision, this Final Order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

DATED this 22nd day of September, 2009.

/Original signed by Anne W. Yates/
Anne W. Yates, Esq.
Hearing Examiner
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601
(406) 444-0503

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 22nd day of September 2009, by first class United States mail.

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

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

**IN THE MATTER OF APPLICATION NO. 76H-)
30005041 TO CHANGE WATER RIGHT NOS.)
76H-2106-00, 76H-2112-00, 76H-15928-00,)
76H-19708-00 BY TOWN OF PINESDALE)**

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, Montana Code Annotated (MCA)), the contested case provisions of the Montana Administrative Procedure Act (MAPA) (Title 2, chapter 4, part 6), and the administrative procedural rules for contested case hearings (Admin. R. M. 36.12.201, *et seq.*), and after notice required by § 85-2-307, MCA, a contested case hearing was held on March 13, 2008, in Missoula, Montana, before the undersigned Hearing Examiner for the Montana Department of Natural Resources and Conservation (Department or DNRC) in the above-referenced matter. The purpose of the hearing was to determine whether an authorization to change Water Right Claim Nos. 76H-2106-00, 76H-2112-00, Implied Water Right Claim No. 30010068, 76H-15928-00, and 76H-19708-00 should be issued to Applicant Town of Pinesdale (Applicant or Town), for the above Application under the criteria set forth in § 85-2-402, MCA. The Department has fully considered the record consisting of all testimony, evidence and argument submitted in this matter.

PARTIES

Applicant appeared at the hearing by and through counsel, David T. Markette. The following were called to testify as witnesses by the Applicant: Tom Allsop, the Town's water system manager (Allsop), Karl Uhlig, Land and Water Consulting, PBS&J (Uhlig), and John Westenberg, Land and Water Consulting, PBS&J (Westenberg). Mr. Uhlig and Mr. Westenberg submitted prefiled testimony, dated November 30, 2007, and supplemental prefiled testimony, dated February 5, 2008, and also provided rebuttal testimony on behalf of the Applicant at hearing.

Objectors Jack D. and Marsha L. Morgan (Morgan), Objectors Raymond A. and Darlene A. Gramza (Gramza), Objector David E. Duarte (Duarte), and Objectors Kimmo and Monica Virtaneva (Virtaneva) (collectively Objectors) appeared at the hearing *pro se*. Objector Walter D. Easley (Easley) (Water Right No. 76H-3009-00 (May 1, 1883)) did not appear at the hearing and is therefore in default and his objection is dismissed from this proceeding. (See Admin. R. M. 36.12.208).

Because the Objectors in this matter did not comply with the June 27, 2007, Scheduling Order, established and agreed to by the parties during the June 26, 2007, pre-hearing telephonic conference, requiring the parties to disclose all witnesses and exhibits they intended to introduce at hearing in this matter by January 15, 2008, the Hearing Examiner notified the parties that the Objectors would not be allowed to present any witnesses or new or additional evidence that was not already in the record, at the hearing. (See February 25, 2008 *Order*, Admin. R. M. 36.12.208; M. R. Civ. P. 16). However, the Objectors were allowed the opportunity to present brief oral summaries of their Objections to the Application at the hearing and cross-examine the Applicant's witnesses.

DNRC Staff Expert Eric Chase, Surface Water Hydrologist (Chase), appeared at the hearing and provided testimony regarding his Memorandum to the Applicant's pre-filed testimony dated January 4, 2008, his response Memorandum to the Applicant's supplemental pre-filed testimony dated February 27, 2008, and his technical opinion in the matter.

EXHIBITS

Applicant offered and the Hearing Examiner accepted and admitted into evidence the following exhibits:

- **Exhibit A-1:** Application file, including DNRC Environmental Assessment;
- **Exhibit A-2:** Aerial photograph map showing the project features, including the locations of the diversions and places of use on Sheafman Creek and South Fork of Cow Creek, dated November 2007, prepared by PBS&J;
- **Exhibit A-3:** Copies of existing water right general abstracts for the water rights proposed for change in the Application;
- **Exhibit A-4:** Select portions of the Preliminary Engineering Report for the Water System Improvement Project for Pinesdale, MT, Final Draft, November 22, 2005, by Kadrmas, Lee & Jackson, Engineers, Surveyors, Planners, located in Billings, MT;
- **Exhibit A-5:** Schematic of the proposed Sheafman Creek diversion and treatment plant facility dated November 27, 2007, prepared by Mr. Uhlig, PBS&J;
- **Exhibit A-6:** Typical dam cross section drawings for both the Sheafman Creek proposed storage reservoir and the enlarged Cow Creek Reservoir;
- **Exhibit A-7:** Copies of proposed abstracts for the water rights listed for change on the Application;
- **Exhibit A-8:** Copy of a letter dated March 16, 2006, sent from Mr. Uhlig, PBS&J, to all Objectors;
- **Exhibit A-11:** Complete Preliminary Engineering Report for the Water System Improvement Project for Pinesdale, MT, Final Draft, November 22, 2005, by Kadrmas, Lee & Jackson, Engineers, Surveyors, Planners, located in Billings, MT;

- **Exhibit A-12:** Diversion summary for the Applicant's water measurement from Mr. Tom Allsop, Water Department Head, to Mr. Uhlig, PBS&J, dated January 14, 2008;
- **Exhibit A-13:** Montana Water Court Post Decree Abstract for Water Right Claim 76H-2110-00, dated April 3, 2006;

Rebuttal Exhibits

- **Exhibit A-14:** 1988 NRCS crop requirements data sheet for pasture grass showing the estimated monthly/seasonal consumptive use;
- **Exhibit A-15:** Revised proposed abstracts for Applicant's water rights on the South Fork of Cow Creek: 76H-2106, 76H-2108; 76H-2109; 76H-2110; 76H-2111; 76H-2112;
- **Exhibit A-16:** General abstracts for Applicant's water rights on the South Fork of Cow Creek: 76H-2106, 76H-2108; 76H-2109; 76H-2110; 76H-2111; 76H-2112.

PRELIMINARY MATTERS

The record was left open after hearing to receive a post-hearing brief from the Applicant summarizing the Application and why the criteria had been met under § 85-2-402, MCA. The Hearing Examiner received said post-hearing filing on April 29, 2008. Therefore, the record in this matter is considered to have closed as of that date.

Being well and fully advised, the Hearing Examiner makes the following Findings of Fact (FOF) and Conclusions of Law (COL).

FINDINGS OF FACT

General

1. Application No. 76H-30005041 to Change Water Right Claim Nos. 76H-2106-00, 76H-2112-00, 76H-15928-00, and 76H-19708-00 in the name of Pinesdale, Town of, and signed by Applicant's representative, Joel S. DuBose, was filed with the Department on August 11, 1998. On September 12, 2005, via written notice from Mr. Uhlig to the DNRC Missoula Regional Office, the Applicant amended the proposed change to include implied Water Right Claim No. 30010068. (Department file)
2. This Application was put on hold for the Applicant to pursue its water right claims through the Montana Water Court process for objections to a preliminary decree. The Water Court issued a Masters Report for these and other water rights on March 17, 2005. Due to the age of this Application, the information presented is at times contradictory and inconsistent as further indicated below. (Department file)

3. The Environmental Assessment prepared by the Department for this Application, dated October 11, 2005, was reviewed and is included in the record of this proceeding. The EA concludes that no significant environmental impacts were identified and that no EIS is required. (Department file)
4. A public notice describing facts pertinent to this Application was published in the *Ravalli Republic*, a newspaper of general circulation, on December 8, 2005, and was mailed to persons listed in the Department file. It appears implied Water Right Claim No. 76H-30010068 was not noticed in the Public Notice dated December 8, 2005. The Water Master's Report filed on March 17, 2005 with the Montana Water Court shows that Water Right Claim Nos. 76H-2106, 76H-2108, 76H-2109, 76H-2110, 76H-2111, 76H-2112, and 76H-30010068 were filed as multiple uses of the same June 1, 1901 decreed right from the South Fork of Cow Creek. Since they are multiple use claims, these rights can alternate or exchange the use of the same 1.25 cfs decreed flow rate, but cannot expand the total use of the rights beyond that flow rate. Because the use of the rights for multiple uses does not increase the extent of the water rights, and the water rights use the same diversion, conveyance, and storage structures (thereby limiting their total collective flow and volume), I find the failure to notice implied Water Right Claim No. 76H-30010068 in the December 2005 Public Notice is not a fatal error in this matter and may proceed forward within this change proceeding. *Cf.*, Bitterroot River Protective Ass'n, Inc. v. DNRC and Siebel (2005), 326 Mont. 241, 108 P.3d 518. (Department file; Testimony of Uhlig, Westenberg; § 85-2-307, MCA)
5. The Town, Sections 21, 27, 28, 33 and 34 of T7N, R21W, is located along the western edge of Montana along the east edge of the Bitterroot Mountain Range in the Bitterroot River drainage, Basin 76H, Ravalli County, approximately 44-miles south of Missoula. In 2005, the population of the Town was estimated at 772 residents, with 139 households and 3 businesses. The Town includes approximately 840 acres (in-town density estimated at 0.92 people per acre, with an average lot size of approximately 6.0 acres). Over the past 24 years (from 1984 to 2008), the population of the Town increased by approximately 314 residents. (Department file; Applicant's Post-Hearing Brief, p. 5; Exhibit A-11)
6. The Bitterroot River Basin was closed to new appropriations legislatively in March 1999. This Application was submitted to the Department in 1998, prior to the basin closure. However, because this Application requests authorization to change one or more existing water rights and the closure is related to new water uses, with few exceptions, the basin closure does not apply to this change Application. (§ 85-2-344, MCA; Applicant's Post-Hearing Brief, p. 5)

7. The Town has four creeks that flow through town, including Sheafman Creek, Cow Creek, Sage Creek and Sheridan Gulch. In the Application and as noticed, the Applicant is seeking to change the purpose, place of use, points of diversion, and add or enlarge two storage reservoirs to the existing water rights from Sheafman Creek and South Fork of Cow Creek to better provide for municipal lawn and garden water needs. The Town uses separate water delivery systems for its treated drinking water and its lawn and garden water within the municipal limits. Generally, both the Sheafman Creek and South Fork of Cow Creek systems incorporate infiltration galleries with 4-inch delivery piping. There are two galleries on the Sheafman Creek side and one on the South Fork of Cow Creek side. The Town diverts water from these two sources into its system through underground infiltration galleries located just off of the sources. Water is measured, treated, and delivered for use to the residents of the Town through a twin pipeline system. One pipeline delivers potable water to each home and the other delivers water to each home for lawn and garden uses. (Department file; Testimony of Uhlig, Westenberg; Exhibit A-11)

8. The Town's water system dates back prior to the Town's incorporation in 1983. The system operates under Public Water Supply System #MT02926. The current water system produces a total of 41.8 million gallons of water per year, yielding an average day demand of 114,500 gallons per day. Based on the estimated population of 772 residents, the annual average water consumption is 148.3 gallons per day. (Department file; Exhibit A-11)

9. Water Right Claim Nos. 76H-17858 and 76H-19709 are municipal use rights utilized primarily for potable purposes, with the remainder used for lawn and garden watering with the Town limits. Treating surface water for potable use is expensive, and the Town has a limited supply of "1st right water" from Sheafman Creek (Water Right Claim Nos. 76H-17858 and 76H-19709) used for this purpose. These 1st right water right claims are not part of this change. Applicant asserts the relocation of the Sheafman Creek "4th right water" (Water Right Claim Nos. 76H-15928 and -19708) and the South Fork of Cow Creek water rights (Water Right Claim Nos. 76H-2106, -2112; and implied Water Right Claim No. 76H-30010068) to the Town's municipal intake system will allow the Town to prioritize the "1st right water" rights for in-home uses. (Department file; Testimony of Allsop, Uhlig, Westenberg; Applicant's Post-Hearing Brief, p. 11)

10. A summary of the proposed Water Right Claims to be changed on each source is as follows:

Sheafman Creek (Water Right Claim Nos. 76H-15928-00, 76H-19708-00):

- Applicant is seeking authorization to change the purpose of use to municipal use, addressing lawn and garden water needs of Town residents. Applicant is also seeking to relocate

the point of diversion of Water Right Claim Nos. 76H-15928 and 76H-19708 from the Upper Heckathorn Ditch upstream to the existing municipal infiltration gallery on Sheafman Creek. These two Water Right Claims were originally filed as supplemental rights in the following pairs: 1) 76H-19709 (1st right) and 76H-19708 (4th right) to irrigate the same overlapping place of use of 20 acres; and 2) 76H-17858 (1st right) and 76H-15928 (4th right) to irrigate the same overlapping place of use of 20 acres. As further explained below, the four Claims were changed to a new place of use and point of diversion (Burke Ditch to Heckathorn Ditch) to irrigate the same 40 acres under Change Authorization G15928-76H. DNRC authorized a change to five Sheafman Creek water rights in 1990. Those water rights include 76H-15928-00 (IR), 76H-19708-00 (IR), 76H-15930-00 (IR), 76H-17858-00 (IR) and 76H-19709-00 (IR). This set of water rights is now used for irrigation on 40 acres (35 acres in the SESE Section 28, T7N, R21W and 5 acres in the NENENE Section 33, T7N, R21W; and stock water in the same 40 acre place of use). The point of diversion for this set of water rights is a headgate in the SWNENW Section 28, T7N, R21W, and uses the Upper Heckathorn Ditch as conveyance.

- At that time the Department required 6.7 miners inches of Claims Nos. 76H-19709 and -15928 to remain in the Burke Ditch to prevent adverse effect to other water rights. In January 1993, Claims Nos. 76H-15930, -17858 and -19709 were changed to include municipal use with a new point of diversion (Change Authorization 76H-1593000) and changed again in December 1993, to move the point of diversion for municipal use to the Town's infiltration gallery (Change Authorization 76H-15930-01). The 1993 changes did not change the right to use Claims Nos. 76H-15930, -17858 and -19709 to irrigate the same 40 acres.
- Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change are used in combination with seven other water rights (Water Right Claim Nos. 76H-15930 (stock water), 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-152102 (multiple domestic), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). The Application does not describe how all of these Water Right Claims are used in combination to irrigate the asserted 40 acres or break out the consumptive use of each of these water rights on the irrigated 40 acres parcel. The flow-rate asserted for 76H-15928 is .40 cfs and the flow-rate asserted for 76H-19708 is .27 cfs, for a combined flow-rate asserted for the two Water Right Claims of .67 cfs (300.7 gpm). The asserted combined consumptive volume attributed to these two Water Right Claims is calculated as 36.8 acre-feet. The Applicant did not provide information about the historic diverted volume. The present

use is authorized by DNRC under Change Authorization G15928-76H, issued on February 22, 1990, as more fully described below.

- The Town proposes to divert the flow rate and calculated volume of these two Water Right Claims from the Upper Heckathorn Ditch headgate to the main Sheafman Creek municipal infiltration gallery. The Town obtains water from Sheafman Creek through two infiltration galleries. The Town has installed a twin delivery pipeline system below the water treatment plant where there is a separate pipeline delivery system for serving potable water to each home and there is a parallel pipeline system that delivers the lawn and garden water to each home site. The system is designed to collect water through an infiltration gallery and the water is transported through pipes a distance of about 300 yards to an electronic metering device. By splitting the Town's system into two separate delivery systems, one system will rely on the water from Water Right Claim Nos. 76H-17858 and 76H-19709, which will be treated and used for potable supplies. The other system will rely on any remaining 1st right water from Water Right Claim Nos. 76H-17858 and 76H-19709; those rights it had previously been using for irrigation of the 98-acres of land located in the South Fork of Cow Creek drainage (Water Right Claim No. 2112); and the Town's "4th right water" Claims (Water Right Claim Nos. 76H-15928 and -19708) out of Sheafman Creek.

- The Town proposes to divert the two Claims at the main diversion and infiltration gallery near the municipal water treatment plant. Applicant is proposing to commingle Water Right Claim Nos. 76H-15928 and -19708 with the Applicant's existing water rights. Rather than flowing the water through the treatment plant for chlorination, the Applicant proposes to install a ½-acre surface area lined flow fluctuation reservoir near the water treatment plant where the diverted water would be directed to and temporarily stored for use during high demand periods. The water would then either be treated and delivered through the pipeline delivery system for potable purposes or distributed for lawn and garden uses under the proposed place of use to a municipal purpose. Applicant states this will allow the Town to take water out for drinking water so turbidity settles out as required by the Department of Environmental Quality (DEQ). The proposed reservoir will be located in a treed area just east of the water treatment plant in the NWNW of Section 28, T7N, R21W. The proposed reservoir will have a surface area of approximately .52 acres, depth of 25 feet, and capacity of 5.2 acre-feet. Applicant states that during times when the proposed reservoir is full and system demands are low, any excess water will be returned to Sheafman Creek for downstream users. The remainder of the more junior water rights not proposed for change (76H-152102, 76H-2609, 76H-2614, and 76H-2619) would remain in the Heckathorn Ditch system.

- Applicant proposes to reduce the place of use for the asserted 40 acres by 1 acre in an effort to compensate for the evaporation loss from the proposed flow fluctuation pond. Applicant also agreed to leave 45 gpm in Sheafman Creek to compensate for the 15% estimated ditch loss under this change, reducing the flow rate allocated between both Claims to 255.7 gpm (300.7 gpm – 45 gpm) (.57 cfs)¹. (Department file; Testimony of Uhlig, Allsop, Westenberg; Applicant’s Post-Hearing Brief p. 5; Exhibit A-11)

11. A brief summary of the elements for the Town’s current Water Right Claims proposed to be changed on Sheafman Creek by Applicant is as follows:

WR Claim #	Place Of Use	Priority Date	Volume (Combined for both Rights)	Flow Rate	Point of Diversion	Period of Diversion	Purpose (Total Acres)
15928 (Decreed)	E2NWN W SEC 26, T7N, R21W	6/1/1883	36.8 AF	179.52 gpm (.40 cfs)	NESENW SEC 27, T7N, R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (35 ac; Supplemental with 7 other rights)
19708 (Decreed)	W2NEN W SEC 26, T7N, R21W	6/1/1883	36.8 AF	121.18 gpm (.27 cfs)	NESENW SEC 27, T7N, R21W (Upper Heckathorn Ditch)	April 1 - Oct 31	Irrigation (5 ac; Supplemental with 7 other rights)

(Department file; Testimony of Uhlig, Westenberg)

South Fork of Cow Creek (Water Right Claim Nos. 76H-2106-00, 76H-2112-00; Implied Water Right Claim No. 76H-30010068):

- Applicant is seeking authorization to relocate Water Right Claim Nos. 76H-2106 and 76H-2112 on the South Fork of Cow Creek to integrate a diversion system where the water rights are diverted directly into the lawn and garden supply distribution system. Water Right Claim No. 76H-2106 is a multiple domestic (20 households) use water right (4/1-10/31, 18 acre-feet, priority date 1901), and Water Right Claim No. 76H-2112 is an irrigation water right asserted to be used on

1. Water Right Claim No. 76H-15928-00 (179.52 gpm) supplies 59.7% of the combined 300.7 gpm flow rate, and Water Right Claim No. 76H-19708-00 (121.18 gpm) supplies 40.3%. If these percentages are applied to the combined flow rate after the required 45 gpm reduction, then 59.7% of 255.7 gpm is 152.7 gpm for Water Right Claim No. 76H-15928-00 and 40.3% of 255.7 gpm is 103.0 gpm for Water Right Claim No. 76H-19708-00.

98 acres. While this Application was pending, the Water Court decreed an implied claim from Water Claim No. 76H-2106 as originally filed (implied Water Right Claim No. 76H-30010068). Implied Water Right Claim No. 76H-30010068 is a multiple domestic use water right (11/1-3/30, 12 acre-feet, priority date 1966). The place of use for Water Right Claim 76H-2112 is 98 acres, which encompasses the 40-acre place of use asserted by Applicant as currently irrigated under Water Right Claim Nos. 76H-15928 and 76H-19708 (and Water Right Claims Nos. 76H-15930 (Stock), 76H-17858 and 76H-19709), and four other supplemental junior water rights (Water Right Claim Nos. 76H-152102 (multiple domestic for four households), 76H-2609, 76H-2614, and 76H-2619, not subject to this Application).

- Water Right Claim No. 76H-2106 enters the Town distribution system for lawn and garden purposes at the Town's infiltration gallery. Water Right Claim No. 76H-2112 is diverted by a ditch to the small flow fluctuation irrigation reservoir known as Knaack Pond (Sam's Pond) and then released for irrigation of the 98-acre field. Under this change Application, the Town proposes to change the purpose of use to municipal and change the place of use by integrating a diversion system where 76H-2106 and 76H-2112 would be diverted into Sam's Pond, which is currently served by Water Right Claim Nos. 76H-2108 (recreation), 76H-2109 (fire protection), 76H-2110 (fish and wildlife), and 76H-2111 (stock) (Applicant does not intend to change these four water right claims under this Application). The Application states that the "place of use" is to be changed but other information in the record appears to be indicate change in the "point of diversion." The intent simply isn't clear based on the information submitted.

- The Applicant proposes to expand Sam's Pond from .70 acres surface area to 1.5 acres, and the capacity from 2.8 acre-feet to 11.25 acre-feet, for purposes of temporarily storing excess water when flows from the South Fork of Cow Creek exceed the Town's lawn and garden demands, and utilize the storage to serve the Town's needs during periods of higher demands. Applicant proposes to change implied Water Right Claim No. 76H-30010068 in an effort to compensate for the estimated evaporative loss from the expansion of Sam's Pond. From this enlarged storage reservoir, the water will be conveyed to the lawn and garden water system for use within the Town limits. The Town does not intend to modify the irrigation gallery and irrigation diversion ditch systems under this change.

- Water Right Claim Nos. 76H-2106, 76H-2112, and 76H-30010068, and the remaining multiple use water rights associated with this system (Water Right Claim Nos. 76H-2108, 76H-2109, 76H-2110, and 76H-2111), use a portion of a single maximum flow rate of 1.25 cfs. The volume

associated in the Preliminary Decree with Water Right Claim No. 76H-2106 is 18 acre-feet and the volume for implied Water Right Claim No. 76H-30010068 is 12 acre-feet. The Applicant asserts a consumptive volume for Water Right Claim No. 76H-2112 of 223.5 acre-feet based on calculations using the Montana Irrigation Guide. However, to compensate for precipitation, ditch loss and topography, Applicant reduced this volume by 1.84 acre-feet using the 1998 Natural Resources Conservation Service (NRCS) standards in the Montana Irrigation Guide for flood irrigation of pasture grass, as more fully described below, for an asserted volume for Water Right Claim No. 76H-2112 of 221.66 acre-feet per year. It does not appear Applicant provided any information on diverted volumes in this Application. Applicant states that under this proposal, only portions of the 98-acre field will be irrigated during the spring high water period by using the junior Sheafman Creek Water Right Claims (76H-152102, 76H-2609, 76H-2614, and 76H-2619). (Department file; Testimony of Uhlig, Allsop, Westenberg; Applicant's Post-Hearing Brief, pp. 4-5)

12. A brief summary of the elements for the Town's current Water Right Claims proposed to be changed on the South Fork of Cow Creek by Applicant is as follows:

WR Claim #	Place of Use	Priority Date	Volume	Flow Rate (Combined for all 3 Rights)	Point of Diversion	Period of Diversion	Purpose (Total Acres)
2106 (Decreed)	SWSW SEC 27, S2SE SEC 28, N2NE SEC 33, & NWNWNW SEC 34, T7N, R21W	6/1/1901	18.0 AF	1.25 cfs	SESESW SEC 28, T7N, R21W (Infiltration Gallery)	April 1 – Oct 31	Multiple Domestic (20 households)
2112 (Decreed)	NESE SEC 28, SESE SEC 28, SWSE SEC 28, N2N2NE SEC 33, T7N, R21W	6/1/1901	223.5 AF (Reduced by 1.84 AF for a total volume of 221.66)	1.25 cfs	NWSWSE SEC 28, T7N, R21W (Ditch); SWSWSE SEC 28, T7N, R21W (Headgate); NWNENW SEC 33, T7N, R21W (Headgate); SESESW SEC 28, T7N, R21W	April 1 – Oct 31	Irrigation (98 ac) ²

² The point of diversion and the number of acres Applicant asserts was historically irrigated within the 98-acres are broken out as follows: Ditch, NESE Sec 28, (18.00 acres); Headgate, SESE Sec 28, (33.00 acres); Headgate, SWSE Sec 28, (16.00 acres); and Infiltration Gallery, N2N2NE Sec 33, (31.00 acres), T7N, R21W.

					(Infiltration Gallery)		
30010068 (Implied Claim)	SWSW SEC 27, S2SE SEC 28, N2NE SEC 33, & NWNWNW SEC 34, T7N, R21W	12/31/1966	12.0 AF	1.25 cfs	SESESW SEC 28, T7N, R21W (Infiltration Gallery)	April 1 – Oct 31	Multiple Domestic (20 households)

(Department file; Testimony of Uhlig, Westenberg)

13. No objections were filed for the three Water Right Claims proposed to be changed on the South Fork of Cow Creek (Water Right Claim Nos. 76H-2106, 76H-2112, and implied Water Right Claim No. 76H-30010068). The Town is the only appropriator on this source. (Department file; Testimony of Uhlig, Westenberg, and Objectors)

Historic Use/Adverse Effect

Sheafman Creek (Water Right Claim Nos. 76H-15928-00 and 76H-19708-00)

14. A review of the Ravalli County Water Resources Survey (1958 and 1965) data and aerial photos show that the Sheafman Creek water rights (76H-15928 and -19708) proposing to be changed were historically used (prior to change authorizations) for irrigation of land in Sections 20, 21, 22, 27, 28, and 33, T7N R21W. The Water Resources Survey does not specify the particular rights as being used; it simply depicts that the lands which comprise these claims were irrigated. The current place of use claimed by the Applicant for these two Water Right Claims being changed is 40 acres located within the Town limits (35 acres located in the SE1/4SE1/4 of Section 28, and 5 acres located in the NE1/4NE1/4NE1/4 of Section 33, all in T7N, R21W). (Department file; Westenberg Testimony; Exhibit A2)

15. Water Resources Surveys are exhaustive county-by-county records of actual on-the-ground water use that were authorized by the 1939 legislature. The surveys involved extensive detailed work in both the office and the field to compile a comprehensive inventory of water rights and included the use of aerial photography to assure accuracy in mapping the land areas of water use. Field forms were prepared for each landowner, showing the name of the owner and operator, photo index number, a plat defining the ownership boundary, type of irrigation system, source of water supply and the total acreage irrigated and irrigable under each. In this case, the Ravalli County

Water Resources Survey (1958 and 1965) is an accurate and reliable source for establishing what lands were historically irrigated in Ravalli County. (Department file; Hearing Record; Exhibit A2)

16. Water Right Claim Nos. 76H-15928 and 76H-19708 were subject to at least two previous Change Authorizations. In *In the Matter of Application for a Change in Water Right No. G15928-76H by Samuel T. and Virginia Allred* (DNRC Final Order, February 5, 1990), the DNRC authorized a change of the points of diversion for the Claims from Burke Ditch to the Heckathorn Ditch, and a diverted flow into the Heckathorn Ditch of 20 miner's inches (.5 cfs) up to a diverted volume of 162.75 acre-feet.³ The Change required 6.7 miners inches (.1675 cfs) of Water Right Claim Nos. 76H-17858 and 76H-19709 (not part of the instant change proceeding) to remain at the Burke Ditch to mitigate adverse effect to users of the Burke Ditch for the Change. Applicant provided only a copy of the Final Order in the Change case. To fully understand the Final Order and allocation on the 6.7 miner's inches, reference must be made to the Proposal for Decision, of which the Hearing Examiner hereby takes official notice. See *In the Matter of Application for a Change in Water Right No. G15928-76H by Samuel T. and Virginia Allred* (DNRC Proposal for Decision, June 9, 1989, adopted by Final Order). (Department file)

17. The Water Court Preliminary Decree, evaluating the rights as they existed pre-1973, i.e. without the Change Authorization, decreed in Water Right Case No.76HF-334 generally as follows: Water Right Claim No. 76H-19708 (June 1, 1883), 121.18 gpm (.27 cfs), maximum irrigated acres 20, April 1 to October 31; and Water Right Claim No. 76H-15928 (June 1, 1883), 179.52 gpm (.4 cfs), maximum irrigated acres 20, April 1 to October 31. The Water Right Claims share the same 40 acres place of use and are supplemental water rights to irrigate the same 40 acres. Historically, Water Right Claim Nos. 76H-19708 and 19709 were supplemental on 20 acres and 76H-15928 and 76H-17858 were supplemental on a different 20 acres. All four Water Right Claims were changed to the same 40 acres place of use in the Allred Change in 1990. Also consistent with Water Court authority for irrigation claims, no volume is decreed for either Water Right Claim in the Preliminary Decree. The Department takes judicial notice of that part of the Water Rights Claim files that indicate the place of use for these Water Right Claims. (Department file)

18. After the 1990 change was authorized for moving the place of use for Water Right Claim Nos. 76H-15928 and 76H-19708 (4th rights) to the 40-acre place of use for irrigation of pasture grasses, they have been historically commingled with Water Right Claim Nos. 76H-17858 and 76H-19709 (1st

³ The Water Right Abstracts for these Water Right Claims provided by the Applicant must be read in conjunction with the Final Order referenced on the Change Abstracts of both Water Right Claims.

rights), and four junior water rights (Water Right Claim Nos. 76H-152102, 76H-2609, 76H-2614, and 76H-2619). The other rights proposed for change in this case (76H-2106 and 76H-2112) also included this 40-acre place of use. These rights were all supplemental to this 40-acre parcel; therefore, Water Right Claim Nos. 76H-19708 and 76H-15928 were supplemental and not full-service irrigation. (Department file; Testimony of Uhlig, Westenberg)

19. Water Right Claim Nos. 76H-17858 and 76H-19709 have a period of use of April 1 to October 31, but Applicant asserts that on average, these Water Right Claims are shut down in mid-July. Water Right Claim Nos. 76H-15928 and 76H-19708 are proposed to be commingled with other Sheafman Creek water rights, and diverted by the infiltration gallery and ditch system near the treatment plant. Applicant asserts Water Right Claim Nos. 76H-15928 and 76H-19708 will no longer be diverted at the Heckathorn Ditch headgate or used on the 40-acre field. This leaves the relatively junior supplemental rights (76H-152102, 76H-2609, 76H-2614, 76H-2619, 76H-15930) in the Upper Heckathorn Ditch, and these remaining junior water rights will continue to serve the 40-acre field. (Department file; Uhlig and Westenberg Testimony; Applicant's Post-Hearing Brief, p.10; Exhibit A-11)

20. Applicant testified that no more water will be diverted than has been historically; it is not proposing to increase system diversion capabilities, nor does Applicant plan to modify the current creek infiltration system capacity. Applicant further testified that the Town is willing to measure and report annually all water diverted to DNRC, as is currently required by previous Sheafman Creek water rights. The total volume will continue to be controlled by the water commissioner appointed to Sheafman Creek. (Department file; Testimony of Uhlig, Westenberg)

21. Applicant testified that the Application was submitted in 1998; therefore, Applicant used the 1998 Natural Resources Conservation Service (NRCS) standards in the Montana Irrigation Guide for flood irrigation of pasture grass. The Montana Irrigation Guide provides calculations to estimate a maximum consumptive use using the Balaney-Criddle method. Assuming a 50% field loss, the Applicant estimates the combined total volume available for Water Right Claim Nos. 76H-15928 and 76H-19708, using 22.15 inches (1.84 acre-feet) to be 73.6 acre-feet on the total 40-acre place of use (40 acres x 1.84 acre-feet). Mr. Chase stated that 1.84 acre-feet is approximately full-service irrigation. (Department file; Testimony of Uhlig, Chase; Exhibit A-14)

22. Eric Chase, DNRC staff expert, testified that the calculated volume of 36.8 acre-feet for 20 acres is slightly higher than the current consumptive use estimate for flood irrigated pasture grass in Ravalli County using the NRCS irrigation water requirements (IWR) program (35.2 acre-feet). The

formula used by Applicant in 1998 for determination of consumptive water use in this Application was typical before the IWR software became available. The IWR program estimates plant consumptive use over the entire irrigation season assuming full service irrigation. The difference may be that precipitation was not excluded in the formula used by the Applicant. However, Mr. Chase stated that the Applicant's estimate of the combined total volume of 36.8 acre-feet for use on 40 acres is reasonable for supplemental irrigation in the abstract without reference to actual historical use. Because Water Right Claim Nos. 76H-15928 and 76H-19708 are supplemental, Applicant agreed at hearing that the combined total consumptive use for the 40-acre place of use should be reduced to 36.8 acre-feet (40 acres x 1.84 acre-feet / 2). (Department file; Testimony of Uhlig, Chase; Exhibit A-14)

23. Water Right Claim Nos. 76H-15928 and 76H-19708 proposed for change share the same 40-acre parcel place of use with seven other water rights (Water Right Claim Nos. 76H-15930 (stock water), 76H-17858 (irrigation), 76H-19709 (irrigation), 76H-152102 (multiple domestic), 76H-2609 (irrigation), 76H-2614 (irrigation), and 76H-2619 (irrigation)). I find there is no evidence in the record as to what portion each of these water rights plays to irrigation of the whole. Applicant further testified that Water Right Claim Nos. 76H-15928 and 76H-19708 are out of priority in July. I find Applicant provides no historic evidence to support the use of the MT Irrigation Guide for Water Right Claim Nos. 76H-15928 and 76H-19708, based on the use of nine water rights providing irrigation to the same 40-acre parcel (post-1990 Change Authorization). The previous change authorized in the Allred case appears to have addressed the historical diverted volume (162.75 acre-feet), but not the consumed amount of each right. (Department file; Testimony of Uhlig, Chase; Exhibit A-14; Allred Proposal for Decision, p. 28)

24. Applicant provided no explanation how Water Right Claim Nos. 76H-15928 and 76H-19708 were used on the 40-acre parcel (POU post-1990 Change) in conjunction with the other supplemental rights part of this Change, 76H-2106 and 76H-2112, and the junior water rights not proposed for change in this Application (76H-152102, 76H-2609, 76H-2614, and 76H-2619). Water Right Claim Nos. 76H-17858 and 76H-19709 are also listed for this 40-acre place of use and their use is unclear. While it is possible to change water rights which are supplemental, an analysis of the entire parcel irrigated is necessary to determine what fraction each right played to the whole historic practice. Otherwise the sum of the parts could far exceed the whole. It is clear that this 40 acre parcel is irrigated. However, Applicant has not provided evidence of the historic diverted flow and historic consumptive use for each of the water rights listed for this 40-acre parcel which collectively

irrigate the same 40-acre parcel or an explanation as to how these water rights were used. Applicant further proposes to continue to irrigate the 40-acre parcel with the junior water rights. Because of the range of priority of the nine supplemental water rights, the large number of rights (9), and the lack of explanation as to how all these rights were historically used to irrigate the same 40 acres, I cannot from the record determine an appropriate supplemental standard, diverted amount or consumed amount for the rights proposed to be changed. (Department file; Hearing Record)

25. Given the lack of evidence in the record as to how the nine water rights have been used on the 40-acre parcel that is currently the place of use for Water Right Claim Nos. 76H-15928 and 76H-19708, the Department turns to the 1990 Change Authorization 76H-1592899 as a basis for evaluating the change sought in this case. In that Change Authorization, the Department authorized the change of Water Right Claim Nos. 76H-15928 and 76H-19708 (4th rights) for a combined total of 20 miners inches (.5 cfs) and 162.75 acre-feet of diverted volume, and Water Right Claim Nos. 76H-17858 and 76H-19709 (1st rights) for 13.3 miners inches (.3325 cfs) and 84.92 acre-feet of diverted flow, all to irrigate the current single 40-acre parcel. The combined flows and diverted volumes are presumably split equally between the rights. Again, Water Right Claim Nos. 76H-17858 and 76H-15928 were historically supplemental on one 20-acre parcel and Water Right Claim Nos. 76H-19709 and 76H-17908 were historically supplemental on another 20-acre parcel. This change involved a change in location of irrigation and did not specify a consumptive use for each right as to its historic share of each 20 acre-parcel irrigated. While this Change Authorization provides a basis for the change of Water Right Claim Nos. 76H-15928 and 76H-19708 (4th rights) for a combined total of 20 miners inches (.5 cfs) and 162.75 acre-feet of diverted volume, because of the nature of the change with combined (1st and 4th) rights changed and continued irrigation, there is no basis to calculate a consumptive use for the individual rights proposed for change based on the Change Authorization. (Department file; Hearing Record)

26. I cannot determine whether this proposed change will create an expansion of Water Right Claim Nos. 76H-15928 and 76H-19708 because I cannot determine from the record the historic consumptive use of these Claims pre-1990 or post-1990 use. Given that the Water Right Claims share the same 40-acre parcel of use, the Applicant intends to continue irrigating the 40 acre-parcel, and evidence of the historical consumptive use of these Claims is not in the record, I cannot conclude the historical basis of the Water Right Claims to be changed or that there will not be an adverse effect from expansion of the historical use Water Right Claims to be changed. (Department file; Hearing Record)

27. The Town has not operated the headgate for the Lower Heckathorn Ditch during the irrigation season for the past 10-15 years because the Applicant asserts the Upper Heckathorn Ditch leaks sufficient amounts of water, thus supplying the water needed for irrigating the 40-acres of land. All but 2-3 acres of those irrigated acres lie outside the Sheafman Creek watershed. Applicant estimates the amount of water leaking from the entire length of the Upper Heckathorn Ditch ranges from 15-20%. Applicant estimates the amount not captured by the Lower Heckathorn Ditch is minimal, ranging from 10-20%. Applicant stated that most of the nonrecoverable ditch loss does not return to Sheafman Creek due to the topography. Some of the losses enhance plant growth on the 30-40 acres of land between the Upper Heckathorn Ditch and Sheafman Creek. Applicant stated some of the return flows are delayed rather than instantaneous ground water flow, and return to Sheafman Creek outside of the irrigation season. Applicant agreed to leave 45 gpm (.10035 cfs) in Sheafman Creek for downstream users, to compensate for the estimated 15-20% ditch loss under this change. This reduces the flow rate allocated between both Claims to 255.7 gpm (300.7 gpm – 45 gpm) (.57 cfs). However, at most, Applicant has a combined total of .5 cfs based on Change Authorization No. 76H-1592899 which would result in a combined total of approximately .4 cfs, available for change. As explained above the extent of the historical use of these Claims has not been proven. (Department file; Testimony of Allsop, Uhlig, Westenberg, Applicant's Post-Hearing Brief, pp. 4, 8; Exhibit A-2)

28. Applicant stated that based on an estimate that 85% of the Upper Heckathorn Ditch losses are recaptured in the Lower Heckathorn Ditch and beneficially used for irrigation in the N2SE of Section 28, then approximately 15% of the Upper Heckathorn Ditch loss would be absorbed by vegetation or returned to Sheafman Creek flows. Applicant estimated that if the two Sheafman Creek water rights have combined diversion rates of .67 cfs and 15% of the ditch loss returns to Sheafman Creek, the loss calculates to a flow of 45 gpm (300.7 gpm X .15) (.10 cfs). Mr. Chase stated that the original Application showed that a June 2, 1998 field investigation by Land and Water Consulting revealed a ditch loss of 43% for the Upper Heckathorn Ditch. Mr. Chase testified that he is uncertain how Applicant came up with the 15% ditch loss. Applicant's explanation is the Upper Heckathorn Ditch loses approximately 43%, but that the Lower Heckathorn Ditch retains most of the loss from the Upper Heckathorn Ditch so the total loss from the system is 15%. Mr. Chase stated that 15% is a reasonable estimate considering the Lower Heckathorn Ditch is capturing this loss. (Testimony of Uhlig, Westenberg; Applicant's Post-Hearing Brief, p. 8)

29. The proposed reservoir will have approximately a surface area of .52 acres, depth of 25 feet, and capacity of 5.2 acre-feet. During times when the reservoir is full and system demands do not exceed infiltration system capabilities, any excess water diverted by the two infiltration galleries will be returned immediately back to Sheafman Creek for downstream users. Applicant also asserts that the prior place of use for these rights was located in the South Fork of Cow Creek drainage, and any waste water possibly generated by this use would not have returned to Sheafman Creek. I find there may be a change in the return flow of the water rights proposed for change. If the return had been apparent in the Cow Creek drainage, but now will be returned to the Sheafman Creek drainage, there could be adverse effect to downstream Cow Creek users. (Department file; Testimony of Uhlig, Westenberg; Exhibit A-11)

30. The municipal diversion is a “zero-loss” system, making it a more efficient system. All the water rights flow through this without any losses to the system, with the exception of evaporation from the reservoirs. Applicant estimates the typical yearly evaporation in the Bitterroot valley to be approximately 3.24 acre-feet per acre⁴, and Applicant believes the proposed reservoir will potentially evaporate 1.69 acre-feet per year (pond surface area of .52 acres X 3.24 feet). Applicant did not present additional evidence regarding the diverted volume based on municipal use, besides what was claimed on the abstracts. Applicant based its calculation of the consumptive use of the two Water Right Claims for a municipal use on the irrigation of 39 acres within the Town site and evaporation of the reservoir of 1.69 acre-feet per year. Because I cannot determine the historical consumptive amounts of Water Right Claims Nos. 76H-15928 and 76H-19708, I cannot conclude that the proposed municipal use will not constitute an expansion of the historic use. (Department file; Testimony of Uhlig, Chase; Exhibit A-15)

31. The point of diversion for the Sheafman Creek Number 3 Ditch is located upstream of both the existing and proposed points of diversion for the Town’s Sheafman Creek rights. Objector Duarte (Water Right No. 76H-47429 (May 1, 1883) utilizes the Sheafman Creek Number 3 Ditch for diverting and delivery of their existing water rights. The Town’s proposed points of diversion are located downstream of Objector Duarte’s point of diversion and place of use. Objector Duarte’s water rights are senior to the two Claims proposed for relocation on Sheafman Creek. I find that Objector Duarte cannot be adversely affected under this proposed change application as the Town

⁴ This number was verified by and found to be an acceptable estimate by Mr. Chase based on a 1988 study conducted through the University of Montana by Don Potts, entitled “Estimation of Evaporation on Shallow Ponds and Impoundments in Montana.” This report is found on DNRC’s website, and is widely used by the DNRC in its analyses of evaporative losses.

cannot make call on an upstream senior right and the senior will continue to receive water before the Town. (Department file; Testimony of Uhlig, Westenberg; Applicant's Post-Hearing Brief, p. 9)

32. Objectors Morgan, Gramza and Virtaneva are located downstream from the Town's existing and proposed points of diversion. Objectors stated at hearing that they are concerned with the flow rate and the control of water from Sheafman Creek if there is no proper monitoring in place. Objectors further stated that requiring the Town to install a solenoid valve or some type of automatic shut-off valve on the irrigation side into the infiltration gallery would help alleviate their concern that the Town is using water that is not being metered and would shut-off the water if the power goes out. They also stated they want the Town to closely monitor inflow and outflow from the infiltration gallery. Applicant states the use of these two Claims is limited by their priority date (June 1, 1883) relative to the downstream senior users on Sheafman Creek (Objectors Virtaneva, Water Right Nos. 76H-17844 (July 28, 1882), and W17845 (June 1, 1883); Objectors Morgan, Water Right Nos. 76H-15936 (June 1, 1883), and 76H-15942-00 (July 28, 1882); Objectors Gramza, Water Right Nos. 76H-15929 (June 1, 1883), 17859 (July 28, 1882), 108934 (June 1, 1883), and 108935 (July 28, 1882)). Currently there are multiple water rights diverted and delivered for irrigation purposes through the Upper Heckathorn Ditch. This proposal involves only Water Right Claim Nos. 76H-19708 and 76H-15928, which are the most senior rights in the Upper Heckathorn Ditch. (Testimony of Objectors; Uhlig, Westenberg)

33. Mr. Allsop testified for the Applicant that the system has two state of the art electronic metering devices; one for irrigation water and the other is for water going directly into the treatment plant. Mr. Allsop checks the meters at least once/week. The metered data is recorded on the computer and reported yearly to DNRC. Objectors requested and Applicant agreed to install a solenoid/automatic shut-of for the irrigation line in the event of a power outage. (Department file; Testimony of Allsop; Objectors; Exhibit A12)

34. There has been a water commissioner appointed to Sheafman Creek in the past. No commissioner records were presented in this matter. All of the Objectors agreed that there is a need for a water commissioner to allocate water rights based on priority, as they have concern about how to separate and administer the rights. Applicant agreed it would work with and continue to be subject to a water commissioner's decisions regarding priority, and would measure and report the water usage to the DNRC or a water commissioner. (Department file; Testimony of Uhlig, Westenberg)

35. I find the Applicant has not proven the historical extent of the water rights to be changed or by a preponderance of evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued for Sheafman Creek. (Department file; Hearing Record)

South Fork of Cow Creek (Water Right Claim Nos. 76H-2106-00, 76H-2112-00; Implied Water Right Claim No. 76H-30010068)

36. A review of the Ravalli County Water Resources Survey (1958 and 1965) data and aerial photos show that the 98 acres proposed to be changed were historically irrigated in Sections 20, 21, 22, 27, 28, and 33, T7N R21W under Water Right Claim No. 76H-2112. The current place of use claimed by the Applicant for Water Right Claim Nos. 76H-2106, -2112, and -30010068 being changed is located within the Town limits (Water Right Claim Nos. 76H-2106 and 76H-30010068 are located in the SWSW 27, S2SE 28, N2NE 33 and NWNWNW 34, T7N, R21W). (Department file; Testimony of Westenberg)

37. Water Right Claim No. 76H-2112 is the only irrigation right and the most senior right on the South Fork of Cow Creek. The Town is the sole owner of all of the water rights on the South Fork of Cow Creek. The Town is also the only water right owner where the Heckathorn Ditches are located. (Department file; Testimony of Uhlig, Westenberg)

38. The South Fork of Cow Creek is an intermittent stream. Applicant states that it does not appear to flow beyond the Town's boundaries. The creek is dewatered before it crosses Mulberry Street, and there is no defined stream channel at the point where the drainage exits at Wildwood Lane, both within the Town's limits. However, a review of an NRIS map of the area, of which I take judicial notice, appears to show that the stream resurfaces approximately 1.5 miles downstream. All natural creek flows are diverted into the existing multiple domestic or irrigation systems. Applicant asserts that the Town is the only water right owner that could be affected by or benefit from the seepage from the ditches. No objections were filed on the Application to change the water rights located on the South Fork of Cow Creek. Objectors agreed at the hearing that they would not be adversely affected if the change for the water rights on the South Fork of Cow Creek were to be granted. (Department file; Testimony of Uhlig, Westenberg, Objectors)

39. Water Right Claim No. 76H-2112 was included in the Montana Water Court's 1998 Preliminary Decree, received an objection, was one of the rights that were the subject of a stipulated agreement between the Town and the United States, and recognized by the Montana Water Court's Water

Master's Report for Case 76HF 355 issued in 2005. The Montana Water Court generated one implied claim from Water Right Claim No. 76H-2106 for multiple domestic use that is associated with the South Fork of Cow Creek system (implied Water Right Claim No. 76H-30010068, with a listed 1966 priority date). (Department file; Testimony of Uhlig, Westenberg, Chase; Applicant's Post-Hearing Brief, p. 6)

40. The Applicant's historically irrigated acres were amended by a Water Master's Report for Case 76HF 355 issued in March 2005. The Water Master's Report reduced the place of use from 145 acres to 98 acres. The Judge's Order adopting the Water Master's Report was issued in April 2006. Applicant asserts that based on the Judge's Order, the 1958 and 1965 Water Resources Surveys, and accompanying historic aerial photos, approximately 40 acres are fully served exclusively by South Fork of Cow Creek, with the remaining 58 acres being served by both South Fork of Cow Creek and Sheafman Creek water. Companion Water Right Claim No. 76H-2106 is linked to Water Right Claim No. 76H-2112 by means of a "multiple purposes" remark. Water Right Claim No. 76H-2106 was also the subject of the stipulated agreement between the Town and the United States, and recognized in the 2005 Water Master's Report for Case 76HF 355. The water rights have a clarification remark that limits the combined flow rate to 1.25 cfs. (Department file; Testimony of Uhlig, Westenberg, Chase; Applicant's Post-Hearing Brief, p. 6)

41. No volume is decreed for Water Right Claim No. 76H-2112. The 1958 and 1965 Water Resources Surveys and aerial photos support irrigation in the sections now included within the Town from the South Fork of Cow Creek. Applicant calculated the diverted volume from the South Fork of Cow Creek using the mid-range of the NRCS standards for irrigation in Climatic Area II of 2.69 - 3.15 acre feet per acre for contour ditch flood irrigation with an efficiency of approximately 60%, or 2.92 acre-feet per acre. Using this calculation, Applicant determined the diverted volume used for the 40 acre place of use under Water Right Claim No. 76H-2112 to be 116.8 acre-feet (2.92 acre-feet per acre X 40 acres). Applicant estimates the diverted volume for irrigation of the remaining 58 acre place of use under Water Right Claim No. 76H-2112, using the 1998 NRCS irrigation standards from the Montana Irrigation Guide for full-service irrigation of 1.84 acre-feet, to be 106.7 acre-feet (1.84 acre-feet per acre X 58 acres). The total diverted volume asserted by Applicant under Water Right Claim No. 76H-2112 is 223.5 acre-feet per year (116.8 acre-feet + 106.7 acre-feet). Applicant stated at hearing that this volume should be reduced by 1.84 acre-feet per acre to reflect losses to the system, reducing the volume to 221.96 acre-feet per year (223.5 acre-feet per year – 1.84 acre-feet). Applicant asserts the entire 58-acre field will no longer be irrigated under this proposal; only

the 40 acre-parcel irrigated by the supplemental junior Sheafman Creek water rights discussed above will continue to be irrigated. The Town is willing to measure and report the water usage to the DNRC or a water commissioner. (Department file; Testimony of Uhlig, Westenberg, Allsop; Applicant's Post-Hearing Brief, p. 7; Admin. R. M. 36.12.115; Exhibit A-14)

42. It appears the Applicant is using the 1.84 acre-feet per acre figure derived from the 1998 NRCS irrigation standards from the Montana Irrigation Guide in two different ways in this Application. For the Sheafman Creek Water Right Claims, Applicant determined the consumptive volume for the supplemental rights using 1.84 acre-feet per acre. For the South Fork of Cow Creek, it appears the Applicant has calculated a diverted volume using 2.92 acre-feet per acre for full-service irrigation (40 acres under Water Right Claim No. 76H-2112) and uses 1.84 acre-feet per acre for supplemental irrigation rights diverted (58 acres under Water Right Claim No. 76H-2112). While the Applicant provides calculations, Applicant has not provided actual evidence of the diverted and historic consumptive volumes for Water Right Claim No. 76H-2112, and the consumptive use for each of the water rights used to irrigate these 98 acres. Mr. Chase found from the IWR program that the consumptive use for full-service on 98 acres is 172.5 acre-feet. However, 58 of the 98 acres are not full-service but supplemental. Applicant has not provided evidence as to how Water Right Claim No. 76H-2112 was used with the other nine supplemental rights from Sheafman Creek that cover 40 acres of the same place of use. Further, Applicant has not explained how Water Right Claim No. 76H-2112 was used in relation to the other five Water Right Claims (Nos. 76H-2106, -2108, -2109, -2110, and -2111) which form the basis for the multiple use remark on the Temporary Decree for the single June 1, 1901 water right. The multiple use remark limits the combined flow rate to 1.25 cfs and a pond capacity of 2.8 acre feet. (Department file; Hearing Record)

43. I find the Applicant did not present evidence to support the calculation of consumptive volume of Water Right Claim No. 76H-2112 for the proposed new municipal lawn and garden irrigation uses, nor specified how the consumptive amount would be allocated for municipal purposes. The Applicant appears to be proposing to trade acre for acre, minus the evaporative losses. I find the Applicant has not proven this historical extent of Water Right Claim No. 76H-2112 proposed for change or by a preponderance of evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued for the South Fork of Cow Creek. (Department file; Hearing Record)

44. The volume associated in the Preliminary Decree with Water Right Claim No. 76H-2106 is 18 acre-feet and the volume for implied Water Right Claim No. 76H-30010068 is 12 acre-feet, which volumes are based on 20 households. This is presumably derived from the standard used during the claims examination process using 1.5 acre-feet per household ($18 \text{ acre-feet} + 12 \text{ acre-feet} / 1.5 \text{ acre-feet/household} = 20$). There was no other information presented to determine historic volume. (Department file; Admin. R. M. 36.12.115)

45. The existing irrigation storage reservoir (Sam's Pond) has a surface area of .70 acres and capacity of 2.8 acre-feet. The pond water rights noted above provide for the initial fill and evaporation loss for the existing pond (2.8 acre-feet). Applicant is requesting to expand the dimensions of the reservoir to approximately 200 feet x 325 feet x 15 feet deep. The surface area will be expanded by .8 acres to 1.5 acres (.70 acres + .8 acres) and the annual volume capacity will be expanded by 8.45 acre-feet to 11.25 acre-feet (2.8 acre-feet + 8.45 acre-feet). (Testimony of Uhlig, Westenberg; Exhibit A-13)

46. Applicant recognizes that evaporative losses in Sam's Pond will increase after the expansion. Using the same yearly evaporation loss coefficient for the Bitterroot Valley of 3.24 acre-feet per acre (as noted above for the Sheafman Creek water rights), the evaporative losses from the proposed expansion of the surface area of the reservoir (1.5 acres) are calculated to be approximately 4.86 acre-feet per year ($3.24 \text{ acre-feet per acre} \times 1.5 \text{ acres}$). Applicant states that the annual volume that would be needed for the expanded pond is the difference between that volume currently protected under Water Right Claim No. 76H-2110 (2.8 acre-feet; fish and wildlife) and the volume resulting from the proposed expansion of the surface area to 1.5 acres. Therefore, Applicant estimates the total yearly volume needed for the proposed expansion, including evaporation, is 11.04 acre-feet ($8.45 \text{ acre-feet} + (.8 \text{ acres} \times 3.24) \text{ acre-feet per year (evaporative rate loss/year)}$). To offset those losses, Applicant is proposing to change implied Water Right Claim No. 76H-30010068, which lists a 12 acre-foot volume. Applicant asserts Water Right Claim Nos. 76H-2110 and 76H-30010068 would provide the volume necessary to compensate for the initial fill of and evaporative losses from the enlarged reservoir. (Testimony of Uhlig, Westenberg; Applicant's Post-Hearing Brief, p. 7)

47. Staff expert Mr. Chase disagrees with the Applicant, finding the proposed new configuration of Sam's Pond would require a total of 16.11 acre-feet ($8.45 \text{ acre-feet proposed expansion} + 2.8 \text{ acre-feet for existing pond dimensions} = 11.25 \text{ acre-feet} + 4.86 \text{ acre-feet per year for evaporative losses}$). Water Right Claim Nos. 76H-2110 (fish and wildlife) and 76H-2108 (recreation) are multiple uses of the same water right and cover the initial fill of Sam's Pond, or 2.8 acre-feet. By using Water Right

Claim Nos. 76H-2110 (2.8 acre-feet) and 76H-30010068 (12.0 acre-feet), which rights are already dedicated for the pond, Mr. Chase opined the Applicant would be 1.31 acre-feet short of being able to fill the reservoir and account for evaporation losses each year (16.11 – (2.8 acre-feet + 12.0 acre-feet)). I find that the Applicant has not shown that it will adequately offset the evaporative losses from the proposed enlarged reservoir under this Application. (Testimony of Uhlig, Westenberg, Chase; Applicant's Post-Hearing Brief, p. 7)

48. I find the Applicant has not presented any consumptive use analysis on Water Right Claim Nos. 76H-2106 and 76H-30010068, and has not proven the historical extent of Water Right Claim No. 76H-2112 proposed to be changed. I find the Applicant has not proven by a preponderance of evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued for the South Fork of Cow Creek. (Department file; Hearing Record)

Adequacy of Appropriation Works

Sheafman Creek

49. Applicant is proposing to move the diversion point of the two Sheafman Creek water rights from the Upper Heckathorn Ditch to an existing municipal diversion approximately 400 yards upstream. The municipal diversion currently uses two infiltration galleries and twin 4 inch delivery PVC pipes. Applicant does not intend to make any changes to the existing municipal diversion under this change application. Applicant is also proposing to install a lined "flow fluctuation" reservoir with an approximate surface area of .52 acres, depth of 25 feet, and capacity of 5.2 acre-feet, to help with delivery during high demand times by temporarily storing diverted water before treatment. (Exhibits A4-A6; Testimony of Allsop, Uhlig, and Westenberg; Chase Report; Applicant's Post-Hearing Brief, p. 10)

50. The valves are 4-inch Hayward TW600FS115A valves, which are computer controlled by the electronic systems that operate the water treatment plant. There is a valve box located immediately outside the water treatment plant that separates the domestic water from the lawn and garden water. Water is measured, treated and delivered for use through a twin pipeline system. One pipeline delivers potable water to each home and the other pipeline delivers water to each home for lawn and garden uses. The municipal diversion has the capability to shut off the diversion (control) if the flows in Sheafman Creek require reduction in diversion rates. (Testimony of Uhlig and Westenberg; Exhibit A11; Applicant's Post-Hearing Brief, p. 10; Chase Report)

51. Applicant provided an engineering report entitled "Preliminary Engineering Report for the Water System Improvement Project for Pinesdale, MT, prepared in November, 2005 by Kadrmas, Lee & Jackson, Inc., a professional consulting engineering firm based in Billings, Montana. The engineering report provides an outline of the existing system. (Exhibit A11; Applicant's Post-Hearing Brief, p. 10)

52. I find the proposed means of diversion, construction and operation of the appropriation works are adequate. (Department File, Hearing Record)

South Fork of Cow Creek

53. Applicant states the existing infiltration gallery and ditch system will not require any modifications, and the existing municipal delivery pipelines are adequate for delivering both the potable and lawn and garden water to users. The measuring device is a Parshall Flume and the infiltration gallery has a valve that allows system operators to control flows into the receiving cistern from the gallery. Applicant is also proposing to enlarge the existing irrigation reservoir, Sam's Pond, to a depth of 15 feet, a surface area of 1.5 acres, and the capacity from 2.8 acre-feet to 11.25 acre-feet. (Testimony of Uhlig; Chase Report; Exhibit A11; Applicant's Post-Hearing Brief, p. 10)

54. Applicant provided an engineering report entitled "Preliminary Engineering Report for the Water System Improvement Project for Pinesdale, MT, prepared in November, 2005 by Kadrmas, Lee & Jackson, Inc., a professional consulting engineering firm based in Billings, Montana. The engineering report provides an outline of the existing system. (Exhibit A11; Applicant's Post-Hearing Brief, p. 10)

55. I find the proposed means of diversion, construction and operation of the appropriation works are adequate. (Department File, Hearing Record)

Beneficial Use

56. The use of water for municipal uses is a recognized beneficial use. (Department file; § 85-2-102(4)(a), MCA; § 85-2-402(2)(c), MCA).

57. Applicant is requesting a flow rate of 255.7 gpm (.57 diverted cfs, leaving 45 gpm in-stream) of Water Right Claim Nos. 76H-15928 and 76H-19708, up to a diverted volume of 36.8 acre-feet from Sheafman Creek for municipal use for lawn and garden use on 39 acres (with 1 acre being set aside to offset evaporation). Applicant is also proposing to create a new reservoir on Sheafman Creek with a surface area of .52 acres, depth of 25 feet, and capacity of 5.2 acre-feet. Applicant did not prove the extent of the historic rights alleged for change in this Application (which based on prior

change authorizations could not exceed .5 cfs total). Further, Applicant did not provide a basis that the flow rate and the amount of volume requested was necessary for the municipal use requested. I find the Applicant has not proven that the flow rate and combined diverted volume are the amounts needed to sustain the proposed beneficial use for the Sheafman Creek Water Right Claims.

(Department file; Hearing Record)

58. Applicant is requesting a combined flow rate of 1.25 gpm up to a diverted volume of 251.66 acre-feet from the South Fork of Cow Creek for municipal use for lawn and garden use on 98 acres for Water Right Claim No. 76H-2112. The volumes associated with the Preliminary Decree for Water Right Claim No. 76H-2106 is 18 acre-feet and Water Right Claim No. 76H-30010068 is 12.0 acre-feet. Applicant is also proposing to expand the existing irrigation reservoir surface of Sam's Pond to 1.5 acres, depth of 15 feet, and capacity of 11.25 acre-feet. Applicant did not provide a basis that the flow rate and the amount of volume requested was necessary for the municipal use requested. I find the Applicant has not proven that the combined flow rate and volume are the amounts needed to sustain the proposed beneficial use for the South Fork of Cow Creek Water Right Claims. (Department File, Hearing Record)

Possessory Interest

59. Montana cadastral mapping information for the identified place of use show and Applicant has affirmed that it has the possessory interest in the property where the water is to be put to beneficial use. (Department file; Allsop Testimony, Exhibit A11)

60. I find that the Applicant has demonstrated its possessory interest in the identified place of use. (Department File, Hearing Record)

Salvaged Water/Water Quality

61. The change application is not for salvaged water. (Department file; § 85-2-402(2)(e), MCA)

62. No objections were raised as to water quality or as to the ability of a discharge permit holder to satisfy effluent limitations. (Department file; § 85-2-402(2)(f) and (g), MCA)

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

CONCLUSIONS OF LAW

General

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in § 85-2-402, MCA. For the

instant Application, the requirements of § 85-2-402(2)(e)(f) and (g), MCA, are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (FOF 1, 60-61)

2. Section 85-2-402(2), MCA, states, *inter alia*, and as applicable to this Application:

Except as provided in subsections (4) through (6), (15), and (16), the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of the evidence that the following criteria are met:

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

(b) Except for a 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.

(c) The proposed use of water is a beneficial use.

(d) 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.

The requirements of Montana's change statutes have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (applicant has the burden of proof at all stages before the Department and courts). Generally an applicant can change up to the historic diverted flow rate and volume as limited by the historic consumptive use of the water right as long as the applicable criteria are met. Id.

3. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case);

Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

4. The public notice requirement of § 85-2-307, MCA, has been met. (FOF 4).

5. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. Id., §§85-2-301 and -402, MCA. Thus, the focus in this case is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120.

6. A Preliminary Decree was issued by the Water Court in 1998 (Water Right Case Nos. 76H-334 and 76HF-335). The Water Court Preliminary Decree evaluates the rights as they existed pre-1973. The Montana Water Court’s Water Master’s Report for Water Court Case Nos. 76HF-334 (Water Right Claim Nos. 76H-19708 and -15928) and 76H-355 (Water Right Claim Nos. 76H-2106, -2112, and -30010068) was issued in 2005. The Montana Water Court’s Order adopting the Water Master’s Report was issued in April 2006. The Water Court does not generally, and did not in this case, decree a volume for the irrigation rights proposed for change.

7. Water Right Claim Nos. 76H-19708 and 76H-15928 were also the subject of Change Authorization No. G15928-76H (February 1990), of which the Department takes official notice. The Department further takes notice of Change Authorizations 76H-1593000 (January 1993) issued for Water Right Claim Nos. 76H-19709, -15930, and -17858; Change Authorization 76H-1593001 (December 1993); Change Authorization 76H-268399 (March 1993); abstracts for Water Right Claim Nos. 76H-15930, 76H-17858, 76H-19709, 76H-152102, 76H-2609, 76H-2614, and 76H-2619; and the Order adopting the Water Master’s Report (2006) and the Water Master’s Reports for Water Court Case Nos. 76H-334 and 76H-355 (2002) (Water Right Claim Nos. 76H-2112, -19708, and -15928). (§ 85-2-234, -406(4), MCA).

8. Official notice was taken of all documents in the record, including those documents referenced above, and any exhibits already contained within the DNRC’s files. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the department’s specialized knowledge. Parties may object to official notice by filing exceptions to this Proposal for Decision. (Admin. R. M. 36.12.221(4))

Historic Use/Adverse Effect

9. An applicant can change only that to which it has a right. E.g., McDonald v. State, (1986) 220 Mont. 519, 722 P.2d 598; see also In re Application for Water Rights in Rio Grande County 53 P.3d

1165, 1170 (Colo.,2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted). The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, even if the water right was decreed in Montana’s adjudication. See McDonald (beneficial use is the basis, the measure and the limit, irrespective of greater quantity attempted to be appropriated). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221, MCA, constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. (See In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation, Final Order, (2008)) The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 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).

10. Historic beneficial use is used to evaluate potential adverse effect to other appropriators, senior and junior. 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 ed.); W. Hutchins, Selected Problems in the Law of Water Rights in the West, p. 378 (1942); In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); McDonald, supra (existing right is the pattern of historic use); see also §85-2-401, MCA. Montana’s change statute at § 85-2-402(2)(a), MCA, reads in part:

... 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.

(Emphasis added).

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

(Emphasis added).

See also, Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, p. 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, § 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).

11. A key element of historic use and 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 Proposal for Decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal for Decision*, (2003) (Final Order adopted Proposal for Decision).

12. Montana's change statute simply codifies western water law.⁵ 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, § 14.04(c)(1)(b), pp. 14-50, 51 (1991 ed.).

13. 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.

Id. § 14.04(c)(1).

⁵ 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.

14. Montana has no legal standard in a water right change proceeding for assigning a volume for historic consumptive use. The actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. Application for Water Rights in Rio Grande County __ Colo. __, 53 P.3d 1165, (2002); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water) Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”); *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order. As a result, there may be evidence that property was irrigated but the amount diverted and consumed is not necessarily equivalent to the duty of water. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. It is the applicant’s burden to produce 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.*, . “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” (*In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), affirmed Royston (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057 Without evidence of the amount of actual historical use, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a); *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, *supra*.

15. Prior to the enactment of the Water Use Act in 1973 and the promulgation of § 85-2-402, MCA, 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 Dist. (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980) 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because

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

16. The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (change denied in part for failure to prove lack of adverse effect due to lack of analysis of return flow)). Section 85-2-402(2), MCA, provides that the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not “adversely affect the use of the existing water rights of other persons.” The phrase “by a preponderance of the evidence” means such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it. Ekwortzel v. Parker (1971), 156 Mont. 477, 484-485, 482 P.2d 559, 563 (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added).

Sheafman Creek (Water Right Claim Nos. 76H-15928-00 and 76H-19708-00)

17. Applicant has shown by a preponderance of evidence that the property claimed in the 40 acre current place of use and the two 20-acre parcels of historic place of use have been irrigated by the water rights proposed to be changed. (FOF 13-14)

18. The 40-acre parcel is currently the place of use of nine Water Right Claims, including Water Right Claim Nos. 76H-19708 and 76H-15928 (Water Right Claim Nos. 76H-15930, 76H-17858, 76H-19709, 76H-152102, 76H-2609, 76H-2614, and 76H-2619). Applicant proposes to continue to irrigate the 40 acre parcel with at least four of the Water Right Claims. (Applicant is not proposing to

change the place of use of Water Right Claims Nos. 76H-19709 and -17858 (1st rights) which include the 40-acre parcel). Applicant provided no evidence as to how all of these water rights have been used to irrigate the 40-acre place of use. It is impossible to determine the actual historical diverted flow rate, diverted volume and consumed amount for the use of Water Right Claim Nos. 76H-19708, and -15928 on the 40-acre parcel. Mere calculations, in the absence of historical facts to support the propriety of the calculations, are insufficient. (Admin. R. M. 36.12.115; FOF 17-19)

19. Water Right Claim Nos. 76H-19708, and -15928 (4th rights) were previously changed in Change Authorization No. G15928-76H (February 1990), with a combined flow rate of .5 cfs up to 162.75 acre-feet of diverted volume. These Water Right Claims were changed with supplemental Water Right Claims Nos. 76H-19709 and -17858 (1st rights) also now designated for the same 40-acre current place of use. No evidence of the consumed amount of the respective Water Right Claims was presented or can be calculated from the Change Authorization. While applicants may change supplemental water rights, the historic use of each water right on a parcel must be explained and examined. The sum of the parts cannot exceed the historic irrigation of the whole. (FOF 15-25)

20. Applicant estimates the amount of water leaking from the entire length of the Upper Heckathorn Ditch is approximately 15-20%, and estimates the amount not captured by the Lower Heckathorn Ditch ranges from 10-20%. Applicant agreed to leave 45 gpm (.10035 cfs) in Sheafman Creek to compensate for the estimated ditch loss of 15%, reducing the flow rate allocated between Water Right Claim Nos. 76H-19708 and -15928 to 255.7 gpm (300.7 gpm – 45 gpm) (.57 cfs) under this Change. (FOF 26-27)

21. While the place of use (pre- and post-Change Authorization) for Water Right Claim Nos. 76H-19708, and -15928 was shown to be irrigated, the amount that each of these Claims historically contributed to the irrigation cannot be determined from the record. Based on either the current irrigation of the 40-acre parcel or the Change Authorization, Applicant failed to prove the extent of the historic rights to be changed and that the proposed change would not expand the water rights claimed. See Royston, supra. An expanded water right can create adverse effect for both upstream and downstream water users. (FOF 29, 34)

22. Applicant has not proven by a preponderance of the 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 or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§ 85-2-402(2)(a), MCA; FOF 13-34)

South Fork of Cow Creek (Water Right Claim Nos. 76H-2106-00, 76H-2112-00, Implied Water Right Claim No. 76H-30010068)

23. Applicant has shown by a preponderance of evidence that the 98-acre place of use for water Right Claim No. 76H-2112 proposed to be changed was historically irrigated. (FOF 35)
24. Applicant failed to provide any historical factual evidence to support its proposed calculation of diverted flow and volume. Applicant provided calculations using the Montana Irrigation Guide to determine irrigation water consumptive use requirements for Water Right Claim No. 76H-2112. The 40-acre parcel within the 98-acre place of use includes nine Water Right Claims, including Water Right Claim Nos. 76H-19708 and 76H-15928 (Water Right Claim Nos. 76H-15930, 76H-17858, 76H-19709, 76H-152102, 76H-2609, 76H-2614, and 76H-2619). Applicant offered no evidence of how this water right was historically used on that parcel or historical facts to support how this Water Right Claim was used on the remaining 58 acres. Mere calculations, in the absence of historical facts to support the propriety of the calculations, is insufficient. (Admin. R. M. 36.12.115; FOF 40-42)
25. Applicant failed to calculate the consumptive use for the proposed new 98 acres of irrigation under the municipal use. (FOF 42)
26. It is impossible to determine the actual historical flow rate, diverted volume and consumed amount for the use of Water Right Claim Nos. 76H-2112. Applicant failed to prove the extent of the historic rights to be changed and that the proposed change would not expand the water rights claimed. See Royston, supra. An expanded water right can create adverse effect for both upstream and downstream water users. (FOF 40-42)
27. No analysis of seepage or return flow downstream was included in the record to support the Applicant's analysis that water would no longer be returned in the South Fork of Cow Creek drainage, but would be returned in the Sheafman Creek drainage if the change were approved. (FOF 28)
28. Along with consumptive use, the analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator.

The Department defines "return flow" in part as:

"Return flow" means that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, and to which other water users are entitled to a continuation of, as part of their water right...

Admin. R. M. 36.12.101(56); see also, Doney, *Montana Water Law Handbook* (1981) p. 21. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters," and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Royston, supra; Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.

2008 MT 377, ¶¶22, 31, 43, 346 Mont. 508, ¶¶22, 31,43, 198 P.3d 219, ¶¶22, 31,43, *citing Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. A change can affect return flow patterns and timing, affecting other water users. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC PFD (2003), application subsequently withdrawn); *In The Matter of Application To Change A Water Right No. 43B 30002710 By USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 To Change Water Right Nos. 76H-108772 And 76H-1-8773 By North Corporation* (DNRC Final Order 2008). Changes to return flows caused by a change in the place of use must be analyzed to prove that there will be no adverse effect to other water users. Royston, supra.

29. The volume associated in the Preliminary Decree with Water Right Claim No. 76H-2106 is 18 acre-feet and the volume for implied Water Right Claim No. 76H-30010068 is 12 acre-feet. These volumes were likely based on the 1.5 acre-feet per household standard used in the claims examination process. There was no other information presented to determine historic consumptive use volume. (FOF 48)

30. Applicant has not proven by a preponderance of the 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 or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§ 85-2-402(2)(a), MCA; FOF 35-47)

Adequacy of Appropriation Works

31. Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (§ 85-2-402(2)(b), MCA; FOF 48-54)

Beneficial Use

32. Applicant's proposal to utilize the water under this change authorization for municipal use is a recognized beneficial use. (§ 85-2-102(4), MCA; § 85-2-402(2)(c), MCA; FOF 55)

33. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), affirmed on other grounds,; *In The*

Matter Of Application For Beneficial Water Use Permit No. 43c 30007297 By Dee Deaterly (Final Order, *affirmed other grounds*, *Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451. Moreover, the Department is specifically prohibited, “[t]he department . . . may not issue a permit for more water than . . . can be beneficially used without waste for the purpose stated in the application.” § 85-2-312(1)(a), MCA. Waste is defined to include the “application of water to anything but a beneficial use.” § 85-2-102(23), MCA.

34. Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the flow and volume necessary to sustain the proposed beneficial use. (§ 85-2-102(4), MCA; § 85-2-402(2)(c), MCA; *E.g., Siebel, supra, In The Matter Of Application for Beneficial Water Use Permit 76lj-30008762 by Vinnie J & Susan N Nardi* (2006); FOF 56-57).

Possessory Interest

35. Applicant has proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (§ 85-2-402(2)(d), MCA; FOF 58-59)

Salvage Water/Water Quality

36. The Application does not involve salvage water. (§ 85-2-402(2)(e), MCA; FOF 60)

37. No objections were raised as to water quality or as to the ability of a discharge permit holder to satisfy effluent limitations. (§ 85-2-402(2)(f) and (g), MCA; FOF 61)

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

FINAL ORDER

Application No. 76H-30005041 to change Water Right Numbers *76H-2106-00, 76H-2112-00, Implied Water Right Claim No. 30010068, 76H-15928-00, 76H-19708-00* by the Town of Pinesdale is hereby **DENIED**.

NOTICE

Any party adversely affected by this Proposal for Decision may file written exceptions and a supporting brief with the Hearing Examiner. Oral argument on the exceptions may be held, if requested. See § 2-4-621, MCA, and Admin. R. M. 36.12.229. Exceptions and briefs, and requests for oral argument must be filed with the Department postmarked by **June 4, 2009**, and copies mailed by that same date to all parties. No new evidence will be considered in the final decision-making process.

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed. No final decision shall be made until after the expiration of the above time period, and due consideration of *timely* oral argument requests, exceptions, and briefs.

DATED this 1st day of May, 2009.

/Original signed by Jolyn E Eggart/
Jolyn E. Eggart, Hearing Examiner
Water Resources Division
Department of Natural Resources and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 1st day of May 2009, by first class United States mail.

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