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

*** * * * * * * * ***

IN THE MATTER OF CHANGE APPLICATION)
NOS. 40A-30042035; 40A-30042036; AND) FINAL ORDER
40A-30042037 BY AMERICAN FORK RANCH)

*** * * * * * * * ***

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, and after notice required by § 85-2-307, MCA, a contested case hearing was held on June 10, 2010, in Big Timber, Montana, continued on June 18, 2010, in Two Dot, Montana, to determine whether Application Nos. 40A-30042035, 40A-30042036, and 40A-30042037 to Change a Water Right should be granted under the criteria of § 85-2-402, MCA.

APPEARANCES

Applicant American Fork Ranch, appeared at the hearing by and through counsel Holly J. Franz. Testifying for the Applicant was Lyle "Bud" Colby, Dave Brown, Duane Tronrud, Jed Evjene (general ranch manager), John Lacey, and Doug Mann (DNRC).

Objector Glennie Ranches, Inc/C Bar J (OGR-CBJ) appeared at the hearing by and through counsel Reneé L. Coppock. Testifying for OGR-CBJ was Stanton Brannin, Jane Glennie, Tom Stevens, and William Anderson.

Objector M Lazy D Limited Partnership (OMLD) appeared at the hearing by and through counsel Stephen E. Woodruff. Testifying for OMLD was Diane Morse.

EXHIBITS

Exhibits offered and accepted at the hearing are as follows (Applicant Exhibits are identified as **A-#**, Objector Exhibits are identified as either **OGR/CBJ-#** or **M Lazy D-A**):

A-1 is a copy of an inch to the mile topographic map of the general areas of the American Fork Ranch outlining the ranch property.

A-2 is 9 pages identified as a “Conservation Plan Map” prepared by the U.S. Soil Conservation Service for the American Fork Ranch (American Fork Unit) dated 11/66.

A-3 is 4 pages identified as a “Conservation Plan Map” prepared by the U.S. Soil Conservation Service for the American Fork Ranch (Lebo Unit) dated 11/66.

A-4 is a photocopy of an inch to the mile map showing the various older pastures of the American Fork Unit of the American Fork Ranch.

A-5 is an enlarged aerial photograph entitled “Conservation Plan Map” prepared by the NRCS dated 11/10/09 showing the newer pastures of the American Fork Unit of the American Fork Ranch.

A-6 is an aerial photograph of the Lebo Unit of the American Fork Ranch showing the existing pastures (undated).

A-7 consists of two pages showing various patents and conveyances of property.

A-8 consists of three pages of BLM Land Patent Details and one page showing a copy of a Desert Lands Entry Grant.

A-9 consists of 16 pages of land conveyance and deed documents.

A-10 consists of a 3 page land conveyance document.

A-11 consists of a 7 page warranty deed.

A-15 consists of a 4 pages of articles regarding Wallis Huidekoper (one of the original settlers of the area around the American Fork of the Musselshell River).

A-16 consists of a 10 page article entitled “Dr. Wallis Huidekoper Cattleman par Excellence” outlining the early days of the ranch(s) in the vicinity of the American Fork Ranch.

A-17 consists of a three page copy of a Great Falls Tribune newspaper article from 1/3/60 entitled “American Fork Ranch’s Land Once Owned by First Sheepmen to Push Across Bozeman Pass.”

A-19 is a one page copy of a document entitled “American Ranch Owned by Wallace Huidekoper” an advertisement for the ranch for sale.

A-20 consists of a copy of a Bill of Sale between Wallis Huidekoper and Robert Stevens showing the sale of the personal property owned by Huidekoper.

A-21 consists of a copy of a six page contract indicating the sale of the “American Ranch” from Wallis Huidekoper to Robert Stevens.

A-22 consists of two pages entitled “American Fork Ranch Cattle Number (1945 – 1973).”

A-23 consists of 55 pages of copies of cattle and hay inventory sheets from the American Fork Ranch dated from 1945 up to 2002.

A-25 consists of four pages showing the 2010 grazing schedule and the projected 2010 – 2020 grazing schedule for the American Fork Ranch.

A-26 consists of 55 pages of actual grazing rotations for various fields and pastures of the American Fork Ranch between 1998 and 2009.

A-27 consists of a 24 page “Conservation Plan or Schedule of Operations” for the American Fork Ranch prepared by the NRCS with an expiration date of 9/30/2014.

A-28 consists of eight photographs of the headgate and measuring device off the American Fork and the Agnes Creek area.

A-29 are two photographs showing the stock tanks installed for the Crooked Creek diversion and the infiltration gallery installed on Lebo Creek.

A-30 is the curriculum vitae for John Lacey.

A-31 is a copy of a document entitled “Water Development Projects on the American Fork Ranch” prepared by John Lacey for Holly Franz, dated May 9, 2010.

A-32 consists of eight site photographs and developments for the Crooked Creek and Lebo Creek developments.

A-35 consists of two pages indicating the offering of the “Bear Creek Ranch” by Wallis Huidekoper dated 1927.

A-36 consists of 36 pages of various title documents, inventories and photographs and maps of the American Fork Ranch.

OGR/CBJ – 6 consists of 37 pages of Abridged Summaries of Water Right Abstracts in the name of Thomas Stevens, et. al. (dba C Bar J).

OGR/CBJ – 7 consists of 73 pages of Abridged Summaries of Water Right Abstracts in the name of Glennie Ranches, Inc.

OGR/CBJ – 8 is the curriculum vitae of William H. Anderson.

OGR/CBJ – 11 consists of 24 pages of site photographs of the locations of the three applications at issue.

OGR/CBJ – 14 is a reproduction of an inch to the mile map of the general area at issue showing land ownership patterns.

M Lazy D – A consists of six pages of Statement of Claim, Abridged Abstract, and Ownership update records of water rights in the name of M Lazy D Partnership.

The Hearing Examiner took Official Notice of 19 pages of a Statement of Claim in the name of American Fork Ranch and General Abstracts of Water Rights in the name of Dorothy Stevens Revocable Trust, et. al. These represent Water Right Nos. 40A-198461 thru 40A-198471.

The following exhibits were offered at the hearing and not admitted:

A-12 consists of 2 pages of biographies of early Montana ranchmen.

A-13 is a one page introduction of Charles McDonnell's induction to the Montana Cowboy Hall of Fame.

A-14 consists of a nine page excerpt from "Pioneer Memories" by the Pioneer Society of Sweet Grass County Montana 1960 regarding Charles McDonnell.

A-33 consists of three photographs of overgrazing and streambank deterioration on the American Fork Ranch.

PRELIMINARY MATTERS

These three Applications are to change what are referred to as non-filed water projects. These are rights that could be voluntarily filed, but were not required to be filed in the statewide stream adjudication under Part 2 of Title 85, MCA. Section 85-2-222, MCA provides:

> [c]laims for existing rights for livestock an individual as opposed to municipal domestic uses based upon instream flow or ground water sources . . . are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed.

Non-filed water projects are rights that are recognized water rights under Montana law. (*See, e.g.* Crow Tribe – Montana Compact §85-2-901, Article III.A.6.b. "[t]he protection of water

rights Recognized Under State Law set forth [in the Compact] extends to: . . . water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA)

Previous Department precedent has also shown that these exempt rights can be changed through the statutory process provided for in §85-2-402. In "In the Matter of the Application for Change of Appropriation Water Rights G(E)088756-76G by Ed and Kathleen A. Janney" (1996 DNRC Final Order) the Department authorized the addition of a point of diversion and place of use for an exempt stock water right. (*See also,* In the Matter of the Application for Change of Appropriation Water Right No. G65713-76N by Fred Fagan (Proposal For Decision) at 2 – 10, adopted DNRC Final Order 1989).

Objector OGR/CBJ produced at hearing a compilation of water rights in the name of American Fork Ranch, to which I took judicial notice, and argues that these filed rights are the actual rights that American Fork intends to change and thus the Applications are deficient. A close examination of those filed rights reveals that they are for discrete, identifiable sources of water and are not the exempt 'stock drinking directly from the stream' rights that American Fork Ranch has applied to change under this proceeding.

Although the three Applications at issue in this proceeding are exempt from filing under § 85-2-222, MCA, American Fork Ranch has filed them with the Department as a "non-filed water project" in order to make changes to these rights. The Department has assigned water right numbers for each of the three Applications as follows: 40A-30042035 for Lebo Creek, 40A-30042036 for Crooked Creek, and 40A-30042037 for the American Fork.

Prior to the contested case hearing the Hearing Examiner and all parties conducted a joint site visit of each of the projects on the American Fork Ranch. All projects are nearly identical in scope and complexity.

GENERAL INFORMATION

Findings of Fact

1. American Fork Ranch filed three "Application to Change a Water Right" forms with the Department on May 14, 2008. Each of these Applications is to change an exempt or "non-filed" water right from stock drinking directly from a stream to an off stream stock watering tank. The Department has assigned an application number (and water right number to each of these Applications as follows: 40A-30042035 for stock drinking directly from Lebo Creek (hereinafter

"Lebo Creek Application"), 40A-30042036 for stock drinking directly from Crooked Creek (hereinafter "Crooked Creek Application"), and 40A-30042037 for stock drinking directly from American Fork and/or Agnes Creek (hereinafter "American Fork Application"). Each of the change applications are filed pursuant to § 85-2-402, MCA. (Department Files)

2. Notices of the Lebo Creek Application, the Crooked Creek Application, and the American Fork Application were separately published in *The Times Clarion*, a weekly newspaper published in Harlowton, Montana, in the issue dated July 2, 2009. Each notice included information about the proposed change and the procedure for filing objections. Notice was also mailed to persons listed in the Department file on July 1, 2009. (Department Files)

3. Individual Environmental Assessments were prepared by the Department for the Lebo Creek Application, Crooked Creek Application, and the American Fork Application and have been reviewed and are included in the record of this proceeding. (Department Files)

4. The Lebo Creek Application (40A-30042035 seeks to install an infiltration gallery and pump alongside Lebo Creek and pump water uphill through a 2-inch pipeline approximately 2714 feet with a lift of 232 feet to two stock tanks located in the NWNESE Section 7, T6N, R14E (located in the Corner Pasture). The infiltration gallery is located in the NESENW Sec. 7, T6N, R14E and is directly adjacent to and is the same source as the original "point of diversion" (stock drinking directly from a reach of Lebo Creek in the W2 Sec. 7, T6N, R14E). The intent of the project is to lessen livestock impacts to the riparian zone and better utilize the available pasture land away from the source of water. Cattle will, however, continue to have access to the reach of Lebo Creek. A pump in the infiltration gallery will provide a maximum flow rate of 12 gallons per minute up to a maximum volume of 1.24 acre-feet (AF) per year. Each stock tank will have a capacity of about 2000 gallons and will have a pressure switch float valve system installed which will shut off the pump when the tanks are full. (Department File Application Review Form)

5. The Crooked Creek Application (40A-30042036) seeks to install an infiltration gallery and pump alongside Crooked Creek and pump water uphill through a 2-inch pipeline approximately 1815 feet with a lift of 140 feet to two stock tanks located in the SESWSW Sec. 17, T6N, R13E. The infiltration gallery is located in the NWNENE Sec. 19, T6N, R13E and is directly adjacent to and is the same source as the original "point of diversion" (stock drinking directly from a reach of Crooked Creek in Secs. 18 and 19, T6N, R13E). The intent of the

project is to lessen livestock impacts to the riparian zone and better utilize their available pasture away from the creek. The two stock tanks will straddle the fence line between the Liz Read Pasture and the Jamela Pasture providing water for each pasture. While cattle are in the Liz Read Pasture and the Jamela Pasture they will be fenced off from Crooked Creek except for a short segment of Crooked Creek in the northwest corner of the Liz Read Pasture. A pump in the infiltration gallery will provide a maximum flow rate of 12 gallons per minute up to a maximum of 1.24 AF per year. Each stock tank will have a capacity of about 2000 gallons and will be equipped with a pressure switch float valve system which will shut off the pump when the tanks are full. (Department File Application Review Form; Exhibit A-5)

6. The American Fork Application (40A-30042037) seeks to change the point of diversion from stock drinking directly from a reach of the American Fork and Agnes Creek to the discrete diversion point for the Tronrud Ditch headgate located in the NENWNE Sec. 11 T5N, R12E. Water is then conveyed down the Tronrud Ditch to a secondary point of diversion in the Tronrud Ditch in the NWSESW Sec. 1, T5N, R12E. The secondary point of diversion will be a metal check structure and pump box and water will be pumped uphill in a 2-inch pipeline approximately 2848 feet long with a lift of 280 feet to two 2000 gallon stock tanks. The stock tanks will be located in the SWNENW Sec. 12, T5N, R12E straddling the fence line between the Coyote Butte Pasture and the South Butte Pasture. The pump will have a maximum flow rate of 12 gallons per minute up to a maximum of 1.24 AF per year and the tanks will be equipped with a pressure float valve system which will shut off the pump when the tanks are full. The intent of the project is to lessen livestock impacts to the riparian zone and better utilize the available pasture land away from the creek. Cattle will continue to be able to access the Tronrud Ditch while in the Coyote Butte Pasture and South Butte Pasture. While cattle are in either pasture they will be isolated from the American Fork channel. (Department File Application Review Form; Exhibit A-5)

7. The Lebo Creek Application and American Fork Application each received valid objections per § 85-2-308, MCA from The Glennie Ranches Inc. and C Bar J Ranch LLC. The basis of each objection is adverse effect to the water rights of the objectors. No water quality objections were received. (Department File Objection Validity Form)

8. The Crooked Creek Application received two valid objections per § 85-2-308, MCA from C Bar J Ranch LLC and M Lazy D Partnership. The basis of each objection is adverse effect to

the water rights of the objectors. No water quality objections were received. (Department File Objection Validity Form)

Conclusions of Law

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in Mont. Code Ann. § 85-2-402. For the instant applications the requirements of Mont. Code Ann. § 85-2-402(2)(e,f,g) are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (Finding of Fact 2,7,8; Department File)

2. Montana Code Annotated § 85-2-402(2) states, inter alia, and as applicable to the instant applications:

> Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of the evidence that the following criteria are met:
>
> a. The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
> b. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
> c. The proposed use of water is a beneficial use.
> d. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

3. Under § 85-2-307, MCA, a public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met for each of applications 40A-30042035, 40A-30042036, and 40A-30042037. (Finding of Fact 2)

HISTORIC USE

Lebo Creek Application Findings of Fact

9. The Lebo Creek Application seeks to pump water from Lebo Creek to stock tanks located in the Corner Pasture. The portion of the American Fork Ranch involved in this application is known as the "lower ranch" which currently consists of the Corner Pasture (709 ac.), the Lebo Basin Creek Pasture (461 ac.), the Creek Pasture (437 ac.), the Wind Mill Pasture (384 ac.), the Strip Pasture (426 ac.) the Whitney Pasture (512 ac.) the Big Elk Pasture (418 ac.), Lebo Lake and two small fields. The Corner Pasture was historically used to graze three year heifers. (Exhibit A-6; testimony of Stanton Brannin)

10. The primary water source for the Corner Pasture was Lebo Creek. 150 to 180 pairs of heifers (cows with calves) would graze the Corner Pasture drinking directly from Lebo Creek. (Testimony of Stanton Brannin and Bud Colby)

11. The pattern of use (livestock rotations or schedules) remained fairly consistent prior to and during the period of time that Bud Colby worked on the American Fork Ranch – 1957 to 1973. (Testimony of Bud Colby)

12. Total historic water use of Lebo Creek from livestock grazing the Corner Pasture can be conservatively estimated by multiplying the number of animals using Lebo Creek as their source of water times the number of days they are in those pastures times the daily water consumption per animal (or animal unit). Although testimony supports that the heifer pairs may have started pasturing as early as June 1, using the Applicant's own estimate of July 1 as the start date of pasturing and that the heifer pairs are in the pasture until the end of grazing season on October 15, the heifer pairs would spend approximately 107 days in the pasture. (Testimony of Stanton Brannin and Bud Colby; Applicant's closing brief; calculation by Hearing Examiner)

13. The Department considers a cow-calf pair as one animal unit (AU) and assigns a consumptive use standard of 0.017[1] AF/AU/year. 180 AU * 0.017 AF/YR ÷ 365 days * 107 days = 0.90 AF/107 days. At 325,851 gallons per AF, the total consumptive use on the reach of Lebo Creek bordering the Corner Pasture equals 292,301 gallons during the grazing season. (DNRC Form 615; calculation by Hearing Examiner)

1. This equates to 15 gallons per day per AU. Evidence in the record indicates that water needs for cattle in this area may be 25 or possibly 30 gallons per day. The Hearing Examiner uses the Department standard throughout this Order for the sake of consistency and to compare historic use with planned use. The numbers derived may or may not reflect actual use, since it is not absolutely known what amount of water an AU consumes .

Crooked Creek Application Findings of Fact

14. The Crooked Creek Application seeks to pump water from Crooked Creek to stock tanks located on the fence line between the Liz Read Pasture and the Jamela Pasture. This portion of the American Fork Ranch is located on what is known as the "upper ranch" and are part of the "North of American Fork" grazing rotation. The pastures involved in this application, as they exist today, are the Section 18 Pasture (627 ac.), Section 19 Pasture (637 ac.), Liz Read Pasture (714 ac.) which is the approximate western 1/3 of the former 1920 ac. Timbered Hills Pasture, and the Jamela Pasture (797 ac.) which is the approximate western 1/3 of the former 1840 ac. Basin Creek Pasture[2]. The Section 18 and Section 19 Pastures were historically used to graze yearling and two year heifers. Generally the yearling and two year heifers would spend the bulk of the summer in the Section 18 and Section 19 Pastures. The Timbered Hills Pasture was used to graze older (+4 year) cows for the bulk of the summer. The Basin Creek Pasture was used to graze 1 or 2-year heifers for the bulk of the summer. (Exhibits A-2, A-5, Testimony of Stanton Brannin, Bud Colby, Dave Brown)

15. The pattern of use (livestock rotations or schedules) remained fairly consistent prior to and during the period of time Bud Colby worked on the American Fork Ranch – 1957 to 1973. In addition, the pattern of use was continued into the 1990's when Stanton Brannin was the ranch manager (1975 – 2000) and Jed Evjene took over as ranch manager in 2000. (Testimony of Stanton Brannin)

16. The primary source of water for the Section 18 and Section 19 Pastures was Crooked Creek. The 1973 livestock inventory for the American Fork Ranch shows 448 year-old heifers and 298 2-year heifers. Inventory records for previous years and later years for the year-old and 2-year heifers are similar. As an example, in 1998, 189 year-old heifers grazed the Section 18 Pasture for 138 days utilizing Crooked Creek as their primary water source. The same year 134 year-old heifers grazed the Section 19 Pasture for 106 days using Crooked Creek as their primary water source. (Exhibit A-26; Testimony of Stanton Brannin)

17. Total historic water use from the reach of Crooked Creek that runs through the Section 18 and Section 19 Pastures can be estimated by using the same method as used above for Lebo Creek. In the Crooked Creek reach this amounts to (189 AU * 0.017 AF/YR ÷ 365 days *

2. Basin Creek and Lebo Creek are used interchangeably throughout the exhibits and testimony.

138 days) + (134 AU * 0.017 AF/YR ÷ 365 days * 106 days) = 1.88 AF for the season. At 325,851 gallons per AF, the total consumptive use on this reach of Crooked Creek is approximately 611,405 gallons during the grazing season. (DNRC Form 615; calculation by Hearing Examiner)

18. Historic use of Crooked Creek water for the Liz Read Pasture (or Timbered Hills Pasture) and the Jamela Pasture (Basin Creek Pasture) is speculative at best since the exhibits and testimony indicate that only a small corner of the Timbered Hills Pasture had access to Crooked Creek and that most of the water used by livestock was from small springs or water developments or upper Lebo (Basin) Creek. This Hearing Examiner declines to assign a consumptive water use from Crooked Creek for the Liz Read (Timbered Hills) Pasture or the Jamela (Basin Creek) Pasture as the evidence points primarily to the other water sources. (Testimony of Bud Colby, Stanton Brannin)

American Fork Application Findings of Fact

19. The American Fork Application seeks to pump water out of the Tronrud Ditch to stock tanks located on the fence line between the Coyote Butte Pasture and South Butte Pasture. The pastures involved in this Application are included in what is called the "South of American Fork" grazing rotation on the "upper ranch." Historically the Coyote Butte Pasture consisted of 856 acres in what is now divided into the Annie Pasture (289 ac.), the North Butte Pasture (239 ac.) and the Coyote Butte Pasture (384 ac.). The South Butte Pasture remains essentially the same as in the past. The current Annie Pasture appears to contain the main stem of the American Fork while the North Butte Pasture appears to contain a portion of Agnes Creek and the Coyote Butte and South Butte Pastures contain upland areas through which the Tronrud Ditch runs. (Exhibit A-2, A-5)

20. Livestock historically drank directly from the American Fork and Agnes Creek (and in all likelihood the Tronrud Ditch) while they were in the "old" Coyote Butte Pasture. Livestock in the South Butte Pasture would drink primarily directly from the Tronrud Ditch. (Testimony of Jed Evjene)

21. The pattern of use (livestock rotations or schedules) remained fairly consistent prior to and during the period of time Bud Colby worked on the American Fork Ranch – 1957 to 1973. In addition, the pattern of use was continued into the 1990's when Stanton Brannin was the

ranch manager (1975 – 2000) and Jed Evjene took over as ranch manager in 2000. (Testimony of Stanton Brannin, Bud Colby)

22. In 1998 the Annie Pasture was grazed by 86 cow-calf pairs for a period of 27 days and in 1999 this pasture was grazed by 514 yearling heifers for 9 days. The primary source of water for these cows was the American Fork. The North Butte Pasture was grazed by 127 cow-calf pairs for 121 days in 1998 and by 86 pairs for 103 days in 1999. The primary source of water for these cows was Agnes Creek. Using the same formula as above (AU * 0.017 ÷ 365 days * # days), livestock would have consumed directly from American Fork .11 AF (35,240 gal.) in 1998 and .22 AF (70,207 gal.) in 1999. During the same years livestock would have consumed directly from Agnes Creek .72 AF (233,219 gal.) and .41 AF (134,434 gal.) respectively. (Testimony of Jed Evjene, Stanton Brannin; Exhibit A-26; DNRC Form 615; calculation by Hearing Examiner)

23. Water rights for existing exempt (non-filed) water projects for livestock are based upon *instream* flows. Because the primary source of water for livestock in the "new" Coyote Butte Pasture and South Butte Pasture was the Tronrud *Ditch*, the Department does not recognize a water right for exempt instream livestock uses for the "new Coyote Butte South Butte Pastures. This Hearing Examiner declines to assign a consumptive use based upon exempt instream livestock uses for the South Butte Pasture where stock drank from the Tronrud Ditch. (Testimony of Jed Evjene; 85-2-222, MCA)

Conclusions of Law (Applicable to each Application)

4. Applicant seeks changes to an "existing water right" represented by its non-filed water rights. The "existing water right" in this case is that as it existed prior to July 1, 1973, because no changes could have been made to a water right after that date without the Department's approval. §§ 85-2-301 and -402, MCA. Thus, the focus in this case is what the right looked like and how it was exercised prior to July 1, 1973. E.g. *Matter of Clark Fork River Drainage Area* (1992), 254 Mont. 11, 17, 833 P.2d 1120.

5. 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).

6. Historic beneficial use is used to evaluate potential adverse effect to other appropriators, senior and junior. Other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; Robert E. Beck, 2 Waters and Water Rights, § 14.04(c)(1) (1991 ed.); W. Hutchins, Selected Problems in the Law of Water Rights in the West, p. 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); McDonald, supra (existing right is the pattern of historic use).

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.").

7. A key element of historic use and an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (*In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor*, Final Order, (2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, Proposal for Decision, (2005) (Final Order adopted Proposal for Decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, Proposal for Decision, (2003) (Final Order adopted Proposal for Decision).

8. Montana's change statute simply codifies western water law. 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.).

9. 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].
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> ....
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> When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.
>
> ....
>
> Expected consumptive use after a reallocation [change] may not exceed historic consumptive use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

Id. § 14.04(c)(1).

10. The Applicant in the instant matter has proven the volumes represent historic beneficial use of Water Right Claim Nos. 40A-30042035 (Lebo Creek), 40A-30042036 (Crooked Creek), and 40A-30042037 (American Fork). (Findings of Fact 9 -23)

ADVERSE EFFECT

Lebo Creek Application Findings of Fact

24. Applicant has entered into an agreement with the U.S. Department of Agriculture Natural Resources Conservation Service for the entirety of the American Fork Ranch including the "lower ranch." This agreement is known as a Conservation Plan or Schedule of Operations (Plan) for American Fork Ranch. Under the Plan, the Corner Pasture is scheduled for 25 days of grazing by up to 300 cow-calf pairs or yearlings. Actual use of the Corner Pasture may, however, be as great as 45 days. This is explained by the fact that the Plan only refers to the growing season. Livestock may be placed in the Corner Pasture for an additional 20 days after the grass has gone dormant. Under the Plan, Lebo Creek will not be fenced off from livestock and livestock will be able to drink directly from the stream or from the off-stream stock watering tanks. (Department File Response of Deficiency Letter; Exhibit A-25; Testimony of Jed Evjene)

25. Using the same formula as was used to determine historic use total consumptive use under the Plan (300 AU * 0.017 ÷ 365 days * 45 days) equals .63 AF or 204,884 gallons.

Evaporation from the stock tanks was estimated to be 7,038 gallons per year (not counting input from precipitation) if the tanks were to be full year-round. Assuming the tanks are full at the end of the grazing period, the loss of water to Lebo Creek would be 4,000 gallons. Adding the year-round maximum evaporation and the full stock tank amounts to the consumptive use by livestock results in a consumptive use of 215,922 gallons. The proposed use of Lebo Creek water will not increase over historic use through implementation of the Plan (215,922 gal. v. 243,584 gal. historic). (Department File; testimony of Doug Mann (DNRC); Hearing Examiner calculation)

26. Objectors make much of the fact that the American Fork Ranch has filed for stock water rights, discussed *supra*, and that these springs and/or developments should continue to be utilized rather than increasing livestock usage of Lebo Creek. There is nothing in the record to indicate that these existing sources will not continue to be used by livestock in the future. Objectors also take issue with the Applicant's historic use figures. This Hearing Examiner recognizes the difficulty in making determinations of historic use of livestock drinking water instream. However, the record shows that operation of the American Fork Ranch from at least 1957 up to 2000 remained consistent and the more recent pasture records are indicative of how the American Fork Ranch operated historically. Objector's expert opined that the estimated loss from the infiltration gallery will be 40 to 60 gallons per minute and that the water thus lost will not return to the creek. While the Hearing Examiner recognizes that some water will be captured by the infiltration gallery it is unlikely that the water captured will be a continual loss of 40 to 60 gallons per minute. In addition, if Lebo Creek is "perched" as described by the Objectors there should be a continual loss of water all along the stream bed making Lebo Creek a losing stream which it appears to the Hearing Examiner from his site visit is not the case. Objectors finally assert that if the riparian areas are not completely fenced off the objective of improving the riparian area and thus increasing overall water quantity, quality and timing cannot be met. While improving riparian areas is not a water right issue under the jurisdiction of the Department, the Hearing Examiner notes that Objectors expert opinion is refuted by the Applicant's evidence and in this Hearing Examiners experience any efforts to keep livestock out of riparian areas will, at least to some degree, result in an improvement thereof. (Testimony of Stanton Brannin, Bud Colby, Jed Evjene, William Anderson; Department File; Hearing Examiner observation; Exhibit A-31)

Lebo Creek Application Conclusions of Law

11. 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).

12. 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).

13. The Department may approve a change in appropriation right subject to terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of § 85-2-402, MCA. (85-2-4-2(8), MCA)

14. Applicant has proven by a preponderance of the evidence that the proposed change in appropriation right, if conditioned such that the amount of water from Lebo Creek for the grazing of livestock in the Corner Pasture be limited to that amount of water necessary for the watering of 300 cow-calf pairs for 45 days each year plus evaporative loss from the stock tanks and 4000 gallons of loss due to draining of the tanks after grazing, will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or development for which a permit or certificate has been issued. (Findings of Fact 24 - 26)

Crooked Creek Application Findings of Fact

27. Applicant has entered into an agreement with the U.S. Department of Agriculture Natural Resources Conservation Service for the entirety of the American Fork Ranch including the "upper ranch." This agreement is known as a Conservation Plan or Schedule of Operations (Plan) for American Fork Ranch. Under the Plan, the Liz Read Pasture is scheduled for 13 days of grazing by up to 300 head. The Jamela Pasture is scheduled for 10 days of grazing by up to 300 head. Actual use of the Liz Read and Jamela Pastures may, however, be increased by 20 days. This is explained by the fact that the Plan only refers to the growing season. Livestock may be placed in the Pastures for an additional 20 days after the grass has gone dormant. Under the Plan the Liz Read Pasture will not be fenced off from Crooked Creek and livestock will be able to drink directly from the stream or from the off-stream stock watering tanks. The Jamela Pasture will have no direct access to Crooked Creek. (Department File Response to Deficiency Letter; Exhibit A-25)

28. In order to estimate if there will be an increase in total water use from Crooked Creek in the vicinity of the proposed diversion under the Plan, the proposed grazing of the Section 18 and Section 19 Pastures must also be considered. The Plan shows that the Section 18 Pasture will be grazed for 10 days and the Section 19 Pasture will be grazed for 13 days. Again assuming that livestock will be permitted stay in each Pasture for an additional 20 days after the

grass has gone dormant the total time spent in the Section 18 and Section 19 Pastures will be 30 days and 33 days respectively. (Exhibit A-25)

29. Total time spent in the four pastures from which livestock could drink in this reach of Crooked Creek under the Plan would be 126 days. Assuming a herd size of 300 animals the water consumption using the formula would be 300 * 0.017 ÷ 365 * 126 = 1.76 AF or 573,676 gallons. Evaporation from the stock tanks was estimated to be 7,038 gallons per year (not counting input from precipitation) if the tanks were to be full year-round. Assuming the tanks are full at the end of the grazing period, the loss of water to Crooked Creek would be 4,000 gallons. Adding the year-round maximum evaporation and the full stock tank amounts to the consumptive use by livestock results in a consumptive use of 584,714 gallons. The proposed use of Crooked Creek water will not increase over historic use through implementation of the Plan (584,714 gal. v. 611,405 gal. historic). (Department File; Exhibit A-25; Hearing Examiner calculation)

30. Objectors make much of the fact that the American Fork Ranch has filed for stock water rights, discussed *supra*, and that these springs and/or developments should continue to be utilized rather than increasing livestock usage of Crooked Creek. There is nothing in the record to indicate that these existing sources will not continue to be used by livestock in the future. In fact the record reveals that other water developments have been constructed in the area. Objectors also take issue with the Applicant's historic use figures. This Hearing Examiner recognizes the difficulty in making determinations of historic use of livestock drinking water instream. However, the record shows that operation of the American Fork Ranch from at least 1957 up to 2000 and the more recent pasture records are indicative of how the American Fork Ranch operated historically. Objector's expert opined that the estimated loss from the infiltration gallery will be 40 to 60 gallons per minute and that the water thus lost will not return to the creek. While the Hearing Examiner recognizes that some water will be captured by the infiltration gallery it is unlikely that the water captured will be a continual loss of 40 to 60 gallons per minute. In addition, if Crooked Creek is "perched" as described by the Objectors there should be a continual loss of water all along the stream bed making Crooked Creek a losing stream which it appears from the Hearing Examiner's site visit is not the case. Objectors finally assert that if the riparian areas are not completely fenced off the objective of improving the riparian area and thus increasing overall water quantity, quality and timing cannot be met. While improving riparian areas is not a water right issue under the jurisdiction of the

Department, the Hearing Examiner notes that Objectors expert opinion is refuted by the Applicant's evidence and in this Hearing Examiner's experience any efforts to keep livestock out of riparian areas will, at least to some degree, result in an improvement thereof. (Testimony of Stanton Brannin, Bud Colby, Jed Evjene, William Anderson; Department File; Hearing Examiner observation; Exhibit A-31)

Crooked Creek Application Conclusions of Law

15. Prior to the enactment of the Water Use Act in 1973 and the promulgation of § 85-2-402, MCA, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc. v. Newlan Creek Water Dist. (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980) 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

16. The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (change denied in part for failure to prove lack of adverse effect due to lack of analysis of return flow). Section 85-2-402(2), MCA, provides that the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not "adversely affect the use of the existing water rights of other persons." The phrase "by a

preponderance of the evidence" means such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it. Ekwortzel v. Parker (1971), 156 Mont. 477, 484-485, 482 P.2d 559, 563 (quoting with approval District Court's Jury Instruction No. 2) (emphasis added).

17. The Department may approve a change in appropriation right subject to terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of § 85-2-402, MCA. (85-2-4-2(8), MCA)

18. Applicant has proven by a preponderance of the evidence that the proposed change in appropriation right, if conditioned such that the amount of water from Crooked Creek for the grazing of livestock in the Section 18, Section 19, Liz Read, and Jamela Pastures be limited to that amount of water necessary for the watering of 300 cow-calf pairs for a total of 126 days each year plus evaporative loss from the stock tanks and 4000 gallons of loss due to draining of the tanks after grazing, will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or development for which a permit or certificate has been issued. (Findings of Fact 27 - 30)

American Fork Application Findings of Fact

31. Applicant has entered into an agreement with the U.S. Department of Agriculture Natural Resources Conservation Service for the entirety of the American Fork Ranch including the "upper ranch." This agreement is known as a Conservation Plan or Schedule of Operations (Plan) for American Fork Ranch. Under the Plan, the Coyote Butte Pasture is scheduled for 10 days of grazing by up to 300 head. The South Butte Pasture is scheduled for 15 days of grazing by up to 300 head. Actual use of the Coyote Butte and South Butte Pastures may, however, be increased by 20 days. This is explained by the fact that the Plan only refers to the growing season. Livestock may be placed in the Pastures for an additional 20 days after the grass has gone dormant for a total period for both pastures of 65 days. Under the Plan the

Pastures will be fenced off and livestock will not be able to drink directly from the American Fork or Agnes Creek. (Department File Response to Deficiency Letter; Exhibit A-25)

32. In order to estimate if there will be an increase in water use from the American Fork and Agnes Creek in the vicinity of the proposed diversion of water under the Plan, the proposed grazing and water use of the Annie Pasture, the North Butte Pasture, the Coyote Butte Pasture and the Section South Butte Pasture must be considered in combination. The Plan shows that the Annie Pasture will be grazed for 12 days and the North Butte Pasture will be grazed for 20 days. Again assuming that livestock will be permitted stay in each Pasture for an additional 20 days after the grass has gone dormant the total time spent in the Annie and North Butte Pastures will be 32 days and 40 days respectively. (Exhibit A-25)

33. Total time spent in the four pastures from which livestock could drink water along the American Fork or Agnes Creek under the Plan would be 137 days. Assuming a herd size of 300 animals the water consumption using the formula would be 300 * 0.017 ÷ 365 * 137 = 1.91 AF or 623,759 gallons. Evaporation from the stock tanks was estimated to be 7,038 gallons per year (not counting input from precipitation) if the tanks were to be full year-round. Assuming the tanks are full at the end of the grazing period, the loss of water to the American Fork and Agnes Creek would be 4,000 gallons. Adding the year-round maximum evaporation and the full stock tank amounts to the consumptive use by livestock results in a consumptive use of 631,197 gallons. It cannot be said that the proposed use of exempt American Fork and Agnes Creek water will not increase over historic use through implementation of the Plan (631,197 gal. v. 303,426 gal. historic). It appears from the record that such a change would enlarge the historic exempt instream livestock right. (Department File; Exhibit A-25; Hearing Examiner calculation)

34. Objectors make much of the fact that the American Fork Ranch has filed for stock water rights, discussed *supra*, and that these springs and/or developments should continue to be utilized rather than increasing livestock usage of the American Fork and Agnes Creek. There is nothing in the record to indicate that these existing sources will not continue to be used by livestock in the future. In fact the record reveals that other water developments have been implemented in the area. Objectors also take issue with the Applicant's historic use figures. This Hearing Examiner Hearing Examiner recognizes the difficulty in making determinations of historic use of livestock drinking water instream. However, the record shows that operation of the American Fork Ranch from at least 1957 up to 2000 and the more recent pasture records are indicative of how the American Fork Ranch operated historically. Objectors finally assert

that if the riparian areas are not completely fenced off the objective of improving the riparian area and thus increasing overall water quality and timing cannot be met. While improving riparian areas is not a water right issue under the jurisdiction of the Department, the Hearing Examiner notes that Objectors expert opinion is refuted by the Applicant's evidence and in this Hearing Examiners experience any efforts to keep livestock out of riparian areas will, at least to some degree, result in an improvement thereof. (Testimony of Stanton Brannin, Bud Colby, Jed Evjene, William Anderson; Department File; Hearing Examiner observation; Exhibit A-31)

American Fork Application Conclusions of Law

19. 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).

20. 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).

21. American Fork Ranch does not have enough exempt instream stock water rights based on evidence of historic use to extend those rights to the Coyote Butte Pasture and South Butte Pasture. This is primarily due to the apparent historic use of the Tronrud Ditch to supply stock water and as has been previously discussed the Tronrud Ditch has no exempt instream stock water rights.

22. 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 development for which a permit or certificate has been issued. (Findings of Fact 31 - 34)

MEANS OF DIVERSION

Findings of Fact for Each Application

35. The means of diversion for the Lebo Creek Application, Crooked Creek Application and American Fork Application are identical except for the following minor exception. For the Lebo Creek Application and Crooked Creek Application an infiltration gallery dug into the banks of the creeks consisting of an inverted perforated culvert surrounded by gravels will be installed. For the American Fork Application a metal pump box will be installed in or alongside the Tronrud Ditch. From there the operations are identical. Water will be pumped using a 1 hp pump installed in the gallery/box and be pumped through a 2-inch pipeline uphill to the stock tanks. The stock tanks are 7 feet wide by 20 feet long and each will hold approximately 2000 gallons of water. A float valve switch on each system will shut the pump off when the tanks are full and

reactivate the pump when the water level drops a predetermined level. Department calculations for each Application show that the system is workable. (Department File Application Review Form)

36. Each system was designed by the USDA Natural Resources and Conservation Service as part of the EQIP grant program for the American Fork Ranch.

Conclusions of Law for Each Application

23. The adequate means of diversion statutory criteria is a codification of the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e. must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1)(a), MCA.

24. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works for the Lebo Creek Application, Crooked Creek Application and American Fork Application are adequate. (Findings of Fact 35, 36)

BENEFICIAL USE

Findings of Fact for Each Application

37. The Lebo Creek Application, Crooked Creek Application and American Fork Application each list stock watering as the beneficial use. While stock watering is a recognized beneficial use, the amount of water for that use must be justified. Evidence and testimony indicate that 25 or 30 gallons of water per day is necessary to support each animal unit while the Department standard is 15 gallons per day. While this Hearing Examiner has used the Department standard throughout this Order, it is recognized that that amount may be inadequate for the needs the livestock. Considering the difficulty in actually measuring amount of water utilized by livestock, the Hearing Examiner has utilized a measurement of "that amount of water necessary to support X AU's for X days." Recognizing that livestock are unlikely to drink more than what they require and considering the stocking rates and rotation under American Fork Ranch's Plan, such a measurement is justifiable. (Department File; Plan; Exhibit A-31; testimony of Jed Evjene)

Conclusions of Law for Each Application

25. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g. Bitterroot Protective Association v. Siebel, *Order on petition for Judicial Review,* Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds,* 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In* the Matter of Application for Beneficial Water use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review,* Cause No. BDV-2003-100, Montana First Judicial District (2004)(fish and wildlife use denied for lack of proof); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11 2008)(change authorization denied – no credible evidence provided on which a determination can be made on whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery).

Applicant's volume of 1.24 acre-feet per year may or may not be the exact amount of water used by the stock because figures for stock water use vary, however each approved Application will be conditioned to allow that amount of water needed to support the American Fork Ranch's Plan.

26. As conditioned, the Applicant has proven by a preponderance of the evidence that the proposed use of water is a beneficial use for the Lebo Creek Application and the Crooked Creek Application. (Finding of Fact 37)

POSSESSORY INTEREST

Findings of Fact for Each Application

38. Applicant has provided extensive records of deeds, title documents and history to the property encompassed by the Lebo Creek Application, the Crooked Creek Application and the American Fork Application. In addition Applicant has signed the notarized affidavit for each Application affirming the possessory interest in the property.

Conclusions of Law for Each Application

27. Applicant has proven by a preponderance of the evidence 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 for the Lebo Creek Application, the Crooked Creek Application and the American Fork Application. (Finding of Fact 38)

ORDER

Lebo Creek Application

Application No. 40A-30042035 (Lebo Creek Application) to change Exempt Stock Water Right No. 40A-30042035 by installing an infiltration gallery and pump alongside Lebo Creek and pumping water uphill through a 2-inch pipeline approximately 2714 feet with a lift of 232 feet to two stock tanks located in the NWNESE Section 7, T6N, R14E up to a volume of 1.24 acre-feet per year (located in the Corner Pasture) is hereby **GRANTED** with the following conditions:

> THE AMOUNT OF WATER FROM LEBO CREEK FOR THE GRAZING OF LIVESTOCK IN THE CORNER PASTURE IS LIMITED TO THAT AMOUNT OF WATER NECESSARY FOR THE WATERING OF 300 COW-CALF PAIRS FOR 45 DAYS EACH YEAR PLUS EVAPORATIVE LOSS FROM THE TWO 2000 GALLON STOCK TANKS AND 4000 GALLONS OF LOSS DUE TO DRAINING OF THE TANKS AFTER GRAZING.
>
> THIS AUTHORIZATION IS CONTINGENT UPON THE APPLICANT FOLLOWING THE CURRENTLY ESTABLISHED GRAZING PLAN OF OPERATION DEVELOPED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE FOR THE AMERICAN FORK RANCH.

Crooked Creek Application

Application No. 40A-30042036 (Crooked Creek Application) to change Exempt Stock Water Right No. 40A-30042036 by installing an infiltration gallery and pump alongside Crooked Creek and pumping water uphill through a 2-inch pipeline approximately 1815 feet with a lift of 140 feet to two stock tanks located in the SESWSW Sec. 17, T6N, R13E up to a volume of 1.24 acre-feet per year is hereby **GRANTED** with the following condition:

> THE AMOUNT OF WATER FROM CROOKED CREEK FOR THE GRAZING OF LIVESTOCK IN THE SECTION 18, SECTION 19, LIZ READ, AND JAMELA PASTURES IS LIMITED TO THAT AMOUNT OF WATER NECESSARY FOR THE WATERING OF 300 COW-CALF PAIRS FOR A TOTAL OF 126 DAYS EACH YEAR PLUS EVAPORATIVE LOSS FROM THE TWO 2000 GALLON STOCK TANKS AND 4000 GALLONS OF LOSS DUE TO DRAINING OF THE TANKS AFTER GRAZING.

THIS AUTHORIZATION IS CONTINGENT UPON THE APPLICANT FOLLOWING THE CURRENTLY ESTABLISHED GRAZING PLAN OF OPERATION DEVELOPED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE FOR THE AMERICAN FORK RANCH.

American Fork Application

Application No. 40A-30042037 (American Fork Application) to change Exempt Stock Water Right No. 40A-30042037 by changing the point of diversion from stock drinking directly from a reach of the American Fork and Agnes Creek to the discrete diversion point for the Tronrud Ditch headgate located in the NENWNE Sec. 11 T5N, R12E, then conducting the water down the Tronrud Ditch to a secondary point of diversion in the Tronrud Ditch in the NWSESW Sec. 1, T5N, R12E then pumping the water from a secondary point of diversion from a metal check structure and pump box uphill in a 2-inch pipeline approximately 2848 feet long with a lift of 280 feet to two 2000 gallon stock tanks located in the SWNENW Sec. 12, T5N, R12E straddling the fence line between the Coyote Butte Pasture and the South Butte Pasture is **DENIED** as it would affect an enlargement of the Exempt Stock Right.

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 and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 29th day of September, 2010.

/Original signed by David A Vogler/
David A Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 29th day of September, 2010 by first class United States mail.

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