

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

**IN THE MATTER OF APPLICATION NO. 76H-)
30042357 TO CHANGE WATER RIGHT)
CLAIM NO. 76H-108798-00 BY KUNEY,)
WILLIAM D AND HENDRICKSON, BETTY J)**

FINAL ORDER

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, and after notice required by § 85-2-307, MCA, a hearing was held October 15, 2009, in Missoula Montana to determine whether Water Right Claim No. 76H-108798 should be temporarily changed for the purpose of maintaining or enhancing instream flow to benefit the fishery resource under the criteria set forth in § 85-2-402, § 85-2-407, and § 85-2-408, MCA.

APPEARANCES

Applicant appeared at the hearing by and through counsel Barbara C. Hall. Testifying for the Applicant was William D Kuney.

Objector Zaveta appeared at the hearing by and through counsel Philip J. O'onnell. Testifying for the Applicant was Marge Zaveta.

EXHIBITS

Exhibits offered and accepted at the hearing are as follows:

Applicant's Exhibit A-1 is a copy of a page from the Water Resources Survey of Missoula County showing the location of the historic place of use of Water Right Claim No. 76H-108798 and associated ditches in T12N, R20W.

Applicant's Exhibit A-3 is a Statement of Claim filed by Betty J. Hendrickson.

Applicant's Exhibit A-4 is a Water Right Transfer Certificate indicating transfer of Statement of Claim No. 108798 to Betty J. Hendrickson and William Kuney.

Applicant's Exhibit A-5 is the General Abstract for Water Right Number 76H-108798.

Applicant's Exhibit A-8 is a copy of a Warranty Deed transferring the historic place of use for Water Right Claim No. 76H-108798 from Betty J. Hendrickson and William Kuney to Mustang Holdings LLC which does not specifically reserve water rights to the Grantors.

Applicant's Exhibit A-11 is a copy of an Amended Warranty Deed transferring the historic place of use for Water Right Claim No. 76H-108798 from Betty J. Hendrickson and William Kuney to Mustang Holding LLC “[s]ubject to reservation of the existing water rights for such property to remain with the Grantors.”

Applicant's Exhibit A-13 is a “Water Rights Lease Agreement” between the Montana Water Trust and William Kuney and Betty Hendrickson.

Objector's Exhibit O-1 a deed transferring property from First Interstate Bank of Kalispel to Marge Zaveta.

Objector's Exhibit O-2 a General Abstract for Water Right No. 76H-211809 in the name of Marge Zaveta.

Objector's Exhibit O-3 a General Abstract for Water Right No. 76H-211808 in the name of Marge Zaveta.

Objector's Exhibit O-5 consists of 5 pages containing field notes and copies of photographs from the Missoula County Water Resources Survey.

Exhibits offered at the hearing which were objected to and a ruling reserved until later include:

Applicant's Exhibit A-2 is a copy of an aerial photograph purporting to show the irrigated acreage and the approximate location of ditches in the vicinity of the historic place of use for Water Right Claim No. 76H-108798 prepared by the Montana Water Trust.

Applicant's Exhibit A-6 is a copy of a “(Land) Buy-Sell Agreement entered into between buyer Dennis W. Doran and William Kuney and Betty Hendrickson.

I find that **Exhibits A-2** and **A-6** are probative of the approximate location of the place of use for Water Right 76H-108798 and the approximate location of the Hedrickson-Kuney ditch and of the intent of the Seller(s) of Water Right 76H-108798 to retain the water right in the Seller's names. **Exhibits A-2** and **A-6** are admitted.

Objector's Exhibit O-6 is an “Agreement Regarding Separate Ownership of Water Rights” entered into between Betty Hendrickson, William Kuney, and Marge Zaveta as part of Water Court Case No. 76HB-61 regarding the water rights at issue in this matter.

I find that **Exhibit O-6** is probative of the intent of the parties to establish that the water rights of the Applicant and Objector are separate and severable, one from the other. **Exhibit O-6** is admitted.

PRELIMINARY MATTERS

While this is a proceeding to determine if the applicable criteria of § 85-2-402 and § 85-2-408, MCA have been proven by a preponderance of the evidence, the Objector in this matter has raised the issue of ownership of the water right and has made argument alluding to abandonment of the water right.

Regarding the issue of abandonment, this Hearing Examiner specifically stated at the hearing that I have no jurisdiction to consider the issue of abandonment (Hearing Record #01 @ 1:11:53) and that I would stop counsel for the Objector from pursuing that issue. Counsel for the Objector replied that he was “making a record.” I reiterate in this Final Order that in an Application to Change a Water Right contested case proceeding, the hearing examiner has no authority to consider whether a water right has been abandoned. The abandonment statutes are found in § 85-2-404 and § 85-2-405, MCA. Under those statutes, to abandon a water right “[i]f an appropriator ceases to use all or part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, appropriation right is, to that extent, considered abandoned and must immediately expire.” 85-2-404(1), MCA. In addition, the statute creates a prima facie presumption that if an appropriator ceases to use all or part of an appropriation for 10 successive years, the appropriator has abandoned the right for the portion not used. 85-2-404(2), MCA. Interestingly, the legislature also declared that “[s]ubsections (1) and (2) do not apply to existing rights until they have been finally determined in accordance with part 2 of this chapter.” 85-2-404(5), MCA. Thus it would appear that the water right in the instant matter (pre-1973 claim 76H-108798) is not subject to an abandonment proceeding until the final adjudication of sub-basin 76H.

The foregoing statement of the existing abandonment law notwithstanding, the Hearing Examiner in an Application to Change a Water Right contested case proceeding would not have jurisdiction to consider abandonment of a water right even if that right was ripe for an abandonment proceeding. The legislature specifically provided for the procedure to be followed to implement 85-2-404, MCA. The department, *sua sponte*, or when a valid claim that an appropriator has been or will be injured by the resumption of a water right that is alleged to have been abandoned, “shall petition the district court that determined the existing rights . . . to hold a hearing to determine whether the appropriation right has been abandoned.” 85-2-405(1), MCA. At the district court hearing the department has the burden of proof that the appropriation has

been abandoned. 85-2-405(2), MCA. Needless to say, in the Application to Change a Water Right proceeding, the department, *sua sponte*, or in response to a valid claim has not filed a petition in the district court to declare an appropriation abandoned. Such is the case in the instant matter. I have no jurisdiction to consider whether Water Right Claim No. 76H-108798 has been abandoned.

In regard to the ownership issue, the Objector asserts that William D. Kuney and Betty J. Hendrickson are not the current owners of Water Right Claim No. 76H-108798 and thus cannot pursue an Application to Change a Water Right for that right. “Only an owner of record, as shown in the department’s water right records, can apply to change a water right . . .” ARM 36.12.1901(6). I find that this issue should be considered in the instant matter as it relates to whether the proper parties are before the Department in this proceeding.

The record contains four significant exhibits relating to the ownership issue.

Exhibit A-6 is titled “(LAND) BUY-SELL AGREEMENT” (agreement) dated August 30, 2002 between a “Dennis W. Doran¹, and/or Assigns” (buyer) and William Kuney and Betty Hendrickson (sellers). The agreement appears to be a standardized form used in realty transfers to create a contractual obligation between buyers and sellers of real estate. On line 138 of the agreement, under “Additional Provisions” the statement is made that “[i]rrigation rights owned by seller shall be retained by seller.” The agreement does not specifically identify the legal description of the property contracted for, only the statement on line 11 “legally described as: to be attached.”

Exhibit A-7 is a Montana Department of Revenue form titled “Realty Transfer Certificate” (certificate) dated January 17, 2003. The certificate identifies the sellers as “Betty J. Hendrickson & William D. Kuney” and the buyers as “Mustang Holdings LLC.” Under Part 6 of the certificate titled “Water Right Disclosure” a box is checked that states “[g]rantor property has water rights but seller has reserved them so **no water rights transfer**” (emphasis in original). The certificate identifies the land to which it applies by geo code 04-2092-34-1-01-09 & 11. Notated under the sellers names is the phrase “9 & 11 = 44 Ac Vac Land.”

Exhibit A-8 (and Objectors **Exhibit O-7**) is a “WARRANTY DEED” (deed) dated January 16, 2003, in which Betty J. Hendrickson and William D. Kuney convey to Mustang Holdings LLC “**All of the NW¼NW ¼ and the SW¼NW ¼ lying Northerly of the Lewis and Clark Highway all in Section 34, Township 12 North, Range 20 West, P.M.M., Missoula**

1. Dennis W. Doran appears to an agent for Mustang Holdings LLC as evidenced in Exhibit A-11. In Exhibit A-11 the Grantee is identified as Mustang Holdings LLC and the document is acknowledged and signed by “Dennis Doran –Representative of Grantee

County, Montana” (emphasis in original). The deed recites that it is “SUBJECT TO covenants, conditions, restrictions, provisions, easements and encumbrances apparent or of record” and goes on to recite:

TO HAVE AND TO HOLD the said premises, with its appurtenances unto said Grantee and to the Grantee’s heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U.S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warranty and defend the same from all lawful claims whatsoever.

Notably, the deed does not specifically mention water rights.

Exhibit A-11 is an “AMENDED WARRANTY DEED” (amended deed) dated June 25, 2004. This amended deed specifically states “[t]his Deed has been executed and amends the Warranty Deed of January 16, 2003 for the property described below. The amended deed was entered into between sellers Betty J. Hendrickson and William D. Kuney and buyer Mustang Holdings LLC (represented by Dennis Doran) and purports to convey the same property identified in the aforementioned deed to Mustang Holdings LLC. This amended deed contains the same “SUBJECT TO” and “TO HAVE AND TO HOLD” language as the aforementioned deed except the amended deed includes the provision “[s]ubject to reservation of the existing water rights for such property to remain with the Grantors.”

Objector asserts that the deed transferred the water right at issue (76H-108798) along with the land since there was no specific exemption of the water right in the instrument of conveyance (deed). As such, because the prior deed had already transferred the land and water right to Mustang Holdings LLC, the subsequent amended deed was of no effect because Kuney/Hendrickson had no continuing interest in the property in question (the land or water right). Objector posits that if Kuney/Hendrickson want to “reobtain” ownership of the water right the proper remedy is by obtaining a quit claim deed for the water right from Mustang Holdings LLC.

Ordinarily, a water right transfers with a transfer of property unless specifically retained by the transferor. 85-2-403(1), MCA (“[t]he right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom.”)

The question presented here is basically can a warranty deed be amended to show the actual intent of the parties? It is manifest in the record what the intent of the parties was in this transaction. Both **Exhibit A-6** (the agreement dated prior to the first deed) and **Exhibit A-7** (the

certificate dated one day after the first deed) show that the water rights associated with the land transferred were intended to be retained by the grantors/sellers William Kuney and Betty Hendrickson. In addition, the amended deed was signed and consented to by the representative of Mustang Holdings LLC whom the objector contends is the holder of the water right. It would appear that the language of the prior deed, which did not include the reservation of the water right to Kuney/Hendrickson was a case of mutual mistake.

In *Thibodeau v Bechtold*, 2008 MT 412, 347 Mont. 277, 198 P.3d 785, the Court considered the effect of not including certain restrictions in a Warranty Deed when there existed evidence of knowledge of those restrictions. Thibodeau and Gillies owned property in Missoula County and divided a portion of that property into 5 parcels: A, B, C, D and E. 2008 MT 412, ¶ 5. At the time of subdivision they agreed that if any of the parcels were sold, certain restrictions (such as prohibiting commercial uses, obnoxious activities and limiting the number and type of animals allowed on the property. *Id.* at ¶ 6. When Thibodeau and Gillies decided to sell parcels D and E and were approached by Bechtold about the possibility of purchasing parcels D and E. Bechtold was informed orally by Thibodeau that any transfer of the parcels would be subject to the same restrictions as parcel A (apparently previously purchased by Bechtold). *Id.* at ¶ 7. The parties subsequently entered into a Buy-Sell agreement for parcel D. The Buy-Sell agreement did not reference the restrictions but Thibodeau brought a copy of the restrictions to the meeting where the Buy-Sell agreement was signed and discussed the restrictions at that meeting. It was agreed that parcel D would have the same restrictions as parcel A. *Id.* at ¶ 8.

To complete the closure of the transaction Thibodeau delivered a copy of the restrictions to the closing agent with instructions to attach them to the Warranty Deed. However, the restrictions were subsequently attached to a Deed of Trust to secure a loan by Bechtold instead of being attached to the deed of conveyance. *Id.* at ¶ 9. Thibodeau and Gillies subsequently filed a complaint, asking the District Court to issue an injunction enforcing the restrictions on both parcels A and D. The District Court granted summary judgment regarding parcel A and the question of whether the restrictions were attached to parcel D and whether they could be enforced proceeded to trial. *Id.* ¶ 10. Relying on the testimony and documentary evidence introduced by Thibodeau and Gillies the District Court concluded that the parties agreed parcel D would be sold to Bechtolds subject to the same deed restrictions as parcel A, and that these restrictions were omitted from the deed conveying parcel D by virtue of a mutual mistake. *Id.* at ¶ 12. The District Court thus reformed the Warranty Deed to include the restrictions in question. *Id.* at ¶13.

The Supreme Court affirmed the District Court. The Court looked at § 28-2-1611, MCA which provides:

When, through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

The Court continued “[t]he steps to reformation are:

There is a prior understanding of the parties; the parties execute a written contract; somewhere and sometime between the understanding reached and the actual creation of the written instrument, a mistake occurs. It occurs in reducing to writing the agreement which the parties have intended. Obviously the alleged mistake must relate to something then in the contemplation of the parties. The fault sought to be corrected is that the executed written instrument does not reflect the actual and true understanding of the parties. This is the cardinal principle in the field of reformation for mutual mistake. Then, and only then, can the powers of equity be invoked to correct the mistake.

See *Voyta v. Clonts*, 134 Mont. 156,166, 328 P.2d 655, 661, (quoting *Restatement of Contracts*, §504 (1932)).

In conclusion the Court held that the District Court did not err in reforming parcels D’s deed to include these restrictions and ordering Bechtold to abide by them.

The instant matter is not of course before the District Court and thus § 28-2-1611, MCA cannot apply. However, *Thibodeau* is instructive because it illustrates that a mutual mistake in a Warranty Deed can be corrected. § 28-2-1602, MCA describes how a written contract may be altered by the parties: “[a] contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.” I can find no reason to hold that if a court can reform a deed in an adversarial proceeding to reflect the intent of the parties, why parties by mutual consent, as is evident here, cannot reform their deed to reflect the original intent of the parties. Indeed, as the Court observed in *Laundreville v. Mero*, 86, Mont. 43, 281 P. 749, “[t]his rule (that courts will not reform purely voluntary conveyances, unless all the parties consent), if correct, as a practical matter bars equitable relief in controversies wherein defective conveyances are sought to be corrected, since, if all parties consent to a reformation, the necessity for invoking the aid of any court disappears. Courts are constituted to hear and decide controversies, to settle disputes, not pronounce benedictions upon agreements.” The record is clear that the intent of Kuney/Hendrickson with the consent and acknowledgement of Mustang Holdings LLC was that water right 76H-108798 was to be retained by Kuney/Hendrickson, consistent with Kuney/Hendrickson as owners of record in the DNRC water

right database. I find that William D. Kuney and Betty J. Hendrickson are the current owners of water right 76H-108798.

GENERAL INFORMATION

Findings of Fact

1. William D. Kuney and Betty J. Hendrickson filed an Application to Change a Water Right (Application) which was received by the Department of Natural Resources and Conservation Missoula Regional Office on June 6, 2008. This Application is to temporarily change Water Right Claim No. 76H-108798 from irrigation to instream flow to enhance the fishery resource in a reach of Lolo Creek pursuant to § 85-2-402, 407, 408, MCA. The new place of use would be the reach of Lolo Creek from the historic point of diversion in the SWNESW, Section 33, T12N, R20W approximately 2.9 miles downstream to a point in the SESW, Section 35, T12N, R20W. (Department File)
2. Notice of Application No. 30042357 was published in the *Missoulian*, a newspaper of general circulation, on January 7, 2009. The 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 January 6, 2009. (Department File)
3. An Environmental Assessment was prepared by the Department for Application 76H-30042357 and has been reviewed and is included in the record of this proceeding. (Department File)
4. Application No. 76H-30042357 seeks to temporarily change Water Right Claim No. 76H-108798 from irrigation to instream flow to benefit the fishery resource in Lolo Creek. As currently identified, according to the General Abstract (Exhibit A-5), Water Right Claim No. 76H-108798 is for irrigation located in the SWNWNW (3.8 acres), SENWNW (3.4 acres), NWSWNW (6.0 acres), NESENW (8.5 acres) and NWSENW (0.7 acres) all in Sec34, T12N, R20W for a total of 22.4 acres. The flow rate is 504.90 gallons per minute (1.12 cfs) with a period of use from May 15 to September 30. No volume is given. The source is listed as Lolo Creek by means of a headgate into the Hendrickson-Kuney ditch. The irrigation method is listed as flood irrigation with a priority date of April 1, 1884. (Exhibit A-5)
5. If changed as per the Application, the entire irrigated acreage would be retired and the entire historic flow and consumptive volume of the water right would be used for instream flow. Applicant requests the full historically diverted volume be protected to the historic headgate and the full historically consumed volume be protected in the new place of use. The new place of

use (protected reach) would be the reach of Lolo Creek from the historic point of diversion in the SWNESW, Sec. 33, T12N, R20W approximately 2.9 miles downstream to a point in th SESW, Section 35, T12N, R20W. (Department File)

6. The Application received two valid objections per 85-2-308, MCA, one of which was subsequently withdrawn. The remaining Objection was filed by Marge Zaveta, a down ditch water right holder on the Hendrickson-Kuney ditch. The Objection lists three grounds for objection: that the Applicant is not the owner of the water right, that the water right has been abandoned (both discussed above), and adverse affect. The adverse affect is alleged to be the need for Applicant's water right to continue to be diverted into the Hendrickson-Kuney ditch to provide "carriage water" for Zaveta's water right. Without the "carriage water" Zaveta's water right is alleged to be insufficient to travel the 1.5 miles in the ditch to the Zaveta place of use due to ditch losses. (Zaveta objection)

Conclusions of Law

1. The Department has jurisdiction to approve a temporary change in appropriation right to maintain or enhance instream flow for the benefit of the fishery of the applicant proves the criteria in 85-2-402, MCA and 85-2-408, MCA by a preponderance of the evidence. (85-2-402 and 85-2-408, MCA)

2. The Department shall approve a temporary change in appropriation right to maintain or enhance instream flow to benefit the fishery resource if the applicant proves by a preponderance of the evidence that:²

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

The proposed use of water is a beneficial use. 85-2-402(2)(c), MCA

In addition to the requirements of 85-2-402 an applicant for a temporary change to instream flow must prove by a preponderance of the 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)

2. The criteria in 85-2-402(2)(b) and (d) are excepted from temporary changes to instream flow. Criteria 85-2-402(2)(e), (f) and (g) are not applicable to this application because no salvage water is involved and no water quality objection has been filed.

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

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. (Finding of Fact No. 2)

HISTORIC USE

Findings of Fact

7. Applicant describes historic use of water right 76H-108798 by presenting the General Abstract of the water right dated March 10, 2008; a copy of the original Statement of Claim dated December 18, 1981; the claim examination worksheet; an abstract of the temporary preliminary decree for the claim dated July 2, 1992; an Abstract of Water Right Claim as Modified by the Water Court; a Master's Report for Case 76HB-61 involving this water right; and information from the 1960 Missoula County Water Right Survey. The Water Right Survey clearly shows the ground appurtenant to water right 76H-108798 as being irrigated. The history of proceedings regarding this Claim in the Water Court also affirms a flow rate for this water right and the place of use.

Mr. Kuney, who had been associated with this property since at least 1933 until 1995, personally testified under oath and/or sworn affidavit that the 22.4 acres under 76H-108798 was flood irrigated using the Hendrickson-Kuney ditch; that the ditch ran for the entire irrigation season (May 15 through September 30); that the water was used by him approximately 5 days per week for a total of approximately 100 days per season; that in order to provide full coverage of the property he had to run laterals over some gravelly mounds in the field; that the property was used to produce a variety of crops, with alfalfa hay being most common; that the water application frequencies were sufficient to support crop production with two cuttings of hay; and that his parents and grandparents operated the ditch system similarly to him.

Mr. Kuney describes the ditch as historically being run on "a rotating basis," however, it appears from the testimony at hearing and from the record that no formal rotation was ever established. Mr. Kuney and his neighbors used the ditch as more of a co-operative effort. Since the ditch ran all season, as one user needed more water and another user could do with less, they would voluntarily adjust their flows to accommodate all users. (Department File; Audio Record)

8. The only water rights diverted from the Hendrickson-Kuney ditch are the Applicant's 1.125 cfs right for irrigation and Objector Zaveta's 0.75 cfs right for irrigation (plus an unquantified stock claim for each) for a total of 1.88 cfs. The record is silent of any information regarding the stock claims. (Department File, Response to Deficiency)

9. The Hendrickson-Kuney ditch is up to 4 feet in depth and approximately 10 feet wide. Using the high water mark found on the ditch banks and Flowmaster v5.13, the ditch has flowed 2.13 cfs. Using the same methodology, the total ditch capacity was calculated to be 8.19 cfs. The ditch is oversized for the water rights authorized from it. (Department File, Response to Deficiency)

10. The Application does not request any ditch loss to be claimed for instream flow, however, ditch loss was estimated by the Applicant. Ditch loss was estimated by comparing the Hendrickson-Kuney ditch with the Denton-Hendrickson-Kuney ditch which was flowing at the time field measurements were taken. The Denton-Hendrickson-Kuney ditch is in close proximity to the Hendrickson-Kuney ditch and flows through similar materials. Over the course of 0.97 miles the Denton-Hendrickson-Kuney ditch lost 0.717 cfs. Normalizing this loss to one mile yields a loss of 0.741 cfs/mile. Applying that rate to the Hendrickson-Kuney ditch of approximately 1.66 miles results in a loss of 1.23 cfs. Applying that loss to the two irrigation water rights (60% to Applicant and 40% to Zaveta) results in a loss of 0.74 cfs apportioned to Applicant and 0.49 apportioned to Zaveta. The 0.74 cfs ditch loss apportioned to the Applicant, over the claimed 100 days of use results in an annual ditch loss of 146.5 acre-feet (Department File, Response to Deficiency; Hearing Examiner calculation)

11. The historically diverted volume is derived by multiplying the flow rate by the conversion factor of 1.98 acre-feet/ cfs for 24 hours by the number of days. Thus, $1.125 \text{ cfs} * 1.98 * 100 \text{ days} = 222.75 \text{ acre-feet}$. (Department File)

12. The historically consumed volume is calculated using the Irrigation Water Requirements (IWR) program for alfalfa hay. Although Applicant claims 22.4 acres of historic irrigation, Applicant's lessee (Montana Water Trust) calculated a currently irrigable acreage of 21.3 acres and uses this smaller figure in calculating historically consumed volume. The IWR program for the Stevensville weather station area, under dry year conditions yields a net irrigation requirement of 20.86 inches (1.74 feet). Applying this value to 21.3 acres results in a calculated consumed volume of 37 acre-feet. (Department File)

13. "Return Flow" is defined by the Department as "that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or

another source of water.” It is not seepage water (i.e. ditch loss) or wastewater (i.e. surface water at the end of a field being returned to a surface water source. Of the 222.75 acre-feet being diverted at the head gate, 146.5 acre feet are lost as seepage water leaving 76.25 acre-feet applied to the field. Of the 76.25 acre-feet of field application, 37 acre-feet is consumed, leaving 39.25 acre-feet as either “return flow” or “wastewater.” This would mean a field efficiency of around 50 percent, well within the expected efficiency for historic flood irrigation. The record does not contain specific information regarding the ultimate disposition of the seepage or wastewater (up to 185.75 acre-feet), however, due to the proximity of the ditch and historically irrigated acreage to Lolo Creek the amount that returned to Lolo Creek would be fairly quick (in terms of ground water movement) and would return well within the protected reach. If the proposed change is approved the 185.75 acre-feet of historic seepage or wastewater will flow past the headgate unprotected and be immediately available for downstream appropriators. (Department File; Hearing Examiner calculation)

14. I find that the 22.4 acres under water right 76H-108798 were historically irrigated. I find further a historically diverted flow rate of 1.125 cfs; a historically diverted volume of 222.75 acre-feet per year; and a historically consumed volume of 37 acre-feet annually. (Findings of Fact 7 – 12)

15. Applicant is requesting only that the historically diverted flow and volume be protected down to the historic headgate and that only the historically consumed volume (evapotranspiration of the crop) be protected in the approximate 2.9 mile protected reach below the headgate. (Findings of Fact 4, 5)

Conclusions of Law

4. Applicant seeks to change an “existing water right” represented by its Water Right Claim. 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). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221, MCA, constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. (See *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation, Final Order*, (2008)) The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., *In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, Final Order*, (1991); *In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order*, (1992).

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. 411 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].

....

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. Montana has no legal standard in a water right change proceeding for assigning a volume for historic consumptive use. The actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water) Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”); *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order. As a result, there may be evidence that property was irrigated but the amount diverted and consumed is not necessarily equivalent to the duty of water. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. It is the applicant’s burden to produce evidence of historical use, and not doing so

constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC*, “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” (*In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), affirmed Royston (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057 Without evidence of the amount of actual historical use, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a); *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC., Proposal for Decision* (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., supra*.

xx. Water Resources Surveys are exhaustive county-by-county records of actual on-the-ground water use that were authorized by the 1939 legislature. The surveys involved extensive detailed work in both the office and the field to compile a comprehensive inventory of water rights and included the use of aerial photography to assure accuracy in mapping the land areas of water use. Field forms were prepared for each landowner, showing the name of the owner and operator, photo index number, a plat defining the ownership boundary, type of irrigation system, source of water supply and the total acreage irrigated and irrigable under each. In this case, the 1950 Sweet Grass County WRS is an accurate and reliable source for establishing what lands were historically irrigated (including lands capable of irrigation) in Sweet Grass County.

11. The Applicant in the instant matter has proven the flow and volumes represent historic beneficial use of Water Right Claim No. 76H-108798. (Findings of Fact 7 – 12, 14, 15)

ADVERSE EFFECT

Findings of Fact

16. Applicant identified all water users utilizing the same diversion as the historic point of diversion of water right 76H-108798. One objection was received from Marge Zaveta, a water user at the end of the Hendrickson-Kuney ditch. Objector Zaveta, in addition to raising the

ownership and abandonment issues discussed above, asserts that she will be adversely affected because she needs the Hendrickson-Kuney water right to act as “carriage water” in order for her water right to be delivered at her place of use. (Department File, Objection)

17. The General Abstracts for Applicant’s water right 76H-108798 (irrigation) and Objector Zaveta’s water rights 76H-211809 (irrigation) and 76H-211808 (stock) show separate ownership and different priority dates (4/1/1884 for Applicant and 4/1/1894 for Objector). In addition, Applicant’s Kuney/Hendrickson and Objector Zaveta have entered into an “Agreement Regarding Separate Ownership of Water Rights” in which it is agreed between the parties that between Applicant’s water right 76H-108798 and Objector’s water right 76H-211809, “the parties hereto agree that they shall each have separate and distinct transferable interests in the 78” therein decreed” and “[t]he parties further agree that each shall have ability to transfer the above-described interests separate and apart from the other on any future sales or as otherwise permitted by Montana law.” (Exhibit O-6)

18. Applicant identified all water owners of record with points of diversion downstream of the historic point of diversion of water right 76H-108798 within the reach of Lolo Creek proposed for instream fishery enhancement of which there were 67. Each of the identified water users received notice of this proposal. No objections were received. (Department File)

19. Applicant proposes to protect the consumed volume in the reach of Lolo Creek identified for instream flow enhancement. Since the amount of water requested for instream flow protection downstream from the historic point of diversion is limited to the consumed volume of water for historic crop evapotranspiration, no adverse affect to downstream appropriators would occur. The difference in the amount of diverted and consumed flow, including ditch losses, seepage and wastewater would remain instream and be available for appropriations downstream. (Department File; Finding of Fact 13)

20. Applicant proposes to protect the historically diverted volume upstream of the historic point of diversion. The diverted volume is 222.75 acre-feet over a 100 days use period between May 15 and September 30. The consumed volume of 37 acre-feet, at a flow rate of 1.125 cfs, could be protected for approximately 16.5 days within the May 15 through September 30 period of use. Applicant specified in their measurement plan that if their flow measurements indicate less water in the creek than their instream flow right call would be placed on upstream users junior to the 4/1/1884 priority date of water right 76H-108798. (Department File)

21. Applicant 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. Monitoring shall be more frequent during water short periods or when calls are made on other water rights. Montana Water Trust shall adhere to USGS protocols for streamflow measurement and trained staff will establish streamflow monitoring sites at least at the historic point of diversion and near the end of the protected reach. Trained staff will also develop rating curves at selected locations as deemed appropriate. (Department File)

22. I find the information provided by the Applicant addressing potential for adverse effects to other water users to be credible. (Findings of Fact 16 – 20)

23. I find the proposed change will not increase the flow rate or volume of water historically diverted, or the volume of water historically consumed. (Findings of Fact 7 – 12, 14, 15)

Conclusions of Law

12. 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).

13. 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. Ekwoztel 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).

14. A downstream appropriator on a common ditch may have a right to carriage water only if the right is owned in an undivided share. *Anderson v. Cook*, 25 Mont. 330, 64 P. 873,876 (1901). As was stated in *In the Matter of the Application for Change of Appropriation Water Right No. G15928-76H by Samuel T. and Virginia Allred*, DNRC Proposal for Decision, June 8, 1989:

Users of separately appropriated water rights have no interest in, and are not entitled to, the use of any water conveyed in said ditch under other water rights as carriage water for their rights. Simply because the Burke Ditch may be used jointly to convey water diverted pursuant to several different water rights does not mean that the various ditch users hold the carriage water in common; rather, each separate water right stands free of the other water rights just as though it used a separate ditch, and must absorb its own carriage loss.

Citing *Cronwall v. Talboy*, 45 Idaho 459, 262 P. 871 (1928). Proposal for Decision *affirmed*, DNRC Final Order, (1990); See also, *In the Matter of the Application for Change of Appropriation Water Right G(w)194309-41D by Jennifer D. Smith*, DNRC Proposal for Decision (1996). *Affirmed*, DNRC Final Order (1996).

While there is evidence in the record that at one time Applicant’s and Objector’s respective water rights were derived from the same original decreed rights (e.g. the Master’s Report refers to an original 78 miner’s inch decreed right), the majority of the evidence indicates that at this time the rights are separate and distinct. The respective rights are not held jointly as shown on the General Abstracts, the rights were filed in the Water Court separately, and the priority dates are different – all indicating that they were intended to stand separately. In addition, even if the rights were derived from the same original right, the parties have agreed

that the water rights are “separate and distinct transferable interests” and each party has the ability “to transfer the . . . interests separate and apart from the other...” Such agreement effectively waives any argument that the water rights are, or were, held in an undivided share or otherwise held jointly. Objector Zaveta’s claim of carriage water in Water Right Claim No. 76H-108798 would be to claim ownership of the right. Such a position is not supported by law and is inconsistent with previous DNRC decisions. (Finding of Fact 17)

15. 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 development for which a permit or certificate has been issued or for which a state reservation has been issued, 85-2-402(2)(a), MCA, and that the temporary change authorization for water to maintain and enhance instream flows to benefit the fishery resource (discussed below), as measured at a specific point, will not adversely affect the water rights of other persons, 85-2-408(3)(a), MCA. (Findings of Fact 7 – 14, 16 – 23)

BENEFICIAL USE

Findings of Fact

24. Application No.30042357 to temporarily change water right 76H-108798 to enhance instream flow for the benefit of the fishery in Lolo Creek is one of a number of efforts by Montana Water Trust to improve flow conditions on Lolo Creek. These combined efforts are intended to work together to accomplish the goal of improving the creek for the benefit of the fishery. (Department File, Application)

25. Applicant provided information from the Montana Department of Fish Wildlife and Parks MFISH website which notes stream dewatering concerns for Lolo Creek. The Applicant provided two documents from Ladd Knotek MTDFWP fisheries biologist, which encourage conversions of irrigation water rights to instream flow uses. Knotek indicates that incremental additions to stream flows would be a benefit to the fishery resource in Lolo Creek. Information from MTDFWP biologists indicate that a desired minimum flow in the lower reaches of Lolo Creek which includes the proposed protected reach would be between 15 and 20 cfs. Applicant describes the 2007 dewater event in lower Lolo Creek and explains that while this proposed instream flow change would not completely address such an event, each incremental addition is expected to maintain a fishery resource in the creek. Applicant argues that allowing this water right to remain instream in the protected reach during very dry years will help sustain pools that hold and protect fish until flows rebound. Applicant explains that the proposed protected reach

is one with numerous large diversions where the proposed water right may be protected in priority. (Department File)

26. I find that the proposed change of Water Right Claim No. 76H-108798 from irrigation to instream flow is a beneficial use.

Conclusions of Law

16. Beneficial use, as defined in the Montana Water Use Act, includes “a use of water through a temporary change in appropriation right for instream flow to benefit the fishery resource in accordance with 85-2-408.” See also, *Application to Change a Water Right No.76H-30042358*, Issued by DNRC, (2009) (changing water right 76H-108799 for instream flow in Lolo Creek) (85-2-102(4)(d); DNRC records)

17. Under the change statute, §85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. 85-2-408(1); see also §§85-2-301 and 311(1)(d), MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *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. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008); 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, 85-2-402(2)(c), MCA, and that the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource, 85-2-408(3)(b). (Findings of Fact 24 – 26)

ADDITIONAL INSTREAMFLOW REQUIREMENTS, 85-2-408

In addition to the criteria in 85-2-402(2)(a),(c) and 85-2-408(3)(a),(b), MCA, and applicant for a temporary change to instream flow under 85-2-408, MCA must:

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

(1)(b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

Length and Location of Steam Reach

Finding of Fact

27. Applicant included in the Application specific information on the length and location of the steam reach in which the streamflow is to be maintained or enhanced. This temporary change application is for 1.125 cfs up to 37 acre-feet to remain in an approximate 2.9 mile reach of Lolo Creek from the historic point of diversion downstream to the approximate location of the railroad bridge. Applicant provided legal land descriptions and a map depicting the stream reach in which the streamflow is to be maintained or enhanced. (Department File, Application)

Conclusion of Law

18. The Applicant included in their Application specific information on the length of the stream reach in which the streamflow is to be maintained or enhanced. (Finding of Fact 27)

Streamflow Measuring Plan

Finding of Fact

28. Applicant will have the Montana Water Trust 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 Lolo Creek. Applicant indicates that permanent monitoring sites will be established after approval of this proposed change application. The 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 protocols for streamflow measurement and trained staff will establish steamflow monitoring sites and rating curves on Lolo Creek. The data will be catalogued and stored at Montana Water Trust's office and will be available upon request.

Conclusion of Law

19. Applicant provided in their Application a detailed streamflow measuring plan that describes the point where and the manner in which the steamflow must be measured. (Finding of Fact 28)

ORDER

Application No. 76H-30042357 to Change Water Right Claim No. 76H-108798-00 by William D. Kuney and Betty J. Hendrickson is hereby **GRANTED** with the following conditions:

THIS TEMPORARY CHANGE AUTHORIZATION IS EFFECTIVE FOR TEN YEARS FROM THE DATE OF ISSUANCE UNLESS MODIFIED OR REVOKED BY THE DEPARTMENT.

APPLICANT SHALL NOT DIVERT INTO THE KUNEY/HENDRICKSON DITCH NOR IRRIGATE ANY OF THE HISTORIC PLACE OF USE (22.4 ACRES) FROM WATER RIGHT CLAIM NO. 76H-108798 DURING THE TERM OF THIS AUTHORIZATION.

THIS TEMPORARY CHANGE AUTHORIZATION IS FOR A FLOW RATE OF 1.125 CFS UP TO 222.75 ACRE-FEET MEASURED AT THE HISTORIC POINT OF DIVERSION OF WHICH 1.125 CFS UP TO 37 ACRE-FEET MAY BE PROTECTED IN THE IDENTIFIED PROTECTED REACH BELOW THE HISTORIC POINT OF DIVERSION FOR A DISTANCE OF APPROXIMATELY 2.9 MILES.

WATER MEASUREMENT RECORDS REQUIRED:

THE APPROPRIATOR SHALL REPORT TO THE DEPARTMENT THE STREAMFLOW DATA COLLECTED IN IMPLEMENTATION OF THE STREAMFLOW MEASUREMENT PLAN REQUIRED BY 85-2-408(1)(b), MCA, AND DESCRIBED IN THE CHANGE AUTHORIZATION APPLICATION AND SUMMARIZED AS: "FLOW MONITORING WILL INCLUDE STREAM DISCHARGE MEASUREMENTS TAKEN AT OR NEAR THE HISTORIC POINT OF DIVERSION AND AT OR NEAR THE END OF THE PROTECTED REACH. DISCHARGE MEASUREMENTS WILL CONTINUE FOR THE DURATION OF THE CHANGE AND WILL BE TAKEN AT LEAST BIMONTHLY FROM MAY THROUGH SEPTEMBER USING USGS STANDARD PROTOCOL FOR OPEN CHANNEL FLOW MEASUREMENT." DOCUMENTATION OF THE LOCATIONS 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

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 7th day of June 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, Montana 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 7th day of June 2010 by first class United States mail.

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