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

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IN THE MATTER OF APPLICATION NO. 76F 30028985 TO CHANGE WATER RIGHT CLAIM NO. 76F 98201-00 BY TALAN, INC	**)** **)** **)**	**FINAL ORDER**

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on May 28, 2009, in Helena, Montana, to determine whether an authorization to change a water right should be issued to Talan, Inc., [hereinafter referred to as "Applicant"] for the above application under the criteria set forth in Mont. Code Ann. § 85-2-402(2), -407, and -408. All water right claims involved in the change application were listed in the required public notice. The Water Right Claim proposed for change is Claim No. 76F 98201-00.

The Hearing Officer who conducted the hearing in the above Application passed away prior to writing his order. The Department afforded the Parties the opportunity to respond to its decision to appoint a new Hearing Officer to draft an opinion based on the written and audio record in this case and state affirmatively that they do, or do not, consider the demeanor of the witnesses to be immaterial except as may be discerned from the audio record and the full record review. Seeing no opposition, the Department substituted Charles F Brasen as Hearing Officer under MAPA, §2-4-622 MCA, to review the record in its entirety, including all audio records of the recorded hearing, and prepare the final order.

APPEARANCES

Applicant Talan, Inc., appeared at the hearing by and through counsel, Stan Bradshaw[1] and Laura Ziemer. Stan Bradshaw, technical consultant in preparation of Applicant's Application; Terry Smith, former owner of the place of use; Ron Pierce, fisheries biologist for Montana Department of Fish, Wildlife and Parks (FWP); Ron Shields, hydrologist, Water Legends Hydrology, were called to testify on behalf of the Applicant.

[1] Pursuant to the DNRC Conference Minutes and Order on Motion (May 21, 2009) Mr. Bradshaw was allowed "to testify in his capacity as a technical consultant in preparation of this Application, and for no other purposes. Mr. Bradshaw shall abstain from making any legal conclusions on the stand, and may resume his role as Applicant's legal counsel after the conclusion of his testimony."

Objector Jon Krutar appeared at the hearing by and through counsel, Holly Franz. Jon Krutar testified for the Objector.

Michael Roberts, Department of Natural Resources and Conservation (DNRC) Surface Water Hydrologist and Staff Expert, appeared at the hearing and was called to testify by the Hearing Examiner.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Except when evidentiary objections are sustained, prefiled exhibits (filed with prefiled direct testimony) will be part of the record. Applicant offered nineteen exhibits for the record. The Objector offered six exhibits. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1 through A15, A17, A18, A19, and A20. Exhibit No. A16 was not offered.

A-1: One-page copy of Talan Inc. Application No. 76F 30028985 Attachments List.

A-2: Two-Page copy of a Deficiency Letter to Talan Inc. from Lindsay Volpe, DNRC, dated October 3, 2007, and a two page copy of a Memorandum to Lindsay Volpe, DNRC from Mike Roberts, DNRC Surface Water Hydrologist, dated September 21, 2007.

A-3: Four-page copy of a Letter to Lindsay Volpe, DNRC from Stan Bradshaw, MT Trout Unlimited, regarding his Response to her Deficiency Letter, dated November 30, 2007.

A-4: Three-page copy of Application Review Form from Lindsay Volpe, DNRC, dated December 28, 2007.

A-5: One-page copy of the Application Map of proposed change (Attachment A).

A-6: One-page copy of the Application Water Resource Survey Map showing Township 14 North, Range 11 West (Attachment B1).

A-7: Is a one-page copy of the Application Attachment D which is a copy of a 1979 aerial photo showing 108 acres of irrigated lands in Section 5, Township 14 North, Range 11 West.

A-8: Is a one-page copy of the Application Attachment C which is a copy of a 1953 aerial photograph which covers the Applicant’s place of use.

A-9: Is a three-page copy of Application Attachment K, the Blackfoot River Fisheries Inventory, Restoration and Monitoring Progress Report for 2001, dated March 2002.

A-10: Is a one-page copy of Rating Table #1 for Kleinschmidt Creek Staff Gage (Ron Shields Pre-filed Testimony, Exhibit B).

A-11: is a one-page copy of a Montana Trout Unlimited Discharge Measurement Log-In Sheet for Kleinschmidt Creek (Ron Shields Pre-filed Testimony Exhibit C).

A-12: is a twelve-page copy of a Notice of Public Hearing on Proposed Amendment in the matter of the proposed amendment of ARM 36.12.1901, Filing a Change Application and 36.12.1902, Change Application – Historic Use.

A-13: is an eighteen-page copy of a Memorandum from Kim Overcast, DNRC re: Historic Consumptive Use Public Meetings, dated September 9, 2008 (eighteen pages)

A-14: is a one-page copy of Irrigation Water Requirements, Crop Data Summary (net irrigation application = 4 inches), dated 05/19/09.

A-15: is a one-page copy of Irrigation Water Requirements, Crop Data Summary (net irrigation application = 1 inch), dated 05/11/09.

A-17: is a two-page copy of a portion of the Montana Irrigation Guide Condensed Version (Application Attachment F2).

A-18: is a one-page copy of Kleinschmidt Creek Flow Measurements 2004 (Application Attachment O).

A-19: Hand-written consumptive use calculations for 159 acres producing 1.75 tons per acre (one-page) by Mike Roberts.

A-20: Hand-written consumptive use calculations for 137 acres and 110 acres producing 2.5 tons per acre (one-page) by Mike Roberts.

Objector Krutar offered six exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector Krutar's Exhibit Nos. OK-1 through OK-6[2].

OK -1: is a one-page copy of Applicant's Application Attachment D, a copy of a 1979 aerial photo.

OK -2: is a one-page copy of a 1979 aerial photo showing Sections 3, 4, 9, 10, 15, and 16 (lands including portions of and portions east of OK-1).

OK-3: Montana Trout Unlimited Discharge Measurement Log-In Sheet for North Fork Blackfoot River downstream of Weaver Ditch Headgate, near Ovando, MT, dated 03/27/2009 (one-page).

OK-4: Montana Trout Unlimited Discharge Measurement Log-In Sheet for North Fork Blackfoot River downstream of Weaver Ditch Headgate, near Ovando, MT, dated 05/27/2009 (one-page).

OK-5: Water Resources Survey (WRS) Powell County 1959, Claim 98201, Kelsey Nielsen 04/04/06 (one-page).

OK-6: is a one-page copy of an aerial photo dated August 30, 1955.

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

FINDINGS OF FACT

General

1. Application to Change A Water Right No. 76F 30028985 in the name of Talan, Inc., and signed by Tom Rue was filed with the Department on December 3, 2007. The Application's original received date was August 17, 2007. However, Applicant's response to the Department's October 3, 2007, deficiency letter was received December 3, 2007. Change application

[2] At Hearing some of Objector Krutar's exhibit numbers were mistakenly transposed; some were referenced as "KO" and a number, instead of "OK" and a number. The record shows that all Objector Krutar's exhibits should be numbered as "OK" and a number.

deficiency letters containing the requested information in the Department's deficiency letter received 31-90 days of the date of the letter, have the received date changed to the date the information is received by the Department. Mont. Code Ann. §85-2-302. Stan Bradshaw, Attorney for Trout Unlimited's Montana Water Project, was the primary compiler and consultant on this application. (Department file)

2. A public notice describing facts pertinent to this application was published in the *Missoulian*, a newspaper of general circulation on February 24, 2008, and was mailed to persons listed in the Department file on February 24, 2008. Three parties filed objections to the Application. Objectors Friede and Objectors Hooker and Geary withdrew their objections and did not participate in the hearing, which left Objector Jon Krutar as the lone Objector. (Department file)

3. The Environmental Assessment (EA) prepared by the Department for this application, dated December 10, 2007, was reviewed and is included in the record of this proceeding. (Department file)

4. Applicant seeks a temporary authorization to add a point of diversion and a fishery purpose and place of use on Water Right Claim No. 76F 98201-00. The added point of diversion is from Kleinschmidt Creek, which is a tributary of the North Fork of the Blackfoot River (NFBR) downstream of the proposed protected reach of the NFBR. The added purpose and place of use is an instream fishery purpose in the NFBR. Applicant will switch from flood irrigation to sprinkler irrigation. The place of use for irrigation will not change, except that the number or acres irrigated will be reduced. Applicant will divert less water at the proposed point of diversion and lease for instream flow the water salvaged from reduced historic conveyance losses. The Big Blackfoot Chapter of Trout Unlimited will lease the salvaged water to protect as instream NFBR flow for fishery purposes between the original NFBR point of diversion and the Ryan Bridge on the NFBR. Applicant intends to use the changed irrigation water and instream flow water every year during the lease and temporary change. The requested length of the temporary change is 25 years[3]. (Department file, testimony of Stan Bradshaw)

5. The Water Right proposed for change by Applicant is Water Right Claim No. 76F 98201-00. This water right claimed 20 cubic feet per second (cfs) of NFBR water for flood irrigation of 159.2 acres between May 1 and October 19 and a November 29, 1910 priority date. Water

[3] At hearing the term of the temporary change was reduced from 30 years to 25 years to coincide with the with the lease term. A temporary change approval may not exceed 10 years, but may be renewed. Mont. Code Ann. 85-2-407.

Right Claim No. 76F 98200-00 (for diversion of Rock Creek water) is supplemental and overlaps the place of use of Water Right No. 76F 98201-00. Water Right Claim No. 76F 98200-00 is not proposed for change by this Application. (Department file)

6. Applicant proposes to not use the point of diversion from the NFBR Ryan - Healy Ditch and instead use an added point of diversion on Kleinschmidt Creek at a point in the SE¼SE¼SW¼ of Section 5, Township 14 North, Range 11 West, Powell County for the irrigation purpose. Kleinschmidt Creek is a tributary to NFBR approximately 3.5 miles downstream of the Ryan - Healy Ditch headgate. Applicant proposes to continue irrigation of 95[4] acres of the historic place of use with a center pivot located in Section 5, Township 14 North, Range 11 West, Powell County, by diverting 2 cfs of water from the added point of diversion during the period May 1 through the October 19. (Department file, testimony of Stan Bradshaw, Michael Roberts)

7. The purpose and place of use change consists of changing to instream flow the Applicant's portion of the historic Ryan - Healy Ditch diversion which has been reduced by the proposed Kleinschmidt Creek 2 cfs flow for the center pivot irrigation at the added Kleinschmidt Creek pump site. The center pivot irrigation will be diverted from an added point of diversion on Kleinschmidt Creek. No water will be diverted into the Ryan - Healy Ditch (aka Weaver - Rue Ditch) by the Applicant while the change is in force. The instream flow will be protected in the reach of the NFBR between the original point of diversion and the Ryan Bridge, some 1.5 miles. The protected volume was estimated using measured flows in the Ryan - Healy Ditch near the headgate. The proposed protected volume is the sum of the following Ryan - Healy Ditch flows: 11 cfs (average) for 31 days between May 1 and May 31 (~676 acre-feet), 11 cfs (average) for 45 days between June 1 and July 15(~982 acre-feet), and 3 cfs (average) for 45 days between July 16 and August 29 (~268 acre-feet) for an estimated total of 1926 acre-feet historically diverted. These measurements were taken 1999-2004. At that time, there were three other users on the Ditch (Weaver, Hooker and Geary). This sum was then reduced by 10% (*North Fork of the Blackfoot River Hydrologic Study*) to account for Ryan - Healy Ditch flows which historically returned to the NFBR when the Ryan - Healy Ditch was in use, for an estimated 1733 historically diverted. (i.e., 1926 less any returning seepage flows [1926 - 0.1*1926 = 1733]). This historic volume (to be protected) must be further reduced by the amount of water to get the historic consumptive use amount to the place of use from the new point of diversion.

[4] Applicant reduced the number of acres to be irrigated from 137 in the Application to 95 at hearing to assure the historic consumptive use by flood irrigation is not enlarged by increased yield from sprinkler irrigation.

This methodology was used by the Applicant and Michael Roberts, Staff Expert. The Applicant agreed with the Staff Expert's calculations in the November 30, 2007 correspondence with Lindsay Volpe, DNRC Water Resources Specialist. Applicant did not identify the portion of existing Ryan - Healy Ditch flow measurements that are Applicant's (i.e., not diverted / used by other Ryan - Healy Ditch appropriators). See June 30, 2007 Memo from Mike Roberts to Lindsay Volpe DNRC. The portion of the proposed computed instream flow protected volume that was diverted by others is not available for Applicant's protection proposal. In addition, Applicant did not provide a flow scenario to be protected other that the claimed 20 cfs – 2 cfs or 18 cfs to obtain 9.8 cfs at the lower end of the protected reach at the Ryan Bridge. (Department file, testimony of Stan Bradshaw)

8. Applicant proposes to change the type of use of the water not diverted into the Ryan – Healy Ditch from irrigation to instream flow to benefit the fishery resource in the NFBR downstream of the Ryan – Healy Ditch headgate (in the SE¼NW¼SW¼ of Section 21, Township 15 North, Range 11 West, Powell County) to the Ryan Bridge (in the SW¼ of Section 29, Township 14 North, Range 11 West, Powell County). This proposed protected reach is about 1.5 miles long. (Department file, testimony of Stan Bradshaw)

9. Applicant proposes to measure the protected reach of the NFBR by taking measurements immediately downstream of the Ryan – Healy Ditch headgate, and measurements immediately below the Ryan Bridge. The upper site will be measured by a Marsh-McBirney Flomate 2000 flow meter to USGS protocols. The lower site will be measured from a staff gauge and rating table installed and maintained according to the United States Geological Survey (USGS). Both sites will be monitored monthly in May, June, and early July. Starting in late July, both sites will be measured biweekly. Trout Unlimited (TU) will be responsible for monitoring the staff gauge and will forward the flow records to the Department each year of the lease of the water right. Applicant does not provide flow rates to be protected other than the unused balance of the claimed 20 cfs. There is not sufficient information in the record to conclude what the protected reach flows would look like, other than Applicant wants 9.8 cfs at the lower end of the protected reach, under the proposed changes. (Department file, testimony of Stan Bradshaw, Ron Shields)

10. Applicant proposes conditions for approval of this change application: 1) Applicant will not divert water from Kleinschmidt Creek at the added point of diversion when to do so would draw Kleinschmidt Creek down to less than 9.0 cfs as measured at Applicant's property fence line with Friedes. Such a condition would also require a commitment during the lease to

continually maintain the stage-discharge rating per USGS standards. Also, the staff gages should be surveyed to an established benchmark to ensure year-to-year consistency. Applicant's proposed condition implies a minimum flow at the added point of diversion on Kleinschmidt Creek (prior to Applicant turning on his pump) of 11 cfs. (9 cfs + 2 cfs for diversion); 2) Applicant will not use any Rock Creek water (under Water Right Claim No. 76F 98200) for irrigating any acres described in Water Right Claim No. 76F 98201. (Department file)

Historic Use

11. Applicant and its predecessors have historically attempted to flood irrigate 159 acres with water diverted from NFBR by the Ryan – Healy Ditch. The Ryan - Healy Ditch is a very leaky ditch with leakage varying over the course of the year. The Ryan – Healy Ditch crosses Rock Creek and in so doing commingles Rock Creek water with NFBR water in the Ryan – Healy Ditch. There used to be a flue over Rock Creek which was replaced with a diversion dam across Rock Creek below where the Ryan - Healy Ditch crosses Rock Creek. Thus, water from the Ryan - Healy Ditch and Rock Creek are added together and are both used to fill the lower portion (downstream of Rock Creek crossing) of the Ryan - Healy Ditch. The varying percentages of water from the NFBR and from Rock Creek during the irrigation season that reaches the place of use through both sections of the Ryan - Healy Ditch was not quantified. Nor were the diversion amounts of other Ryan - Healy Ditch appropriators presented. (Department file, testimony of Terry Smith, Michael Roberts)

12. The 159 acres of historic irrigation consists of approximately 119 acres of irrigated hay ground and 40 acres of irrigated pasture. Applicant accepted Staff Expert's historic use estimate of 124.4 acre-feet per year of consumptive use for these 159 acres. The Staff Expert used the method proposed in the Department's Administrative rules shown in Exhibit A-12 to further refine his earlier historic consumptive use estimate based upon the Irrigation Water Requirement (IWR) for grass hay. Mr. Roberts used county-wide agriculture statistics, local climate data, and information presented in the Application according to the method set out in the proposed administrative rule, to refine the earlier estimates determined by IWR. (Powell County IWR estimate for flood irrigation = 11.41 in.; Management Factor for Ovando [County yield / Obtainable Yield = 2.31 / 2.81 = 0.822]; Historic Consumptive Use = (0.822) * (11.41 in.) / 12 in. = 0.78 feet * 159.2 acres = 124.4 acre-feet. Applicant's witness Terry Smith estimated crop tonnage at 2.5 tons per acre for sprinkler irrigated crops in the Ovando area. Mr. Roberts stated that in Montana it takes 6" of water to grow a ton of hay. Thus, Mr. Roberts estimated that a 2.5 tons per acre yield would require 1.25 feet of water. Applicant agrees to drop the acres

proposed for irrigation by the center pivot from 137 acres (as applied for) to 95 acres. By reducing the irrigated acreage Applicant will assure the historic consumptive use is not enlarged by this change even though the tons per acre yield would be increased. During the change 64.2 acres (159.2 – 95 = 64.2) of the historic place of use of the current Statement of Claim would have to be removed from irrigation because the historic consumptive use would be sufficient for only 95 acres of continued irrigation. The consumptive use of the 95 acres using the projected yield of 2.5 tons per acre (and Mr. Roberts' 1.25 feet per ton, Exhibit A20) is 118.75 acre-feet. When the effective precipitation of 1.93 inches found on Exhibit A-15 is subtracted, the consumptive use for 95 acres is 103.5 acre-feet. ([[2.5 tons/ac * 6"/ton -1.93"] / 12] * 95 ac = 103.5 af) Thus, projected use would be less than the historical consumptive use. Which 64.2 acres would be removed during the temporary change is not in the record. (Department file, testimony of Michael Roberts, Terry Smith)

13. Applicant argues that some of the water diverted from NFBR into the Ryan - Healy Ditch but which does not reach the place of use is consumed in that it does not return to the source (NFBR) in the proposed protected reach. However, witness testimony is that the water that is not consumed by the crops (minus the 10% loss: See Finding of Fact No. 7) is likely returned to Kleinschmidt Flats, NFBR, Rock Creek, area springs. There is no evidence that the water not consumed does not return to these area sources. The timing and location of the returning water will be affected by not diverting the historic amounts into Ryan - Healy Ditch. Instead it will flow down the NFBR. (Department file, testimony of Michael Roberts)

14. Not using the Ryan - Healy Ditch to convey NFBR water to the place of use and instead pumping Kleinschmidt Creek water through a pipeline to the place of use will require less water to be diverted. The capacity of the Ryan - Healy Ditch has been estimated at 24 cfs. The Ryan - Healy Ditch has not been measured during time of diversion of maximum flows. The flow was claimed at 20 cfs, but the maximum measured flow in the record during the irrigation season is 13 cfs. Applicant estimated the water historically diverted using these measured flows because they approximate historic practice based on testimony of Terry Smith. When the Ryan - Healy Ditch is not used to convey water to the Applicant's place of use as proposed in this change, historically diverted water will be salvaged. This volume of water which historically returned to NFBR from shallow ground water including springs north of Rock Creek, Rock Creek proper, and Kleinschmidt Creek, will now be left in the NFBR instead of diverted into the Ryan - Healy Ditch. The proposed added point of diversion flow is 2 cfs, so Applicant alleges that reducing the claimed historic amount diverted by 2 cfs saves up to 18 cfs over the historic practice. The

amount of water that is saved by not using the Ryan - Healy Ditch is available for beneficial use including a lease for instream flow. (Department file, testimony of Stan Bradshaw, Tom Rue, Michael Roberts)

Adverse Effect

15. Downstream of the Ryan - Healy Ditch on the NFBR and within the protected reach, Jacobson Ranch (Gary and Sharon Jacobsen) have Water Right Claim Nos. 76F 10388 and 76F 10389 (both with priority dates of May 4, 1890). The proposed change will decrease the amount of water historically diverted into the Ryan - Healy Ditch by Applicant and leave it in the NFBR. Any water left in the protected reach by this change will be available for the Jacobson's **senior** use even though their point of diversion is within the protected reach. Jacobson Ranch will not be adversely affected by the proposed change. (Department file, testimony of Stan Bradshaw)

16. Two water users with water rights on the Ryan - Healy Ditch, Charles Geary and Karen Hooker, objected to this Application. These Objectors divert water from the NFBR into the Ryan - Healy Ditch under Water Right Claim Nos. 76F 45403 and 76F 45402. In a Settlement Agreement Applicant agrees to not interfere with Appropriators (and former objectors) Charles Geary's and Karen Hooker's operation and maintenance of the Ryan - Healy Ditch. The proposed change will not preclude these appropriators from diverting their entitled amount. However, if the amounts diverted by these appropriators were part of the general ditch diversion measurements provided by Applicant as a basis for this change, and the Applicant protects the full measured amount while these appropriators divert their water, there will be less water available downstream. Less water in a closed basin implies an adverse affect to other water users. These Appropriators will not be adversely affected by the proposed changes. (Department file, testimony of Stan Bradshaw)

17. Appropriators Ross and Lacene Friede own water rights to divert and use water downstream of Applicant's proposed added point of diversion on Kleinschmidt Creek. These Appropriators objected out of concern that their downstream Water Right Claim No. W 146808 might be adversely affected, out of concern for the fishery health in the restored portion of Kleinschmidt Creek, and out of concern that their water rights would be subject to call by the Applicant's senior right if the Applicant's point of diversion is moved to Kleinschmidt Creek. In a settlement agreement Applicant agrees, in brief: 1) to install a staff gauge at a location that can be read from Friede's property, 2) to read such gauge at least weekly between April 15th and

September 15th of each year, 3) to not start pumping from the added point of diversion until flows at the staff gauge read 11.0 cfs (9 cfs plus the 2 cfs for continued irrigation), and 4) to stop pumping when flows are below 9.0 cfs at the gauge, and 5) to subordinate the priority date of the water pumped from Kleinschmidt Creek to Friede's downstream irrigation and stock water rights. These Appropriators will not be adversely affected by the proposed changes when the Applicant proceeds according to the settlement agreement. (Department file)

18. Objector Krutar has water rights for irrigation from Kleinschmidt Creek. Objector Krutar lists his affected water rights to include Water Right Claim No. 76F 3916 for 250 gallons per minute for irrigation and is downstream of the proposed point of diversion. There are 4.31 cfs of water rights claimed on Kleinschmidt Creek. Objector Krutar offered no evidence that the condition not to divert 2 cfs unless flows are 11 cfs at the new point of diversion (i.e. net flows of 9.0 cfs) measured at the Rue/Friede property line on Kleinschmidt Creek will be insufficient to cover his and other downstream diversions from Kleinschmidt Creek. (Department file)

19. There are six water right claims on Kleinschmidt Creek totaling 4.31 cfs. Adverse affect to upstream Kleinschmidt Creek appropriators could come if Applicant uses a senior priority date to call the source in times of shortage. Subordinating Applicant's priority date to all rights in existence at the time this application was received will prevent adverse affect to any downstream or upstream appropriators on Kleinschmidt Creek. Subordination would only apply to the Applicant's Kleinschmidt Creek added point of diversion. (Department file)

20. Applicant seeks to protect the "historic diverted flow" minus the 2 cfs changed to Kleinschmidt Creek to the original Ryan - Healy Ditch point of diversion on the NFBR. The Applicant acknowledges that the protected reach of the NFBR is a losing reach. Applicant's instream flow protection goal is to achieve a 9.8 cfs flow at the Ryan Bridge. The Applicant has offered indirect proof that the Ryan - Healy Ditch can carry up to 24 cfs, but no proof that 24 cfs, or even 20 cfs was actually diverted when it was available for Applicant's water right. The Ryan - Healy Ditch is used by multiple water right holders. Applicant has proven that flows up to 13 cfs have been diverted into the Ryan - Healy Ditch with their own and Mr. Robert's measurements at the Ryan - Healy Ditch headgate. However, there is no information on which water right holders were diverting the water under the collective diversion flow of 13 cfs. Nor was there an assessment of any impacts (upstream or downstream) from not identifying who was using water when the Ryan - Healy Ditch measurements were taken. Without evidence as to what part of the 13 cfs was used under the water right for change (as opposed to use by other Ryan - Healy Ditch users under their water rights) approval of the 13 cfs for change could

expand the historic use of this water right and adversely affect upstream appropriators by increased calls. (Department file, testimony of Stan Bradshaw)

21. The water historically diverted into the Ryan - Healy Ditch, but not consumed by the crop, enters shallow groundwater and returns to the NFBR through this shallow ground water including springs north of Rock Creek, Rock Creek proper, and Kleinschmidt Creek. These historic return flows all return to the NFBR downstream of the protected reach. By not diverting according to historic practice, the water will instead flow down the protected reach of stream channel to the locations where the water historically returned to the stream from the shallow ground water. (Department file, testimony of Michael Roberts)

22. The historic consumptive use on the 159 flood irrigated acres is 124.4 acre-feet. The consumptive use on the 95 pivot irrigated acres is 118.75 acre-feet (see Exhibit A-20). There is no adverse affect from increased consumptive use.

23. Applicant is requesting protection of 18 cfs at the Ryan - Healy Ditch headgate to get 9.8 cfs in the NFBR at the Ryan Bridge. The technique used to estimate the historic diverted volume in the Ryan - Healy Ditch showed a declining flow in the late season. There is no explanation of how (or if) the protected flow changes (or if it remains at 18 cfs) over the course of the season. Protecting the full 18 cfs for the full season could expand the historic use of this water right and adversely affect upstream appropriators by increased calls. (Department file, Finding of Fact No. 7.

Adequacy of Appropriation Works

24. Applicant's added point of diversion on Kleinschmidt Creek will be using a pump (20 hp) capable of pumping the 2 cfs required to irrigate the 95 acres under the new center pivot. Applicant intends to use designs provided by the Natural Resource Conservation Service (NRCS) to install and operate the center pivot. Applicant's irrigation appropriation works are adequate for the intended purpose. (Department file)

25. The leased water for instream flow does not require a diversion as it will not be diverted and will be left instream. (Department file)

Beneficial Use

26. Applicant identified the total diverted amount of water required to irrigate 95 acres as 2 cfs with the pivot irrigation consumptive volume capped by the historic consumptive use of 124.4 acre-feet (See Finding of Fact No. 12) per year at the new point of diversion. However,

the actual volume to be diverted (consumptive use plus delivery losses) for the 95 acres at the added point of diversion is not known. (Department file, testimony of Michael Roberts)

27. Applicant proposes instream flow for the benefit of fisheries under Mont. Code Ann. § 85-2-408 of 18 cfs measured at the Ryan - Healy Ditch headgate and 9.8 cfs measured at the downstream end of the protected reach, the Ryan Bridge. However, measurements submitted by Applicant (even with multiple Ryan - Healy Ditch users) did not exceed a maximum of 13 cfs. The Application requested a change in purpose of 1995 acre-feet to instream flow. That requested volume was later modified to 1733 acre-feet (1926 – 10% 1926 = 1733). (See Finding of Fact Nos. 7, 14)

28. The NFBR is designated "proposed critical habitat for bull trout and is ranked in the top 10% of total stream restoration priorities for the Blackfoot River basin." The lease will help correct dewatering problems during the July – October base flow period between the Ryan - Healy Ditch headgate and the downstream Ryan Bridge. An example is in 2001 when about 80 adult bull trout plus an unknown number of cutthroat trout and whitefish were trapped by irrigation-induced dewatering. This dewatering forced FWP to initiate a "fish rescue" of the bull trout spawners. During this time chronic dewatering of the NFBR between river miles 6.2 and 12.0 was caused by natural losses and irrigation. In the case of the Ryan - Healy Ditch the change of use to instream flow purpose will address problems associated with both fish losses and low flows in the dewatered section. The proposed water instream flow lease of any additional flow or volume will benefit the NFBR fishery. (Department file, testimony of Ron Pierce)

Possessory Interest

29. Applicant has affirmed that it has the possessory interest, or the written consent of the person with the possessory interest in the property where the irrigation water is to be put to beneficial use. The Applicant does not need to prove a possessory interest in the property where water is to be put to beneficial use instream. (Department file)

Water Quality Issues

30. No valid objections relative to water quality were filed against this Application. There were no objections relative to the ability of a discharge permitholder to satisfy effluent limitations of his permit filed in this Application. The water quality of a prior appropriator will not be adversely affected by this proposed change. (Department file)

Salvage Water

31. Applicant historically diverted water at its original point of diversion for flood irrigation with a claimed acreage of 159 acres. Applicant proposes to continue irrigating 95 acres with sprinkler irrigation. Under the continued irrigation, Applicant will divert 2 cfs, but did not specify the volume to be diverted at the new point of diversion. Through a change in its operation, Applicant alleges to it will salvage water from the Ryan - Healy Ditch; but, the flows and volumes diverted into the Ryan - Healy Ditch offered into evidence may not be water diverted solely by the Applicant. Historically diverted but not consumed water by an Applicant is available for change to instream flow under the holding of *Order on Petition for Judicial Review*, Hohenlohe v. DNRC, Cause No. BDV-2008-750 Montana First Judicial District Court (June 9, 2009), *appealed on other grounds*, Case No. DA-09-0429. However, here the flow and volume of Applicant's diversions are not known – just the total diversions for multiple users on the Ryan - Healy Ditch. Without the flow and volume of the historic use as to compare to the continued irrigation, it is impossible to determine a salvage amount. (Department file, §85-2-402(2)(e) MCA)

Temporary Change For Instream Flow Issues

32. The length and location of the stream reach in which the streamflow is to be maintained or enhanced is approximately a 1.5 five-mile reach of the NFBR to the Ryan Bridge from the historic point of diversion into the Ryan - Healy Ditch. (Department file)

33. The detailed streamflow measuring plan describing the points where and the manner in which the streamflow will be measured is adequate. (Finding of Fact No. 9, Department file, testimony of Michael Roberts; § 85-2-408(1)(a)(b), MCA)

34. The water historically diverted into the Ryan - Healy Ditch under Water Right Claim No. 76F 98201-00, but not consumed by the crop, enters shallow ground water and returns to the NFBR either immediately (approximately 10%) or beyond the protected reach through this shallow ground water including springs north of Rock Creek, Rock Creek proper, and Kleinschmidt Creek. In the Application, the Applicant requested the Department to consider seepage that is lost to the protected reach downstream of the historic point of diversion to the Ryan Bridge as "consumed" water for the purposes of the Application. The amount historically diverted and proposed for change is the volume returning to the NFBR through this shallow ground water, and the volume to be applied to the crop from the added point of diversion. Applicant can protect the volume historically diverted and returning to the NFBR through this

shallow ground water. The amount (flow and volume) historically diverted **by the Applicant** is not known from the evidence (Ryan - Healy Ditch measurements) provided. (Finding of Fact Nos. 7, 12; Department file; testimony of Stan Bradshaw; Tom Rue)

35. The temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, may not adversely affect the water rights of other persons when properly conditioned. An evaluation of the use by other Ryan - Healy Ditch users is needed to see if there would be an impact on the NFBR by this proposed change. (Finding of Fact Nos. 8, 9, 20; Department file, testimony of Stan Bradshaw)

36. The flow and volume of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. (Finding of Fact No. 28; Department file, testimony of Ron Pierce)

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402, -407, and -408.

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

be adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. (Mont. Code Ann. §§ 85-2-402(2)(a) through (g))

3. For the instant instream flow change Application, the requirements of § 85-2-402(2) (b), (d), (f)-(g), MCA, are not applicable because the proposed change Application is for a temporary instream flow; no objections were received as to water quality or the ability of a discharge permitholder to satisfy effluent limitations. (§ 85-2-402(2) (b), (d), (f)-(g), MCA; See Finding of Fact No. 31)

4. A temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use. (§ 85-2-407(2), MCA)

5. The Department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under §§ 85-2-402, -407, and -408, MCA. An application for a temporary change authorization for instream flow under § 85-2-408, MCA, shall:

(a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and

(b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured. (§ 85-2-408(1) (a), (b), MCA)

6. A temporary change authorization under § 85-2-408, MCA, is allowable only if the owner of the water right voluntarily agrees to:

(a) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or

(b) lease a consumptive use water right to another person for instream flow to benefit the fishery resource. (§ 85-2-408(2) (a), (i), (ii), MCA)

7. In addition to the requirements of §§ 85-2-402, and -407, MCA, the Applicant must prove by a preponderance of the evidence that:

(a) The temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the rights of other persons; and

(b) The amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. (§ 85-2-408(3) (a), (b), MCA)

8. A public notice containing the facts pertinent to the change application was published once in a newspaper of general circulation in the area of the source and mailed to the appropriate individuals and entities. (Mont. Code Ann. § 85-2-307. See Finding of Fact No. 2)

9. 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 Mont. Code Ann. §85-2-402. Id.

10. 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).

11. 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. The Montana Water Court does not decree a volume for direct flow irrigation claims nor does the Court decree the pattern of historic use. §85-2-234, MCA; Montana Supreme Court Water Right Claims Examination Rule 15(c). The volume of the Claim, however, cannot exceed the amount put to historical and beneficial use," which of necessity must be determined when evaluating the effects of a proposed change application. Here, the total Ryan - Healy Ditch diversions are estimated, but not the amount of Applicant's diversion is not known.

12. 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); 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 441, 666 P.2d 215, 222. As stated by the Montana Supreme Court in McDonald:

> The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: **such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use**. Thus an owner may have a decreed right to a certain number of miner's inches of water; or a statutory appropriative right to a stated amount; or a right depending upon mere use; or even a prescriptive right to a stated amount; nonetheless, **the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use.** … To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained…no matter how the water right is expressed in the decrees of the water court, either in flow rate or in acre feet or a combination thereof, such expression of amount is not the final determining factor. It is best expressed in the statutes of other states: *beneficial use* shall be the *basis,* the *measure* and the *limit* of all rights to the use of water.

(Emphasis added), 220 Mont. at 529-30, 722 P.2d at 604-05. Historic ditch capacity alone is not determinative of historic use. E.g., Bailey v. Tintinger (1912), 45 Mont. 154, 122 P. 575 (beneficial use, not ditch capacity is determinative); Ted J. Doney, *Montana Water Law Handbook* (1981) p. 24..

13. 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)028708-41I 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). Historic beneficial use is the cornerstone to evaluating 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. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002). 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).

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect in the prior appropriation doctrine under a statute similarly worded to §85-2-402(2)(a), MCA. E.g., 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 (Colo.1988). The Colorado Supreme Court has consistently explained:

> "A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority." Citations omitted) . . .
>
> … it is inherent in the notion of a "change" of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation

omitted) …

> … diversions are implicitly limited in quantity by historic use at the original decreed point of diversion…
>
> …we have explained this limitation by noting that "over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes." (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) "Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion."
>
> FN9. The term "historic use" refers to the "historic consumptive use," (citations omitted).

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

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).

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.).

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.

[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.

Id. § 14.04(c)(1).

14. 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).

15. 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.

16. Guides and estimates such as the Montana Irrigation Guide or the NRCS 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.

17. 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).

18. 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. Generally, return flow is water that is not consumed or otherwise lost to the system. 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. *See* Admin. R. M. 36.12.1903; Royston, supra.

19. Based upon the 1959 Powell County WRS, aerial photos, maps, and notes, and witness testimony, Applicant has shown by a preponderance of evidence that the property claimed in the historic place of use was irrigated by Water Right Claim No. 76F 98201-00 proposed to be changed. The maximum flows of the Ryan - Healy Ditch have not been measured; its maximum capacity is estimated at 24 cfs. However, a flow of only 20 cfs was claimed. Thirteen cubic feet per second of use has been measured in the Ryan - Healy Ditch, but there is no evidence that this diverted water is solely by the Applicant. Historic volume diverted into the Ryan - Healy Ditch has been estimated at 1926 acre-feet using measured flow rates. How much of this

volume is Applicant's is not known. The historic volume consumed by the 159 acres is 124.4 acre-feet. (See Finding of Fact Nos. 11, 12, 14)

20. The Applicant has not proven by a preponderance of the evidence that the water rights of other appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected, including changes to return flows. The only evidence of pattern and extent of historic use is Applicant's ditch diversion measurements. Terry Smith testified that that these measurements reflect historic practice. The evidence does not show that upstream NFBR appropriators will not be affected if Applicant is allowed to change amounts based upon total Ryan - Healy Ditch flows instead of amounts it diverted into the Ryan - Healy Ditch. (I must assume the former would be larger than the latter.) If this change were allowed, Applicant could take its full ditch amount and the other Ryan - Healy Ditch appropriators could take their amount, thus enlarging the historic demand on the NFBR. The Applicant's portion of the Ryan - Healy Ditch flows is all that can be included in a change. Even if a change authorization was conditioned as proposed by the Applicant, affects on other appropriators from possible enlargement of the demand on the NFBR could occur. (Conditions proposed by Applicant include: 1) Applicant will not divert water from Kleinschmidt Creek at the added point of diversion when to do so would draw Kleinschmidt Creek down to less than 9.0 cfs as measured at Applicant's property fence line with Friedes, 2) to install a staff gauge at a location that can be read from Friede's property, 3) to read such gauge at least weekly between April 15th and September 15th of each year, 4) to not start pumping from the added point of diversion until flows at the staff gauge read 11.0 cfs, and 5) to stop pumping when flows are below 9.0 cfs at the gauge, and 6) the appropriator shall not call for water from junior water right holder(s) on Kleinschmidt Creek with respect to the additional new point of diversion authorized.) If Applicant were to call the source for the measured flows at the Ryan - Healy Ditch headgate for use in the protected reach, and the other Ryan - Healy Ditch users were to use their water rights, the amount used by the other users could be an added burden to the source. It is not known from the record if the Ryan - Healy Ditch headgate measurements included the amounts of all Ryan - Healy Ditch users or just the Applicant's use.

There are six water right claims on Kleinschmidt Creek. Applicant agreed to subordinate the priority date of the water pumped from Kleinschmidt Creek to Friede's downstream irrigation and stock water rights. However, adverse affect to upstream Kleinschmidt Creek appropriators could come if Applicant uses priority date seniority to call the source in times of shortage. Subordinating Applicant's priority date to **all** rights in existence at the time this application was

received will prevent adverse affect to any downstream **or** upstream Kleinschmidt Creek appropriators that may exist. Such subordination would only apply to the Applicant's Kleinschmidt Creek added point of diversion. I find no adverse effect to appropriators on Kleinschmidt Creek from the propose change as conditioned.

Injury from changes in return flow will not occur in this case because historically diverted water will now be allowed to flow instream through the protected reach to where it historically entered the NFBR or through protection of conditions. (See Finding of Fact Nos. 7, 10, 11, 15, 17, 20, 21)

21. Under Applicant's proposed changes, the water rights of prior appropriators on the lower NFBR will continue to be satisfied, as the rights have historically been used for irrigation. Objectors appear to argue in part that exact historic conditions such as return flow must be matched or maintained. However, the statutory criterion only requires that an appropriator not be adversely affected by this proposed change – not that the historic practice must be maintained or matched. See Mont. Code Ann. § 85-2-402(2)(a). Applicant has shown an intent to use the water right being changed, and historic consumption of this water right will not increase under the proposed change. There is no increase in the historic consumption under the proposed change when the acreage irrigated is reduced to 95 acres and water under Water Right Claim No. 76F 98200-00 will not be used to irrigate because the historic consumption of water is not expanded. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 35)

22. The Applicant has proven the added point of diversion's proposed means of diversion, construction, and operation is adequate. The Applicant does not have to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this Application is for instream flow under Mont. Code Ann. §85-2-408. (Mont. Code Ann. § Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 24, 25)

23. 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. Irrigation and fishery are beneficial uses under Mont. Code Ann. §85-2-102(4).

Applicant has proven by a preponderance of evidence that the minimum flow of 9.8 cfs (up to 18 cfs) proposed to be protected in the reach below the historic point of diversion to the Bridge would benefit the fishery below the original point of diversion. However, the exact quantity of water proposed to be used is not known other than Applicant wants to see 9.8 cfs at the Ryan Bridge. (§ 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). (See Finding of Fact Nos. 27, 28)

24. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the flow and volume necessary for the proposed beneficial uses and the proposed uses are beneficial at the original and new point of diversion. The diversion volume at the new point of diversion is not known (identified only by 2 cfs) and the flow regimen to be protected at the upper end of the protected reach is not known. (Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact Nos. 7, 9, 26, 28, 36)

25. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to irrigation beneficial use. The Applicant does not need to prove a possessory interest in the property where water is to be put to beneficial use because this Application is for instream flow under Mont. Code Ann. §85-2-408. (Mont. Code Ann. §85-2-402 (2)(d). See Finding of Fact No. 29)

26. The water quality of a prior appropriator will not be adversely affected. No valid objections to the water quality of a prior appropriator, or the ability of a discharge permit holder to satisfy effluent limitation of a permit was raised. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See Finding of Fact Nos. 30.

Measurement Plan

27. Applicant is required to include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced, and provide a detailed

streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured. Applicant has provided a measurement plan and identified the protected reach. However, it is not known how this proposed change in use will be enforced; that is, what is the flow at the upper end of the protected reach, and what happens when it is not there? (§ 85-2-408(1)(a), MCA) See Finding of Fact Nos. 32, 33, 34, 35.

28. Applicant has identified and provided specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced. (§ 85-2-408(1)(a), MCA; See Finding of Fact No. 7, 32)

29. Applicant has provided a detailed stream flow measurement plan that describes the point and manner in which stream flow must be measured. (§ 85-2-408(1)(b), MCA; See Finding of Fact Nos. 9, 33)

Salvage Water

30. Applicant has not proven by a preponderance of the evidence that it will salvage at least the amount of diverted water asserted under this proposed change because the historic diverted flow rate and volume **by the Applicant** are unknown. Applicant is not salvaging any consumed volume of water. (§ 85-2-402(2)(e), MCA; See Finding of Fact Nos. 6, 14, 31)

31. Consumptive use is defined as "…the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water." See Mont. Admin. R. 36.12.101(15). The water lost from the Ryan - Healy Ditch does not meet this definition. However, Applicant is proposing to lease the water salvaged by reducing conveyance losses to the Big Blackfoot Chapter of Trout Unlimited to be protected as instream flow for fishery purposes in a naturally losing reach of the NFBR between the original point of diversion and the Ryan Bridge. Salvage is defined "…to make water available for beneficial use from an existing valid appropriation through application of water-saving methods." See Mont. Code Ann. § 85-2-102(20).

32. The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the "amount historically consumed," or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion. (§ 85-2-408(7), MCA)

Applicant did not salvage "consumed water" under the definition in Mont. Admin.R. 36.12.105(15). Reducing conveyance losses can be considered salvaged water. Under the holding of *Order on Petition for Judicial Review*, Hohenlohe v. DNRC, Cause No. BDV-2008-750 Montana First Judicial District Court (June 9, 2009), *appealed on other grounds*, Case No. DA-09-0429 [hereinafter Hohenlohe], Applicant may use this "salvaged" diverted flow for instream flow under certain circumstances. The historic diverted flow and volume may be protected below the point of diversion through the protected reach so long as historic return flows did not return in the protected reach and the other applicable criteria are met. Here, in essence, the historic diverted flow and volume are "consumed" to the protected reach of the source. 85-2-408(7), MCA. The historical diverted flow rate and volume are unknown. Therefore, it is not known what amount of water could be protected below the point of diversion through the protected reach. (See Finding of Fact Nos. 7, 14, 31)

33. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for authorization to change a water right. Here, even though there are conditions which can be applied to reduce impacts, there remains an unknown impact from not knowing whether the measured flows in the Ryan - Healy Ditch are only the Applicant's or if they include other users. (Mont. Code Ann. § 85-2-402(8). See Conclusion of Law No. 20, 24, 30)

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

FINAL ORDER

Application to Change a Water Right No. 76F 30028985 is hereby **DENIED**.

NOTICE

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 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 26th day of February 2010.

/ Original Signed By Charles F Brasen /

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 5th day of March 2010, by first-class United States mail.

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