

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

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IN THE MATTER OF APPLICATION NO.)	
76H-30029998 TO CHANGE WATER)	
RIGHT CLAIM 76H-104919 BY MONTANA)	FINAL ORDER
WATER TRUST)	

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Pursuant to its authority under Montana Code Annotated §§ 2-4-601 *et seq.*, and 85-2-310, and Mont. Admin. R. 36.12.201 *et seq.*, and 36.12.501 *et seq.*, and upon the request of Applicant Montana Water Trust, the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on September 29, 2009, to allow Montana Water Trust, hereinafter referred to as "Applicant" for the above application, to show cause why the Application to Change a Water Right should not be denied under the terms specified in the Statement of Opinion (SOP), issued by the Department on July 13, 2009. The show cause hearing provided the Applicant an opportunity to present all additional written and/or oral evidence and argument. This Final Order must be read in conjunction with the July 13, 2009 SOP. The Application proposes to change the purpose and place of use of water right Statement of Claim 76H-104919, priority date 6/1/1878, from irrigation to instream flow to enhance the fishery resource (instream fishery) in a section of Sweeney Creek, a Bitterroot River tributary. The proposed new place of use would be the reach of Sweeney Creek beginning at the historic point of diversion in the NW¼ NW¼ SW¼ Section 22, T10N, R20W approximately 0.9 miles downstream to a point in the NE¼ SE¼ Section 22, T10N, R20W where Sweeney Creek passes beneath US HWY 93. The Applicant proposes to protect an asserted historic diverted flow rate (0.91 cfs) and historic diverted volume (280.5 AF) upstream from the historic headgate diversion and to protect the diverted flow rate (0.91 cfs) and consumed volume (37.1 AF) downstream of the historic headgate in the protected reach. The temporary change will be for a period of 10 years commencing at the date of approval by DNRC.

APPEARANCES

Applicant Montana Water Trust appeared at the hearing by and through counsel, Ms. Barbara Hall, who also serves as Montana Water Trust Executive Director. Prior to her position as Executive Director, Ms. Hall worked on the staff of Montana Water Trust as a project manager with duties that included water right due diligence, historic use assessment, and water measurement.

EXHIBITS

Applicant offered 12 exhibits, SC-A thru SC-L, for the record at the hearing. The Hearing Examiner accepted and admitted into evidence all of Applicant's Exhibits. During the hearing, the Hearing Examiner requested additional information regarding the Applicant's calculation of historic consumed volume. The Hearing Examiner allowed until 5:00 pm on September 30, 2009 for the Applicant to provide this information for the record. The Applicant provided the requested information in a timely manner, replacing Exhibit SC-L as submitted at the hearing with a revised Exhibit listed as SC-N; an additional exhibit, listed below and labeled as Exhibit SC-M, and a request to withdraw Exhibit SC-H. The two new exhibits are accepted and admitted into evidence and the request to withdraw Exhibit SC-H and Exhibit SC-L is granted.

EXHIBIT #	EXHIBIT DESCRIPTION
SC-A	Ditch capacity calculations
SC-B	List of water rights sharing Simpson Ditch POD
SC-C	Water Commissioner records (1987-2006)
SC-D	Summary of Water Commissioner records for 76H 104919
SC-E	Aerial photo showing place of use of supplemental water rights
SC-F	Statements of Claim for supplemental water rights 76H 104921 & 76H 104922
SC-G	General abstracts of supplemental water rights
SC-H	Excerpt from proposed consumptive use rule Withdrawn
SC-I	Aerial photo showing down-ditch water users
SC-J	Excerpt from Mountain Meadows Subdivision describing existing water rights
SC-K	Aerial photo showing PODs in protected reach
SC-L	Applicant's Motion and Brief to Reconsider Decision to Deny Water Right Change Application Withdrawn
SC-M	IWR table and modification for consumed volume calculation.
SC-N	Applicant's Motion and Brief to Reconsider Decision to Deny Water Right Change Application (Revised)

PRELIMINARY MATTERS

All of the exhibits offered by the Applicant were accepted into the record. This order must be read in conjunction with the July 13, 2009 SOP as the show cause hearing was held to address the denial of the Application for the reasons set forth in the SOP. This decision considers the new evidence and arguments presented by Applicant at the hearing and constitute the Final Order on this Application. The Application was denied in a SOP from Missoula Regional Office Manager Bill Schultz on July 13, 2009, the contents of which is hereby incorporated by reference. The Application was proposed to be denied based on failure to prove the criteria of Historic Use (ARM 36.12.1902; Mont. Code Ann. §§85-2-402(2) and -408(7)) and Adverse Effect Mont. Code Ann. §85-2-402 (2)(a) and §85-2-408 (3)(a). Criteria related to Adequacy of Diversion, Beneficial Use, Possessory Interest, Salvage Water, and Water Quality were addressed in the SOP and were not part of this hearing, Mont. Code Ann §85-2-402(2)(b), (c), (d), (e), and (f). Criteria related to Length & Location of Stream Reach, Streamflow Measurement Plan, and Amount of Water for Proposed Use were addressed in the SOP and were not originally part of this hearing. Mont. Code Ann §85-2-408(1)(a), (b), and (3)(b). The Applicant proposed at hearing modification to the length of stream reach (reduced) and amount of water for proposed use (reduced) to meet historic use and adverse effects criteria. The Applicant modified the streamflow measurement plan to account for the reduced stream reach protected. Because of these modifications, the Hearing Examiner includes findings and conclusion regarding beneficial use criteria. Mont. Code Ann. §85-2-402(2)(c).

The Applicant on August 10, 2009 requested a show cause hearing and a show cause hearing was held on September 29, 2009. The issues at the hearing to be addressed were Historic Use and Adverse Effect.

The Hearing Examiner, having reviewed the full record in this matter and being fully advised in the premises, does hereby respond as follows to the Applicant's arguments presented at the Show Cause Hearing held September 29, 2009 and the additional information provided by close of business September 30, 2009, as allowed.

Hearing Procedure

The overall summary of the SOP stated that in the opinion of the Department the Applicant did not adequately address the criteria of historic use and adverse effect. The Show Cause Hearing was conducted in such a manner that each criterion was addressed in the order

that they are discussed in the Department's SOP denying the Application. Set out below are specific details from the SOP denying the Application followed by the Applicant's argument on the respective criteria at the show cause hearing, the Hearing Examiner's Findings of Fact on that criteria after the show cause hearing, and the Hearing Examiner's Conclusions of Law for each of the respective criteria following the show cause hearing.

1. **Statement of Opinion:** The Applicant states that the diversion is sufficient to accommodate all the water rights claiming the Simpson Ditch diversion. The Applicant did not provide measurements of the ditch capacity or the combined flow rate of all of the water rights served by the Simpson Ditch.

Applicant Show Cause Argument and Evidence: Based upon the contents of Exhibit SC-A, the Applicant provided information including photographs of a Parshall flume, with a throat width of two feet, positioned in Simpson Ditch and calculations to show a maximum capacity of 15 cfs. The photo of the flume shows a distinct rust line on the sidewall at 0.9 feet, which translates to 6.9 cfs as a typical diversion rate. This demarcation does not preclude diversions in excess of 6.9 cfs. The Applicant provided Exhibit SC-B, a list of all water rights sharing the Simpson Ditch point of diversion. The list indicates that the combined flow rate of the water rights listing the Simpson Ditch as the point of diversion is 18.079 cfs. The information indicates a total flow rate of 6.8 cfs with a priority date equal to or earlier than the water right claim being changed.

Hearings Examiner Finding of Fact: Based on the contents of Exhibit SC-A and SC-B, the Simpson ditch has adequate capacity to carry 15 cfs and to support that fact that the ditch can carry the amount of water necessary to serve the water right being changed and all rights senior to the right being changed.

2. **Statement of Opinion:** The Applicant states that the distribution of decreed water rights on Sweeney Creek is performed by a water commissioner. The Applicant states that these water commissioner records are on file at the Ravalli County District Court but does not present any documentation or records of such water commissioner distribution.

Applicant Show Cause Argument and Evidence: The Applicant provided information including copies of water commissioner records from 1987 through 2006 (Exhibit SC-C) and a summary of the water commissioner records (SC-D) as they pertain to water right claim 76H 104919. Exhibit SC-N identifies the water commissioners and provides details on the flow and distribution. The Application stated that water has been delivered by a commissioner historically

for years prior to 1987 in a similar fashion. The decree has been in place since 1906. The place of use was developed into a residential subdivision after 2004. These records show that this water right claim was fully served an average of 126 days per year (generally April 1 through late July) for the period 1987-2003. Water was available for the longest period of use in 1993, when records show full service through the end of August. Water was available for the shortest period in 1988, when records show water was available until July 20.

Hearings Examiner Finding of Fact: Based upon the contents of Exhibit SC-C, Exhibit SC-D, and Exhibit SC-N, water commissioner records support that water right 76H 104919 was served on a regular basis for an average of 126 days per year, generally from April 1 through late July.

3. **Statement of Opinion:** The Applicant does not make any adjustment to the historic diverted flow rate even though the historic irrigated acreage was reduced for the purpose of this application from 26.82 acres to 18.75 acres. The Hearing Examiner takes notice that the Statement of Opinion contains a typographical error when it indicates the 28.82 acres. The correct acreage is 26.82 acres as noted elsewhere throughout the document.

Applicant Show Cause Argument and Evidence: The Applicant agrees that the flow rate should be reduced to account for the reduced acres and requests to modify the flow rate requested from 0.91 cfs to 0.71 cfs (18.75 acres X 17 gallons per minute per acre = 318.8 gpm = 0.71 cfs). See Exhibit SC-N.

Hearings Examiner Finding of Fact: Based upon the contents of Exhibit SC-N, the Applicants modification of the requested flow rate is appropriate for the historic irrigated acres. The modified flow rate of 0.71 cfs reflects the historic diverted flow rate.

4. **Statement of Opinion:** The Applicant does not present any evidence to support their estimate of the number of days water was available under this water right. The Applicant states that this water right may not have been available every year due to over appropriation of the source Sweeney Creek and drought. The Applicant presents no information to show which water rights in priority have been consistently satisfied from Sweeney Creek.

Applicant Show Cause Argument and Evidence: Applicant presented copies of water commissioner records (Exhibit SC-C), a summary of water commissioner records (Exhibit SC-D), and Exhibit SC-N, which identifies the water commissioners and provides details on the flow and distribution. These records show that this water right claim was fully served an average of 126 days per year (generally April 1 through late July) for the period 1987-2003. The records

show water was available for the longest period of use in 1993, when records show full service through the end of August (153 days). Water was available for the shortest period in 1988, when records show water was available until July 20 (111 days). The Applicant chose to use a conservative estimate of the length of time water is available. The application includes the water right claim filing for 76H 104919, claim examination records, and Water Resource Survey information which indicate irrigation of the historic place of use in August and “adequate supply”.

Hearings Examiner Finding of Fact: Review of the claim information and Water Resource Survey information, including historic aerial photos, indicates irrigation on the historic place of use in a pattern similar to that indicated in the Water Commissioner records provided. Based upon these sources and the contents of Exhibit SC-C, Exhibit SC-D, and Exhibit SC-N, the source through the Simpson Ditch historically provided water for water right claim 76H 104919 for 126 days per year (generally April 1 through late July).

5. **Statement of Opinion:** The general abstract of water right claim 76H-104919 provided by the Applicant lists three water rights that are supplemental to the water right being changed (76H-104919). The abstract remark from the temporary preliminary decree states that these rights have overlapping place of use and the sum total of the rights cannot exceed the amount put to historical and beneficial use. The Applicant does not provide information to explain how these rights were used in combination to serve the historic place of use or if they will continue to serve the historic purpose and place of use.

Applicant Show Cause Argument and Evidence: The applicant summarized the three supplemental water rights, 76H 104922, 76H 104921, and 76H 104920 (Exhibit SC-N), provided General Abstracts (Exhibit SC-G) and copies of water right claim filings (Exhibit SC-F). The Applicant noted that 76H 104920 was withdrawn in the adjudication as confirmed by the status shown on the General Abstract. The place of use of 76H 104922 and 76H 104921 is outside the 18.75 acre claimed place of use of the water right claim being changed (76H 104919) as noted by the legal descriptions in the claim filings and confirmed by the maps included with the claim filings Exhibit SC-F and further noted in Exhibit SC-E, an aerial photograph with the place of use of all the affected rights designated.

Hearings Examiner Finding of Fact: Based on the information provided, the Applicant adequately addressed the supplemental rights. Overlapping places of use are not at issue with this change authorization. Water Right Claim 76H 104920 could have served a portion of the 18.75 acre claimed place of use, but has been withdrawn. Water Right Claims 76H 104921 and 76H 104922 did not historically irrigate the 18.75 acre place of use for 76H 104919.

6. **Statement of Opinion:** Applicant appears to assume full service irrigation and no contribution from supplemental water rights. Applicant presents no evidence to support these assumptions.

Applicant Show Cause Argument and Evidence: Applicant presented evidence to show that the supplemental rights did not contribute to the irrigation of the 18.75 acres claimed as the place of use for the water right proposed for change. See SOP item number 5 above.

The Applicant agrees that their original calculation of consumed volume assuming full service irrigation is not supported and requests to modify the amount of historically consumed volume to be changed from 37.1 AF per year to 24.8 AF per year. See Exhibit SC-N. This volume was determined using the NRCS IWR program and then subtracting the net irrigation requirement for the months of August and September. There is no October irrigation requirement at this site according to the IWR program. See Exhibit SC-M.

According to the application and Exhibit SC-N, the primary goals of this change authorization are: to restore flow around the diversion structure that routs water to the Simpson Ditch in order to allow fish to negotiate around the dam; and, to maintain refuge for fish in pools below the dam. The diversion structure and pool habitat occur within the protected reach. The flow rate and volume in this change authorization will benefit the fishery by providing flow around the dam and flow to the pools below the dam (Exhibit SC-N).

Hearings Examiner Finding of Fact: Reducing the consumed volume to be changed to be consistent with the confirmed period of diversion as noted by the water commissioner records (Exhibit SC-C) is credible and supported by the exhibits provided by the Applicant. See Exhibit SC-N. The modified historic consumed volume of 24.8 AF reflects the historic consumed volume.

The data and analysis supplied through Exhibits SC-A through SC-G and Exhibit SC-M and SC-N, and the modification to the flow rate and volume to be protected, demonstrates that the criterion of historic use is adequately addressed. The Applicant has proven the historic diverted flow rate, historic diverted volume and amount historically consumed of the water right to be changed. The Applicant has proven that even though the flow rate and volume have been reduced, the amounts of water allowed by this change authorization provide a beneficial use to instream fisheries.

Conclusion of Law: The Applicant has proven by a preponderance of the evidence that the amount of water being changed for water right claim 76H-104919 will not exceed or

increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use. Mont. Code Ann. §85-2-402(2)(a).

Applicant has proven by a preponderance of the evidence the amount historically diverted and the amount historically consumed Mont. Code Ann. §85-2-408(7). The Applicant has proven by a preponderance of evidence that even though the flow rate and volume have been reduced, the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource and is the amount necessary to sustain the beneficial use. Mont. Code Ann. § 85-2-402 (2)(c) and -408(3)(b).

7. **Statement of Opinion:** The Applicant did not provide information indicating the status of the supplemental water rights serving the historic place of use of 76H 104919. The Applicant assumes full service irrigation has been provided by water right 76H 104919 despite acknowledging that water may not be available for the entire period of use, and does not account for supplemental water rights with overlapping place of use. According to the Applicant, the water rights diverted into the Simpson Ditch are administered by a court-appointed water commissioner. However, no commissioner records were submitted.

Applicant Show Cause Argument and Evidence: See discussion above in the Historic Use section, items number 5, supplemental rights; item number 4, full service irrigation; and item number 2, water commissioner records.

Hearings Examiner Finding of Fact: Based on the information provided, the Applicant addressed the supplemental rights, full service irrigation, and water commissioner records issues. See Hearings Examiner Findings of Fact information in Historic Use section, items number 5, 4, and 2.

8. **Statement of Opinion:** The WRS information presented by the Applicant indicates the Simpson Ditch continues past the historic place of use to serve other water users. The Applicant does not specifically identify these other water users.

Applicant Show Cause Argument and Evidence: The Applicant provided Exhibit SC-I, an aerial photo identifying the Simpson Ditch and lateral ditch locations, property boundaries, and property ownership of the down-ditch water users. The Applicant provided a table showing owners, water right claim numbers, priority date, and flow rates of the down-ditch water rights. See Exhibit SC-N. The rights of the down-ditch users have the same priority date as the water right being changed. Water is delivered by a water commissioner according to priority (Exhibit

SC-C). The water rights with senior or equal priority date on the Simpson Ditch that will continue to be delivered by the water commissioner total 5.9 cfs. (Exhibit SC-B).

Hearings Examiner Finding of Fact: Based on the information provided, sufficient water will remain in Simpson ditch to serve down-ditch users and these users can continue to reasonably exercise their water rights.

9. **Statement of Opinion:** The Applicant does not provide evidence or analysis of the existence or effect of changes to return flows if the proposed change were approved.

Applicant Show Cause Argument and Evidence: The Applicant provided calculations indicating the volume of historic return flow is the difference between the claimed historic diverted volume (177.13 AF) and the historic consumed volume (24.8 AF), or 152.33 AF per year. (Exhibit SC-N). The Applicant seeks to change only the historic consumed volume below the historic point of diversion. The Applicant provided evidence that the groundwater gradient is easterly toward the Bitterroot River and unconsumed water returned to the Bitterroot River and not to Sweeney Creek. (Exhibit SC-J) Historic return flow would have entered the Bitterroot River below the confluence of the River with Sweeney Creek. The place of use for the water right being changed has been developed into a residential subdivision and has not been irrigated since 2004. There has been no complaint of adverse effects since irrigation was curtailed.

Hearings Examiner Finding of Fact: Based on the information provided, water for instream flow under this change will enter the Bitterroot River above where return flow historically entered the River and the change in return flow will not cause adverse effects to other users.

10. **Statement of Opinion:** The Applicant provided information from DNRC records which indicates that there are 4 diversions located within the proposed protected reach that divert water rights senior to the subject water right. The first of these diversions is located approximately 0.25 miles downstream from the Simpson Ditch diversion. Depending on whether these downstream senior water rights are satisfied, it is apparent that any additional water available at these diversions resulting from this change application would be available for diversion. The only time when the subject water right would be allowed past these four diversions is when there is sufficient water in Sweeney Creek to satisfy both senior water rights as well as the subject water right.

Applicant Show Cause Argument and Evidence: The Applicant acknowledged the

occurrence of points of diversion serving water rights senior to the right being changed within the proposed stream reach to be protected. The Applicant requested to modify the protected reach place of use to the stream reach between the Simpson Ditch point of diversion and the first downstream diversion serving a senior user, approximately 0.25 miles. The Applicant also proposes to modify the streamflow measurement plan to a single measurement site at the Simpson Ditch point of diversion. See Exhibit SC-N. According to application, the primary goals of this change authorization are to restore flow around the diversion structure routing water to the Simpson Ditch and maintain refuge for fish in pools below the structure.

Hearings Examiner Finding of Fact: Based upon the contents of Exhibit SC-N, the Applicant's modification of the protected reach, reducing it from the Simpson Ditch point of diversion to the first headgate serving a senior user, approximately 0.25 miles, adequately addresses the issue that the proposed new use can be protected through the assigned place of use without adversely affecting senior users. The modified streamflow measurement plan is adequate to meet the requirements of Mont. Code Ann. § 85-2-408(1)(b). The Department will require annual reporting of the measurements. The measurement condition to this change authorization is included on the last page of this SOP. The Applicant has proven the proposed use in the reduced protected reach is a beneficial use.

The data and analysis supplied through, exhibits, and the modification to the flow rate, volume stream reach to be protected demonstrate that the criteria of adverse effect has been met.

Conclusion of Law: The Applicant has proven by a preponderance of the 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 or for which a state reservation has been issued. Mont. Code Ann. § 85-2-402(2)(a) and § 85-2-408(3)(a).

The Applicant has provided specific information regarding the length and location of the stream reach in which the streamflow is to be maintained or enhanced. § 85-2-408(1)(a), MCA. The Applicant has proven the proposed use is a beneficial use and flow rate and volume are the amounts of water needed to sustain the proposed beneficial use. § 85-2-402(2)(c) and § 85-2-408(3)(b), MCA.

The Applicant provided in Exhibit SC-N a revised detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured. § 85-2-408(1)(b), MCA.

I FIND: The Applicant at the show cause hearing on September 29, 2009 did through additional written and oral evidence and argument and application modifications show cause why application No. 76H-30029998 to change water right claim 76H-104919 by Montana Water Trust should not be denied under the terms specified in the SOP issued by the Department on July 13, 2009.

Therefore, application No. 76H-30029998 to change water right claim 76H-104919 by Montana Water Trust is GRANTED for the reasons specified above and in the SOP.

FINAL ORDER

Application to Change a Water Right No.76H-30029998 is **GRANTED, with modifications described in this order and summarized below**, to Montana Water Trust to change, for a period of 10 years, the purpose and place of use of water right Statement of Claim 76H-104919-00, priority date 6/1/1878, from irrigation to instream flow to enhance the fishery resource (instream fishery) in a section of Sweeney Creek, a Bitterroot River tributary. The following change to Water Right Claim 76H-30029998 is approved: 18.75 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 22 T10N R20W are removed from irrigation; historic diverted flow rate of 0.71 cfs up to the historic diverted volume of 177.13 AF per year is approved to be called to the point of diversion; the historic consumed volume of 24.8 AF per year can be protected below the point of diversion through the protected reach for approximately 16 days within the period of use at the historic diverted flow rate; the period of use is April 1 to July 31; proposed new place of use would be the reach of Sweeney Creek beginning at the historic point of diversion in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 22, T10N, R20W (Simpson Ditch) approximately 0.25 miles downstream to a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 22, T10N, R20W, the Miles Ditch point of diversion; and the number of locations to be measured in accord with the measurement plan is reduced to one site, the historic point of diversion. Reporting of water measurement records is required as per the condition below.

Application Modifications and Conditions

The following condition is required to be adhered to by the Appropriator and will be added as a condition of the Change Authorization.

PROOF OF PLACE OF USE NOT IRRIGATED REQUIRED:

THE APPROPRIATOR WILL PROVIDE EVIDENCE THAT 18.75 ACRES, THE PLACE OF USE OF WATER RIGHT CLAIM 76H 104919, ARE NO LONGER IRRIGATED USING SWEENEY CREEK. THIS EVIDENCE WILL BE 1) A SIGNED NOTARIZED STATEMENT FROM OWNER OF THIS WATER RIGHT CLAIM; AND 2) A MAP SHOWING LOCATION OF DITCH MODIFICATIONS AND AREA OF THE HISTORIC PLACE OF USE THAT IS NOW NOT IRRIGATED. THE DEPARTMENT RESERVES THE RIGHT TO REQUIRE AN ANNUAL DOCUMENTATION OF NON-IRRIGATION USE.

WATER MEASUREMENT RECORDS REQUIRED:

THE APPROPRIATOR SHALL REPORT TO THE DEPARTMENT THE STREAMFLOW DATA COLLECTED IN IMPLEMENTATION OF THE STREAMFLOW MEASUREMENT PLAN REQUIRED BY MONT. CODE ANN. § 85-2-408(1)(b) AND DESCRIBED IN THE CHANGE AUTHORIZATION APPLICATION AS MODIFIED BY THE FINAL ORDER. DOCUMENTATION OF THE LOCATION OF THE MEASURING POINTS AND MEASUREMENT METHODOLOGY MUST BE PRESENTED WITH THE FLOW MEASUREMENT RECORDS. THE MEASUREMENT REPORT SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS TEMPORARY CHANGE AUTHORIZATION.

NOTICE

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

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 for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 8th day of October, 2009.

/Original signed by Bill Schultz by e-signature/

Bill Schultz, Hearings Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 5004
Missoula, MT 59806-5004

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 8th day of October 2009, by first-class United States mail.

BARBARA HALL
MONTANA WATER TRUST
140 SOUTH 4TH ST WEST, UNIT 1
MISSOULA, MT 59801

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

CHANGE APPLICATION STATEMENT OF OPINION

Application No.: **76H-30029998 – Montana Water Trust**

Date: **July 13, 2009**

Final Decision Maker: **William J. Schultz – Regional Manager**

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

DENY APPLICATION: The findings and conclusions do not show that the criteria have been met. A Notice and Statement of Opinion will be sent to the Applicant.

MODIFY APPLICATION: The findings and conclusions show the criteria have been met, however application modifications are required. A Notice and Statement of Opinion will be sent to the Applicant.

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

Application Details: The Applicant, Montana Water Trust, is proposing a temporary change, as provided for in §85-2-408 MCA. The Applicant is requesting to change the purpose and place of use of water right Statement of Claim 76H-104919-00, priority date 6/1/1878, from irrigation to instream flow to enhance the fishery resource (instream fishery) in a section of Sweeney Creek, a Bitterroot River tributary. The proposed new place of use would be the reach of Sweeney Creek beginning at the historic point of diversion in the NW¼ NW¼ SW¼ Section 22, T10N, R20W approximately 0.9 miles downstream to a point in the NE¼ SE¼ Section 22, T10N, R20W where Sweeney Creek passes beneath US HWY 93. The general location of the proposed place of use is approximately 1.5 miles south of Florence, Montana, in the Bitterroot River Basin.

The Applicant proposes to protect an asserted historic diverted flow rate (0.91 cfs) and historic diverted volume (280.5 AF) upstream from the historic headgate diversion and to protect the diverted flow rate and consumed volume (37.1 AF) downstream of the historic headgate in the protected reach.

The temporary change will be for a period of 10 years commencing at the date of approval by DNRC.

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

FINDINGS OF FACT: The Applicant documents historic use of water right 76H-104919 -00 by presenting the general abstract of the water right, information from the Ravalli County Water Resource Survey (1958), various documents related to claim examination copied from the DNRC record, a copy of the Ravalli County District Court Decree upon which this water right claim is based, a copy of the Montana Water Court Masters Report, and photographs of the diversion structure and ditch. The Applicant describes the conveyance ditch as the Simpson Ditch, which is identified in the Ravalli County WRS as serving multiple places of use, including the historic place of use of water right 76H-104919.

Acres Irrigated: The Applicant describes the historic irrigated place of use as 18.75 acres located

in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 22, T10N, R20W. The Applicant explains that the acres claimed as irrigated and decreed by the Montana Water Court are 26.82 acres. The Applicant has quantified the acres that were historically irrigated by analyzing the available aerial imagery and using a GIS mapping program. The Applicant refers to the DNRC Claim Examination which included a determination of 18.75 irrigated acres shown on the Ravalli County Water Resource Survey map. The same DNRC Claim Examination also reviewed the 1979 USDA aerial photograph #179-134 and found 26.3 acres of irrigation. The WRS map data source indicates an area of approximately 18.75 acres being irrigated at the time of the WRS field investigation. During the processing of this application, DNRC reviewed the 1979 aerial, the WRS map and a 1995 aerial photograph and concluded that approximately 19 acres may have been irrigated. The Applicant bases its calculation of consumptive volume of water right 76H-104919 on 18.75 acres of irrigation, not the 26.82 acres of irrigation identified on the general abstract of water right 76H-104919. The applicant notes that 2005 aerial photography indicates that subdivision development of the place of use has commenced.

The Applicant provided a copy of a water right purchase and sale agreement between the Applicant and the most recent former owner of water right 76H-104919. Paragraph 2 of this agreement is Landowners Representations and Warranties. The seller represents that the water right has been put to use in at least one of the past ten years immediately preceding the 2005 irrigation season.

I find that the information provided to support that 18.75 acres were historically irrigated is credible. The Applicant has proven by a preponderance of evidence that 18.75 acres were historically irrigated under water right 76H-104919.

Diverted flow and volume: The Applicant presents a determination of the claimed diverted flow rate of water right 76H-104919-00 of 410.2 gpm by providing copies of the claim examination, the Montana Water Court Masters Report, a copy of the Ravalli County District Court decree and photographs of the headgate diversion structure, ditch and flume.

The Applicant presents information including current photographs (dated February 2008) and 2005 aerial photographic maps that indicates that the location of the historic diversion is as claimed in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 22, T10N, R20W.

The Applicant states that the diversion is sufficient to accommodate all the water rights claiming the Simpson Ditch diversion. The Applicant did not provide measurements of the ditch capacity or the combined flow rate of all of the water rights served by the Simpson Ditch.

The Applicant states that the distribution of decreed water rights on Sweeney Creek is performed by a water commissioner. The Applicant states that these water commissioner records are on file at the Ravalli County District Court but does not present any documentation or records of such water commissioner distribution.

DNRC reviewed the Ravalli County District Court Decree Case no. 933, May 9, 1906, page for the water right of John E. Thill, the owner to whom the court decreed the water right in 1906, provided by the Applicant. The District Court decreed 80 miners inches for 80 acres. The original decree allotted one miners inch (11.22 gpm) per acre. It is noted that water right 76H-104919 originally claimed 40 miners inches (448.8 gpm) for 26.82 acres. The original claimed flow rate was approximately 1.5 miners inches (16.83 gpm) per acre which is 50% greater than decreed by the District Court. The Montana Water Court reduced the total flow rate of water right 76H-104919 from 40 miners inches to 36.56 miners inches (410.2 gpm) for 26.82 acres to resolve a decree exceeded issue.

The Applicant does not make any adjustment to the historic diverted flow rate even though the

historic irrigated acreage was reduced for the purpose of this application from 28.82 acres to 18.75 acres.

The claimed period of diversion for the water right claim 76H 104919 is April 1 – October 4. The Applicant calculates diverted volume by multiplying the diversion flow rate of 410.2 gpm or 0.914 cfs by the estimated number of days that the water right was historically diverted (155 days) and by the factor 1.98 (1.98 is the factor used to convert CFS to AF/Day). Diverted volume is estimated by the Applicant as follows: $0.91 \text{ cfs} \times 155 \text{ days} \times 1.98 = 280.5 \text{ AF}$. The Applicant explains that the number of days in the period of use is 186 days. The Applicant explains that 155 days of diversion is estimated to allow for a period of time at the beginning and a period of time at the end of the diversion period when water is not needed for plant growth. The Applicant also subtracts a period of days during the irrigation season when crops are harvested. The Applicant does not present any evidence to support their estimate of the number of days water was available under this water right. The Applicant states that this water right may not have been available every year due to over appropriation of the source Sweeney Creek and drought. The Applicant presents no information to show which water rights in priority have been consistently satisfied from Sweeney Creek.

The general abstract of water right claim 76H-104919 provided by the Applicant lists three water rights that are supplemental to the water right being changed (76H-104919). The abstract remark from the temporary preliminary decree states that these rights have overlapping place of use and the sum total of the rights cannot exceed the amount put to historical and beneficial use. The Applicant does not provide information to explain how these rights were used in combination to serve the historic place of use or if they will continue to serve the historic purpose and place of use.

I find the historic diverted flow rate and volume of water diverted that the Applicant seeks to change have not been established or proven by a preponderance of evidence.

Consumed volume: The Applicant estimates the consumptive use of the irrigation water right by using the NRCS IWR program to calculate net crop requirements for alfalfa hay on 18.75 acres based on climatic data from Stevensville Weather Station, Ravalli County. The IWR report included indicates that in a dry year the net crop requirement is 1.98 AF per acre. For 18.75 acres the net crop requirement is 37.1 AF per year. The Applicant indicates that all water not used by crop evapotranspiration is returned to either the groundwater or surface water down gradient of the ditch and irrigated acreage.

Historic Use Summary Table

<i>WR#</i>	<i>Priority Date</i>	<i>Historic Flow Rate - Cfs/Gpm</i>	<i>Historic Diverted Volume</i>	<i>Period of Diversion</i>	<i>Historic Consumptive Volume</i>	<i>Historic Acres Irrigated</i>
76H-104919-00	06/01/1878	410.2 GPM	280.5 AF	04/01 – 10/04	37.1 AF	18.75

The Department's review of the calculation of consumed volume indicates the Applicant appears to assume full service irrigation and no contribution from the listed supplemental water rights. Applicant presented no evidence to support these assumptions.

I find that the Applicant has not provided sufficient information needed to support the historic use of water. There is no information on water availability, the pattern of historic system operation or whether full service irrigation was received. The Applicant did not provide information regarding the actual historic consumptive volume which is available to change.

CONCLUSIONS OF LAW: Department administrative rulings have held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No. 008323-q76L by Starkel/Koester, April 1, 1992, Final Order; McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis, measure, and the limit or a water right); see also 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). Importantly irrigation water right claims are not decreed with a volume and are thus limited to the their “historic 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).

I find that the historic flow rate and diverted and consumptive volume are not proven by a preponderance of the evidence. There is no actual evidence of diversions. No actual records of available flow were provided. The applicant has not provided credible information that supports the amounts claimed, and the amounts claimed appear to be higher than the amount needed for crop consumption on 18.75 acres. Moreover, 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).

It is the applicant’s burden to produce this evidence of historical use, and not doing so constitutes a failure of proof. In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., Proposal for Decision (2005) adopted by Final Order. 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. See also historic use discussion in the following “adverse effect” Conclusions of Law.

The Applicant has not proven by a preponderance of the evidence that the amount of water being changed for water right claim 76H 104919 will not exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use.

Adverse Effect: The Applicant must prove the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

FINDINGS OF FACT: The Applicant provided information to show that the water right has been removed from the claimed (26 acres) historic place of use. The Applicant did not provide information indicating the status of the supplemental water rights. The maps provided by the Applicant indicate that water diverted into the Simpson ditch is conveyed approximately 1 mile to the historic place of use. The WRS information presented by the Applicant indicates the Simpson Ditch continues past the historic place of use to serve other water users. The Applicant does not specifically identify these other water users. The Applicant has provided information that indicates the historic place of use is

being developed into a residential subdivision and states that all lateral ditches historically used to convey water from the Simpson Ditch to that parcel have been obliterated. The Applicant has acquired ownership of this water right via a Water Right Purchase and Sale Agreement and recorded quit claim deed. Based on the provisions of these documents, this water right will no longer be diverted into the historic Simpson Ditch and all acres historically irrigated with this right will be permanently removed from irrigation by water diverted from Sweeney Creek. The Applicant has provided documentation of acquisition of the affected water right.

The Applicant presented a list identifying all water rights on Simpson ditch and a list of all water rights with diversions downstream of the historic point of diversion of water right 76H-104919-00 within the reach of Sweeney Creek proposed for instream fishery enhancement. Each of the owners of the identified water rights received notice of this proposal. Two objections were received. The DNRC assigned a Hearing Examiner to conduct a hearing on the two objections. During the course of pre-hearing conference, the Hearing Examiner accepted a withdrawal of objection from one objector. The Hearing Examiner defaulted the other objector for failure to attend a mandatory pre-hearing conference. The Hearing Examiner dismissed the defaulting objector and remanded the application to the Missoula Regional Office for analysis and processing to determine if the Applicant has proven compliance with the criteria set forth in § 85-2-402, MCA by a preponderance of the evidence. §85-2-310(3), MCA.

The Applicant proposes to protect the asserted historic consumed volume below the historic diversion in the reach of Sweeney Creek identified for instream flow enhancement. The consumed volume is identified by the Applicant as 37.1 AF, which amount could be protected for approximately 20 days within the April 1 through October 4 period of use at the claimed flow rate. The Applicant states that since the amount of water requested for instream flow protection downstream from the historic diversion is limited to the consumed volume of crop evapotranspiration, no adverse affect to downstream appropriators would occur.

As discussed in the Historic Use section of this Statement of Opinion, the Applicant assumes full service irrigation has been provided by water right 76H-104919 despite acknowledging that water may not be available for the entire period of use, and does not account for supplemental water rights with overlapping place of use.

The Applicant proposes to protect the historic diverted volume upstream of the historic point of diversion. The diverted volume is identified by the Applicant as 280.5 AF diverted and the Applicant claims it was historically used in a 155-day period within the April 1 through October 4 period of use.

The Department used the list of water rights served by the Simpson ditch to calculate the combined claimed diverted flow rate of the subject water right along with the claimed diverted flow rate of all other water rights that share the Simpson Ditch and have the same or senior priority date to be a total of 6.79 cfs. The subject water right flow rate claim is 0.91 cfs which is approximately 13% of these water rights. If this change were approved, the total flow of all senior or equal priority water rights diverted from Sweeney Creek into the Simpson Ditch would be 5.88 cfs. Of this total, 3.13 cfs is senior to the subject water right. According to the Applicant, the water rights diverted into the Simpson Ditch are administered by a court-appointed water commissioner. However, no commissioner records were submitted. According to the Applicant there is a 2' parshall flume in the Simpson Ditch to allow water measurement. Senior rights in the Simpson Ditch would be fully served before this water will be available for instream flow.

The Applicant addresses return flows by acknowledging that it is reasonable to assume that some, if not all, of the possible ditch seepage losses return to the source and are not a component of the

historic consumed volume. The Applicant further acknowledges that any ditch loss would likely be returned to a surface water or groundwater source. The Applicant does not provide any evidence or analysis of the existence or effect of changes to return flows if the proposed change were approved.

The Applicant provided information from DNRC records which indicates that there are 4 diversions located within the proposed protected reach that divert water rights senior to the subject water right. The first of these diversions is located approximately 0.25 miles downstream from the Simpson Ditch diversion. Depending on whether these downstream senior water rights are satisfied, it is apparent that any additional water available at these diversions resulting from this change application would be available for diversion. The only time when the subject water right would be allowed past these four diversions is when there is sufficient water in Sweeney Creek to satisfy both senior water rights as well as the subject water right.

The Applicants presented a measurement plan as required by §85-2-408 MCA. The measurement plan indicates that Montana Water Trust shall monitor flow at least every two weeks. Streamflow will be measured at the historic diversion and at the end of the proposed protected reach. Monitoring shall be more frequent during water shortage or calls on other water rights. Montana Water Trust shall adhere to USGS guidelines for streamflow measurement and trained staff will establish streamflow monitoring sites and rating curves on Sweeney Creek.

I find the Applicant has not provided sufficient evidence that the proposed change in appropriation right will not adversely affect 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 reservation has been issued. Mont. Code Ann. §85-2-402(2)(a).

CONCLUSIONS OF LAW: Applicant has not proven by a preponderance of the 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 or for which a state reservation has been issued. Mont. Code Ann. § 85-2-402(2)(a).

Junior users have a right to the continuance of those return flows. Other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908).

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

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

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

....

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

(italics added).

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

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 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.

(italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase

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

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

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

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

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(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, 38 Mont. 302, 100 P. 222 (1909)(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, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. 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). The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. 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.”

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.

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

In a change proceeding, the *consumptive* use of the historical right has to be determined: In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

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

....

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

....

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

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

The Applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). 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 only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402. Furthermore, the Montana Water Court does not decree a volume for irrigation claims nor does the Court decree the pattern of historic use. §85-2-234, MCA. The decreed claims are, however, limited to the “historic beneficial use,” which of necessity be determined.

Return flows are not part of a water right and an appropriator is not entitled to return flows in a change in appropriation. 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, 1077.2; 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 (Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation). This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The analysis of return flow is also a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991). In particular, changing irrigation water to instream can alter the timing of irrigation return flows from late in the irrigation season and fall to immediately upon use for instream flow. An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., 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 failed to analyze the effect of changing historic irrigation return flows to instream.

In the present case, the claimed historic beneficial use of the water right proposed for change (including diverted flow and volume and consumed amount) is not supported by evidence in the record and thus whether there will be adverse effect to another appropriator cannot be determined

2 Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84 [hereinafter Stone].

from the record. The Applicant has not proven by a preponderance of the 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 or for which a state reservation has been issued. Mont. Code Ann. § 85-2-402(2)(a).

The Department recognizes that the First Judicial District recently issued its decision in Hohenlohe v. DNRC, Cause No. BDV-2008-750 (2009). That decision is factually and legally distinguishable from this case. That decision is binding only in the First Judicial District for Lewis and Clark County. Furthermore, the applicant in that case provided historical use information from the former irrigator as well as ditch measurements, which are absent in this case. In addition, in that case all of the water rights irrigating the property at issue were proposed for change.

Adequacy Of Appropriation Works: The Applicant must prove, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource 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](#) (as in this application) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

FINDINGS OF FACT: According to the Applicant, the existing appropriation works for water right 76H-104919-00 is a headgate and ditch. The Applicant provided photographic evidence of the diversion works. The new use for instream flow to enhance fishery resource in Sweeney Creek (instream fishery) would not require a method for diversion, which is allowed by statute as noted above. The diversion structure allows sufficient control to regulate flow to the ditch. The Applicant presented information about the Parshall Flume located in the Simpson Ditch which allows the Water Commissioner to regulate the amount of water diverted from Sweeney Creek.

I find that the present application is for a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) which does not require adequate diversion.

CONCLUSIONS OF LAW: Applicant is pursuing a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#), and so falls within the exception that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).

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

FINDINGS OF FACT: This application is for a change in purpose to instream flow to enhance the fishery resource (instream fishery) in a section of Sweeney Creek, a Bitterroot River tributary. Beneficial use, as defined in the Montana Water Use Act, includes “a use of water through a temporary change in an appropriation right for instream flow to benefit the fishery resource in accordance with 85-2-408, MCA. , § 85-2-102(4)(d), MCA.

The Applicant provided information from the Montana Department of Fish Wildlife and Parks MFISH website regarding stream dewatering concerns. Sweeney Creek is identified as chronically dewatered from mile 0.0 to mile 1.0. Mile 0.0 is the mouth of Sweeney Creek at its confluence with the Bitterroot River. Available information suggests that an on-stream pond at or near mile 1.0 presents a barrier to fish passage between Sweeney Creek and the Bitterroot River. The Applicant acknowledges this fish barrier and is requesting to enhance the reach of Sweeney Creek from the

historic Simpson Ditch headgate to the point where Sweeney Creek passes beneath the US Highway 93 Bridge, which is upstream of the dam which bars fish passage.

The applicant did not provide information from a fisheries biologist regarding the specific need or benefits to fisheries of this proposed change to instream flow.

Additionally, according to the Applicant, the dam which is used to divert water into the Simpson Ditch also serves as a barrier to fish migration. The Applicant presents information from the MTDFWP website that indicates the presence of Bull Trout, Westslope Cutthroat Trout and Brook Trout in a section of Sweeney Creek that is upstream of the Simpson Ditch headgate. The Applicant provides information that indicates there are deep pools below the Simpson Ditch headgate where fish are present. The Applicant maintains that the water kept instream as a result of this application would provide additional water to these pools and therefore benefit the resident fish population.

The Applicant provided information which indicates that water is diverted into the Simpson Ditch by means of a rock and tarp dam that crosses the entire width of Sweeney Creek. The Applicant provided a photograph of this diversion dam. The Applicant states that this diversion dam acts as a barrier to the flow of Sweeney Creek except during high water. According to the Applicant observation and communication with the Sweeney Creek water commissioner, any water flowing below this dam is the result of seepage.

I find that the information presented by the Applicant to show the proposed change is beneficial to be credible.

CONCLUSIONS OF LAW:

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*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451.

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

Possessory Interest: The Applicant must prove, except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

FINDINGS OF FACT: The applicant is the owner of the water right claim being changed and is pursuing a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#).

CONCLUSIONS OF LAW: The Applicant is pursuing a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) and so falls within the exception that 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. § 85-2-402(2)(d), MCA.

Salvage Water: If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the Applicant.

The application does not involve salvaged water. § 85-2-402(2)(e), MCA.

Water Quality Issues: The Applicant must prove that the water quality criteria have been met only if a valid objection is filed. No objections relative to water quality or the ability of a discharge permit holder to satisfy effluent limitations of the permit holder were filed against this Application.

Public Notice: The Application was properly noticed pursuant to §85-2-307, MCA.

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

85-2-408. Temporary change authorization for instream flow – additional requirements.

Mont. Code Ann. § 85-2-408 states in part:

(1) ...The application must:

- (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.

....

(3) In addition to the requirements of 85-2-402 and 85-2-407, an applicant for a change authorization under this section shall prove by a preponderance of 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 water 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.

Length and Location of Stream Reach:

FINDINGS OF FACT: The applicant provided legal land descriptions and a map depicting the stream reach (approximately 0.9 miles in length) in which the streamflow is to be maintained or enhanced.

CONCLUSIONS OF LAW: The Applicant included in their application 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.

Streamflow Measuring Plan:

FINDINGS OF FACT: The applicant, Montana Water Trust (MWT) will administer this temporary change to instream flow for fisheries. The flow monitoring plan will include stream discharge measurements taken at or near the historic point of diversion and at or near the end of the protected reach, all on Sweeney Creek. The measurement plan indicates that Montana Water Trust shall monitor flow at least every two weeks during the period of use. Monitoring shall be more frequent during water shortage or calls on other water rights. Montana Water Trust shall adhere to USGS guidelines for streamflow measurement and trained staff will establish streamflow monitoring sites and rating curves. The data will be catalogued and stored at MWT's office and will be available upon request.

CONCLUSIONS OF LAW: The Applicant provided in their application a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured. § 85-2-408(1)(b), MCA.

Change in Purpose To Instream Flow To Benefit Fishery or Lease or 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 Water Rights Of Other Persons:

FINDINGS OF FACT: The Montana Water Trust is the owner of the water right being changed and has applied for a change of purpose to instream flow for fisheries for a period of 10 consecutive years from the date of authorization from the Department pursuant to 85-2-408 (2) (ii). This temporary change application is for 0.91 cfs up to 37.1 acre feet of previously consumed volume to remain in an approximately 0.9 mile long reach of Sweeney Creek.

The applicant referred to their discussion provided for the requirement of 85-2-402 (2) (a) to satisfy the requirement of 85-2-408 (3) (a). See above findings of fact under Adverse Effect. This criteria assessment documents that the applicant has not satisfied the adverse effect criteria.

CONCLUSIONS OF LAW: The Applicant, in addition to the requirements of 85-2-402 and 85-2-407, has not proved by a preponderance of evidence that 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 water rights of other persons. § 85-2-408(3)(a), MCA. See discussion under **Adverse Effect**, above.

The Amount Of Water For The Proposed Use Is Needed To Maintain Or Enhance Instream Flows To Benefit The Fishery Resource:

FINDINGS OF FACT: The applicant referred to their discussion provided for the requirement of 85-2-402 (2) (c) to satisfy the requirement of 85-2-408 (3) (b). See findings of fact under Beneficial Use. This criteria assessment confirms that the applicant satisfied the beneficial use criteria.

CONCLUSIONS OF LAW: The Applicant, in addition to the requirements of 85-2-402 and 85-2-407, has proven by a preponderance of evidence that the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. Mont. Code Ann. § 85-2-408(3)(b).