

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

APPLICATION TO CHANGE WATER RIGHT NO. 41F 30070072 AND 41F 30104013 BY SUN WEST RANCH PROPERTY OWNERS ASSN))))	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On July 1, 2014, Sun West Ranch Property Owners Association (Applicant) submitted Application to Change Water Right No. 41F 30070072 to change Water Right Claim Nos. 41F 138425-00 (IR) and 41F 127287-00 (ST) to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The application was transferred to the Bozeman Regional Office for processing. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of December 4, 2014.

The Department met with the Applicant's consultant, Dave Baldwin of Water Right Solutions, Inc., for a pre-application meeting on November 12, 2013. This pre-application meeting expired before the application was submitted and was not renewed prior to submittal. An Environmental Assessment for this Application was completed on February 4, 2015. Upon further review, a determination was made that the two water rights did not have the same purpose in the end, and thus could be submitted in one change application. Original Application to Change Water Right No. 41F 30070072 is just for Water Right Claim No. 41F 138425-00 (IR). Application to Change Water Right No. 41F 30104013 was created to change Water Right Claim No. 41F 127287-00 (ST). As these multiple use (same appropriation of water with different purposes) water rights are linked in analysis, a single decision document will represent both change applications.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as Filed:

- Form 606 IR, Addenda, and Supplements
- Letter from Rusty Taylor (DNRC) to R. Mark Josephson, dated October 18, 1991
- Letter from Josephe Urbani (Urbani Fisheries, LLC) to Dave Schmidt (Water Right Solutions, Inc.), dated October 24, 2013
- Letter from Michael W. Vaughn (Montana Department of Fish, Wildlife & Parks) to Dave Baldwin (Water Right Solutions, Inc.), dated January 6, 2014

Information Received after Application Filed:

- Change of Purpose Addendum (updated), received by DNRC on July 18, 2014.
- Telephone conversation with Dave Baldwin, Water Right Solutions, Inc., November 3, 2014
- Map IR.2.C Historic Use (updated), received by DNRC on November 3, 2014.

Information within the Department's Possession/Knowledge

- Environmental Assessment, dated February 4, 2015
- Water Right Claim Files 41F 138425-00 (IR) and 41F 127287-00 (ST)
- Rusty Taylor June 18, 1991, field investigation notes and correspondence
- 1947 Gallatin County Water Resources Survey

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The purpose of Statement of Claim No. 41F 138425-00 (IR) is flood irrigation on a place of use (POU) of 64 acres in Sections 17 and 20; both T10 S, R01 E, Madison County. This water right is for 5.95 cubic feet per second (CFS) of flow and 256 acre-feet (AF) of diverted volume from Horse Creek, a tributary of the Madison River, with a priority date of October 22, 1912. The period of use and the period of diversion are from May 1 to September 1. The point of diversion (POD) is located in the SENWSE of Section 19, and the water is conveyed to the place of use through the D-6 Ditch, a.k.a., Upper Sprague Ditch. The POU is located approximately 30 miles south of Ennis in Madison County.
2. The purpose of Statement of Claim No. 41F 127287-00 (ST) is stock use. This right originally claimed 506 animal units (AU) and 7.00 AF. This water right does not have a decreed flow rate or volume, as stock drank directly from the D-6 Ditch. The priority date is October 22, 1912, and the period of use is from May 1 to September 30. The POD and POU are the same as the above-described irrigation right: the SENWSE of Section 19; and Sections 17 and 20, respectively. Water was conveyed to the POU through the D-6 Ditch, from which stock drank directly.
3. Sun West Ranch Property Owners Association is the sole owner of the two water rights.
4. Department records list water right 41F 138425-00 (IR) as supplemental to irrigation rights 41F 138426-00 and 41F 138427-00. However, the map included in the claim files for these water rights, historic use information supplied by the Applicant and by aerial photographs, and the layout of the ditches in the area indicate that, while these rights were exercised in the same general area, 41F 138425-00 (IR) is the only right that was exercised on its specific POU.
5. No previous change authorizations have been issued on Statement of Claim 41F 138425-00 (IR) , although there is an original version and a post-decree version. The historical basis for the water right is a filed notice of appropriation, which was modified by a Water Court decree. No previous change authorizations have been issued on Statement of Claim 41F 127287-00 (ST). The historical basis for this water right is a filed notice of appropriation. Basin 41F is currently under a Temporary Preliminary Decree through the Water Court.

Table 1: Existing Water Right Details

Water Right Number	Flow Rate	Diverted Volume	Purpose	Period of Use	Place of Use ¹	Point of Diversion ¹	Priority Date
41F 138425-00 (IR)	5.95 CFS	256 AF	Irrigation	5/1 – 9/1	64 acres Sec. 17, 20	SEWSE, Sec. 19	10/22/1912
41F 127287-00 (ST)	--	--	Stock	5/1 – 9/30	Sec. 17, 20	SEWSE, Sec. 19	10/22/1912

Note: ¹POU and POD located within T10 S, R01 E, Madison County.

CHANGE PROPOSAL

FINDINGS OF FACT

Note: See Figure 1 at the end of this section for a map of the point of diversion and protected reach locations.

6. Two different versions of irrigation water right 41F 138425-00 (IR) are proposed. The first is a temporary change to instream flow in order to maintain streamflow levels for the benefit of the fisheries in Horse Creek and the Madison River. The second is a permanent change in POD for the underlying irrigation right in case of reversion from the instream fishery change.

7. Water Right No. 41F 138425-00 (IR) – Instream Version

The purpose of 41F 138425-00 (IR) would be temporarily changed to instream flow in order to maintain streamflow levels for the benefit of the fisheries in Horse Creek and the Madison River, to which Horse Creek is tributary to and connected for the purposes of fisheries, for a period not to exceed 10 years with the option to renew the instream change. During a November 3, 2014, conversation with Dave Baldwin, Water Right Solutions, Inc., he indicated that the D-6 Ditch could never be used again, due to a signed stipulation, so the Applicant intends to leave this water right instream for the foreseeable future. Under the instream change, the POU and POD would be temporarily changed to the reach that extends from a point in the SWSWNW of Section 20 to the confluence of Horse Creek with the Madison River in the SESWSE of Section 17; both T10 S, R01 E, Madison County. Water would no longer be diverted through D-6 Ditch and would instead be left in Horse Creek. During the temporary change, no irrigation would occur under 41F 138425-

00 (IR) . The full volume that was historically diverted under this water right would be protected along the reach from the upper end of Horse Creek to the historical POD in the SWSWNW of Section 20. Only the total volume that was historically consumed would be protectable along the reach from the new permanent POD to the confluence of Horse Creek with the Madison River.

8. Water Right No. 41F 127287-00 (ST) – Stock Right

Concurrently, the Applicant also proposes to permanently change the POD and POU for multiple use stock right 41F 127287-00 (ST) to be direct from Horse Creek along the reach that extends from a point in the SWSWNW of Section 20 to the confluence of Horse Creek with the Madison River in the SESWSE of Section 17; both T10 S, R01 E, Madison County. The proposed POU and POD align exactly with the proposed POU and POD for the instream fishery version of 41F 138425-00 (IR).

9. Two sources submitted biological justification for the benefit that the additional instream flow would confer on the fisheries in Horse Creek: Michael W. Vaughn, Madison-Gallatin Fisheries Biologist for the Montana Department of Fish, Wildlife & Parks; and Joseph Urbani, Fisheries Biologist/Principal for Urbanic Fisheries, LLC.

10. The Applicant has proposed to install staff gages at the proposed new permanent upstream POD and at a point in the NWNE of Section 20, near the lower reaches of Horse Creek, in order to measure flows and monitor the source.

11. The following conditions for 41F 138425-00 (IR) will be incorporated into the analysis below:

WATER MEASUREMENT RECORDS REQUIRED (TEMPORARY CHANGE)
THE APPLICANT OR A DESIGNEE SHALL MEASURE THE PROTECTED REACH OF HORSE CREEK IN MADISON COUNTY MONTHLY FROM MAY THROUGH SEPTEMBER USING DEPARTMENT-APPROVED MEASURING DEVICES. MEASUREMENTS MUST BE TAKEN A MINIMUM OF MONTHLY DURING THE MEASUREMENT TIME PERIOD. MEASUREMENT RECORDS SHALL BE MADE AVAILABLE TO THE DEPARTMENT UPON REQUEST DURING THE TEMPORARY CHANGE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE ACCURATELY.

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (INSTREAM FLOW)
 IN THE EVENT THAT THE APPLICANT MAKES A CALL FOR WATER OR A WATER COMMISSIONER IS APPOINTED, THE FOLLOWING OPERATION OF PROTECTION REPRESENTING UNDIVIDED, CONTINUOUS FLOW RATES OF THE WATER RIGHT MUST BE FOLLOWED TO PREVENT EXCEEDING VOLUME LIMITATIONS ON THE WATER RIGHT.

Month	Protected Reach Flow Rate	Days Diverted	Volume Diverted
(-)	(CFS)	(#)	(AF)
May	1.01	31	61.96
Jun	1.01	30	59.96
Jul	1.01	31	61.96
Aug	1.01	31	61.96
Sep	1.01	1	2.00
		SUM =	247.83

Change Overview

12. The following table reflects the water right elements proposed for change:

Table 2: Proposed Water Right Change Details

Water Right No. (41F)	Version	Flow Rate (CFS)	Volume (AF)	Purpose	Period of Use	Place of Use	Point of Diversion	Priority Date
138425	1 (Temp.)	5.95 CFS	<i>Total:</i> 247.83 ¹ <i>Protected Reach:</i> 178.85	Instream Fishery	5/1 – 9/1	<i>Reach:</i> SWSWNW, Sec. 20 to SESWSE, Sec. 17 ²	<i>Reach:</i> SWSWNW, Sec. 20 to SESWSE, Sec.17 ²	10/22/1912
127287	--	--	7.0 AF	Stock	5/1 – 9/30	<i>Reach:</i> SWSWNW, Sec. 20 to SESWSE, Sec. 17 ²	<i>Reach:</i> SWSWNW, Sec. 20 to SESWSE, Sec. 17 ²	10/22/1912

Notes:

¹The full historically diverted volume and flow (5.95 CFS) is protectable to the historical POD; only the historically consumed volume and flow (1.01 CFS) is protectable from the permanent POD to the confluence of Horse Creek and the Madison River. The protected reach extends from the new permanent POD to the confluence of Horse Creek and the Madison River and is approximately 0.97 miles long. The protected reach is the POD and POU for the temporary instream change.

²The temporary instream fishery reach (POD and POU) and the stock direct from source reach (POD and POU) align exactly. They are located in T10 S, R01 E, Madison County.

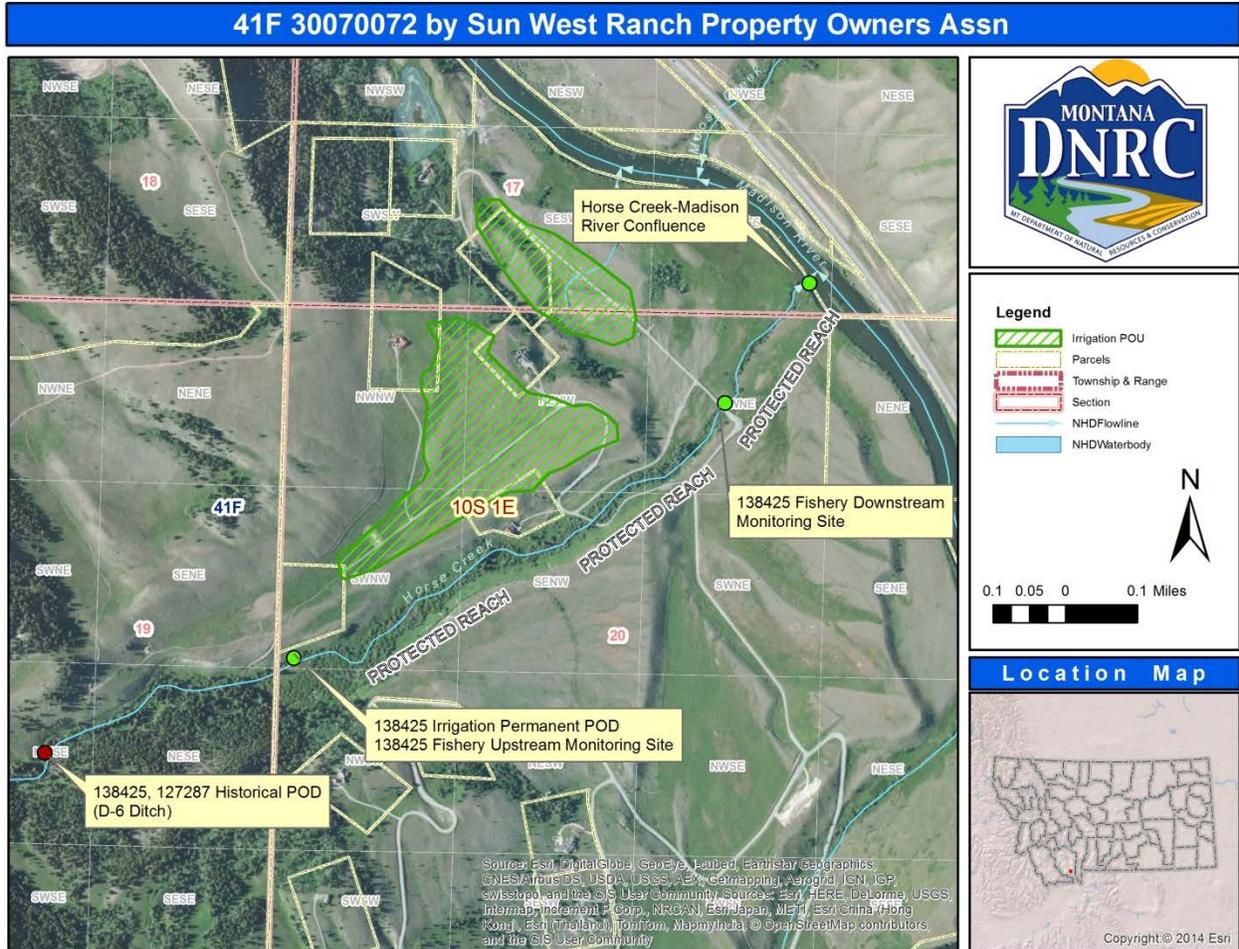


Figure 1: Area map for the proposed changes.

§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

13. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

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

issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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 or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

14. The burden of proof in a change proceeding by a preponderance of evidence is “more probably than not.” Hohenlohe ¶¶ 33, 35.

15. In a change proceeding and in accordance with well-settled western water law, 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;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶

43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *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); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

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

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

....

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

(italics added).

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

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

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, 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.

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

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

Colorado follows a similar analysis under its requirement that a “change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

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 (2007), at § 5:78 (“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.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

17. Accordingly, 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, (DNRC Final Order 1991); In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, (DNRC Final Order (1992); In the Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H, Proposal for Decision and Memorandum at pgs. 8-22, adopted by Final Order (January 9,1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

18. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re

[Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

[Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 43, 45](#); see also [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 9](#).

19. The extent of the historic beneficial use must be determined in a change case. *E.g.*, [McDonald](#); [Hohenlohe ¶ 43](#); [Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 \(Colo. 2002\)](#); [Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 \(Colo.,1999\)](#); [City of Bozeman \(DNRC\), supra](#) (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors.”) As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA. [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 11](#) (proof of historic use is required even where a water right is decreed).

20. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. Hohenlohe ¶¶ 30-31.

21. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision adopted by Final Order (2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003) . An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

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

....

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

....

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

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

22. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

23. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. Admin. R. Mont. (ARM) 36.12.221(4).

Historic Use

FINDINGS OF FACT

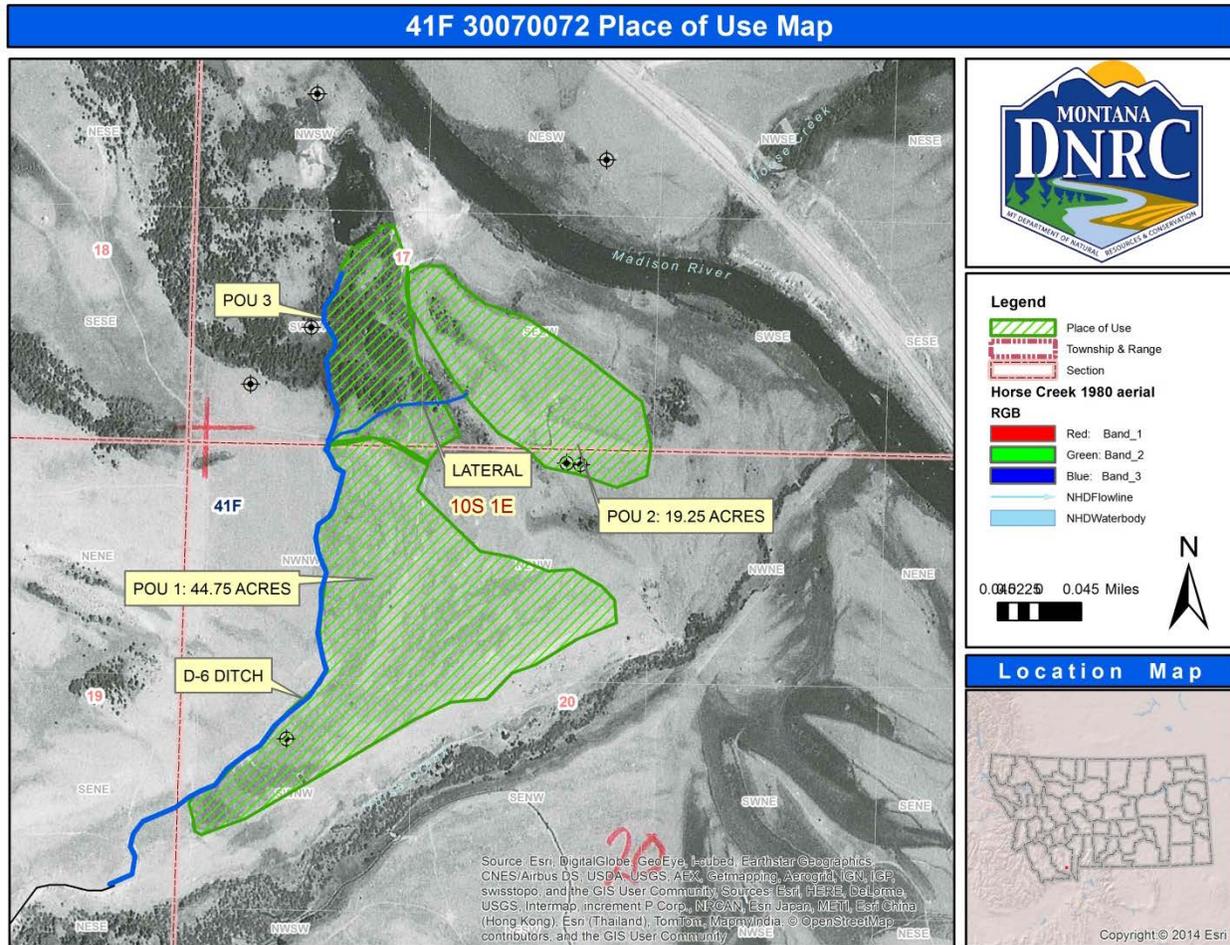
Point of Diversion and Priority Date

24. Both of the water rights proposed for change share the same historical POD, located in the SENWSE of Section 19, T10 S, R01 E, Madison County. From this POD, water was conveyed to the irrigated acres through the D-6 Ditch. Stock pastured in the area and drank directly from the ditch. History of the area backs up that cattle were in this area and were run by the original owners, a well-known rancher of the area named Sam Shelton. The priority date for both water rights is based on the same historical filed document with a date of October 22, 1912, for water put to use on Horse Creek (formerly known as Trail Creek).

Place of Use

25. **Water Right No. 41F 138425-00 (IR)**

The claimed POU for this water right is generally 64 acres located in Sections 17 and 20, T10 S, R01 E, Madison County. DNRC analysis of the 1954 Madison County Water Resources Survey (aerial imagery date: 1947) found 28.8 irrigated acres. DNRC analysis of a 1980 USDA aerial photograph found 64.0 irrigated acres. According to the Applicant, use of this water right historically alternated between three sub-POUs. See Map 2 for the location of these sub-POUs. Approximately 44.77 acres (POU 1 on Map 2), located almost entirely in Section 20, were irrigated. The additional acreage alternated between POU 2 and POU 3, both located predominantly in Section 17. The D-6 Ditch continues due north from Section 20 into Section 17 toward stands of pine trees and a small pond; however, a lateral branches off and continues due northeast toward POU 2. The claimed acreage includes only POU 1 and 2. Dave Baldwin, Water Right Solutions, Inc., submitted an updated Historic Use Map clarifying that the historical use of this water right within its claimed POU is represented by POU 1 and 2.



Map 2: Place of use and irrigated acreage for water right 41F 138425-00 (IR) . Photo USDA 278-116, dated 7/27/1980.

26. Water Right No. 41F 127287-00 (ST)

The historical POU for this multiple use stock right is Sections 17 and 20. Stock drank directly from the D-6 Ditch as it conveyed water across the Applicant’s property. The original ranch owner, Sam Shelton, is a historical figure in the Madison Valley known for cattle ranching.

Periods of Diversion and Use

27. Water Right No. 41F 138425-00 (IR)

The claimed and decreed period of diversion and period of use are from May 1 to September 1. (Due to a database limitation, these ranges currently show up on abstracts as May 1 to September

4. The original claim filing documents and the Temporary Preliminary Decree for Basin 41F confirm the May 1 to September 1 range.) The POU is located in Climatic Area V, which has an irrigation guideline of April 25 to October 5. The claimed period of use is within that guideline and reasonable for this area.

28. Water Right No. 41F 127287-00 (ST)

The claimed and decreed period of diversion and period of use are from May 1 to September 30. This stock right is served by water from the D-6 Ditch, which conveys water to the irrigation POU; stock drink directly from the ditch. It shares the same start date, but is exercised for an additional month after the cessation of irrigation.

Flow Rate

29. Water Right No. 41F 138425-00 (IR)

The historical flow rate associated with water right 41F 138425-00 (IR) is 5.95 CFS. Pursuant to a February 28, 1991, order from the Montana Water Court, DNRC water resource specialist Rusty Taylor conducted a June 18, 1991, field investigation of Water Right Claim nos. 41F 138424-00, 138425-00, and 138426-00 specifically to determine the flow rates associated with the above-listed claims. Mr. Taylor indicated that the ditch is “physically much larger than the flow actually used would indicate” and, using the Manning Equation for uniform steady flow, estimated a flow rate for the D-6 Ditch of 5.85 CFS. In an October 18, 1991, letter from Mr. Taylor to R. Mark Josephson, attorney for the former property owner, Mr. Taylor says that the measurements of the D-6 Ditch are “the most accurate of any of the estimated flows calculated for the Sun Ranch.” They were based on an in-stream Price AA flow measurement, and Mr. Taylor considers 238 miner’s inches (MI) (5.95 CFS) to be a reasonable claimed flow rate. Mr. Josephson then filed a September 9, 1994, affidavit requesting a flow rate of 5.95 CFS. The Temporary Preliminary Decree incorrectly listed a flow rate of 2.43 CFS, but a November 21, 1994, Master’s Report definitively concluded that the flow rate should be 5.95 CFS.

30. Water Right No. 41F 127287-00 (ST)

The historical flow rate associated with water right 41F 127287-00 (ST) was not quantified because the right is for stock drinking directly from a ditch. This change application would

change the water right to be stock drinking directly from Horse Creek. Therefore, a flow rate is not quantified for this right.

Diverted Volume and Consumed Volume

31. Water Right No. 41F 138425-00 (IR)

This water right was historically exercised at the full flow rate of 5.95 CFS for flood irrigation three times per season for seven days each, giving a total diverted volume of 247.83 AF, slightly less than the claimed volume. In order to determine consumptive use, the Applicant has elected to use the Department’s consumptive use rule, ARM 36.12.1902. The POU is located approximately 30 miles south of Ennis in Madison County, so the Irrigation Water Requirements (IWR) for flood irrigation in Madison County at the Ennis Weather Station were used to calculate consumptive use. As this claim reflects a pre-1973 use of water, the 1964 – 1973 Management Factor for Madison County was employed. See the Irrigation Technical Report for calculation details. Consumed volumes associated with this water right can be broken into five components:

(1) crop consumptive use =	59.78 AF
(2) ditch evaporation =	2.31 AF
(3) plant evapotranspiration along the ditch =	1.89 AF
(4) irrecoverable field loss =	11.18 AF
(5) return flows consumed from source =	103.69 AF
Total consumptive use (1 – 4) =	75.16 AF
Total volume consumed from source (1 – 5) =	178.85 AF

The total consumed volume for this water right is 75.16 AF. However, additional volume was consumed from the source because the majority of the return flows, 103.69 AF, accrued to the Madison River instead of returning to their source, Horse Creek. Therefore, the total historically consumed volume under this right is 75.16 AF, but up to 178.85 AF may be protected for instream flow along the protected reach because that volume was consumed from the source. The total diverted volume is 247.83 AF.

32. **Water Right No. 41F 127287-00 (ST)**

Because 41F 127287-00 (ST) is a right for stock drinking directly from the D-6 Ditch and is being changed to instead allow stock to drink directly from Horse Creek, the volume identified here is the consumed volume. The original claim was filed for 506 animal units, which, using the standard of 30 gallons per day per animal from May 1 to September 30 (153 days), would be a volume of 7.13 AF per year. The claimant filed for 7 AF per year, so this change will reflect 7 AF.

Return Flows

33. The historical return flow volume for water right 41F 138425-00 (IR) is the difference between the total volume applied to the field and the total volume consumed by the crops at the field: $247.83 - 75.16 = 152.86$ AF. Of this volume, 103.69 AF returned directly to the Madison River and not to Horse Creek. Therefore, this volume is lost to the source and is legally protectable as instream flow under this change. The total volume protectable for instream flow is then 178.85 AF. The remaining 48.98 AF returned to Horse Creek. See the Department's November 20, 2014, Return Flow Memorandum for a full discussion of return flows for this right.

Supplemental Rights and Non-Use

34. Department records list water right 41F 138425-00 (IR) as supplemental to irrigation rights 41F 138426-00 and 41F 138427-00. However, the map included in the claim files for these water rights, historic use information supplied by the Applicant and by aerial photographs, and the layout of the ditches in the area indicate that, while these rights were exercised in the same general area, 41F 138425-00 (IR) is the only right that was exercised on its specific POU. The sum of these individual rights will not exceed their historical beneficial use as a whole.

35. In the Application, consultant Water Right Solutions, Inc., said that the "last time this water right was used to the extent indicated was 2007. Water Right Solutions was present on site and observed the ditch running." This use was within the previous 10 years, and so no non-use analysis is needed.

Overview

36. Table 3 represents the historical use:

Table 3: HISTORICAL USE

Water Right Number	Priority Date	Diverted Volume	Consumptive Use	Flow Rate	Purpose (Total Acres)	Place of Use	Point of Diversion
41F 138425-00 (IR)	10/22/1912	247.83 AF	75.16 AF ¹ 178.85 AF ²	5.95 CFS	Irrigation 64 acres	NW, Sec. 20; S2SW, Sec. 17, T10 S, R01 E	SENWSE, Sec. 19, T10 S, R01 E
41F 127287-00 (ST)	10/22/1912	--	7 AF	--	Stock --	NW, Sec. 20; S2SW, Sec. 17, T10 S, R01 E	SENWSE, Sec. 19, T10 S, R01 E

Notes:
¹Historic consumptive use.
²Consumed from the source and legally protectable under the instream flow change.

CONCLUSIONS OF LAW

37. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. §85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions, citing Featherman v. Hennessy, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the

enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

38. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right, or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, reflecting basic water law principles).

39. The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. *Id.* at Pg. 14.

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

Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

41. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16)

42. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005); 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”).

43. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. 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. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

44. “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* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; 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.

45. The Department has the authority to consider waste in determining a volume for change in a water right.

The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868](#).

Hohenlohe ¶ 71.

46. Applicant may proceed under ARM. 36.12.1902, the Department’s historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case, Applicant has elected to proceed under ARM 36.12.1902. (FOF No. 31)

47. The Applicant has proven by a preponderance of the evidence that the historic use of Water Right Claim No. 41F 138425-00 (IR) is 247.83 AF of diverted volume and 5.95 CFS flow rate with a consumptive use volume of 75.16 AF and a volume consumed from the source of 178.85 acre-feet. (FOF Nos. 29, 31)

48. The Applicant has proven by a preponderance of the evidence that the historic use of Water Right Claim No. 41F 127287-00 (ST) is a historic consumptive volume of 7.00 acre-feet. (FOF Nos. 32)

Adverse Effect:

FINDINGS OF FACT

49. The source of water for 41H 138425-00 is Horse Creek. Under this temporary Change Authorization, water in the amount of 5.95 CFS up to 247.83 AF will be left in Horse Creek for the purpose of instream fisheries. The full amount of 247.83 AF will be protectable to the new POD. The volume that was historically consumed from the source, 178.85 AF, will be protectable from a new temporary POD to the confluence of Horse Creek with the Madison River. This project protects water that was historically consumed from the source instream.

50. The POD is also being temporarily changed. The proposed new POD is located in the SWSWNW of Section 20, which is downstream from the historical POD. Department records do not show any intervening PODs that would be affected by this change.

51. The Department has no knowledge of an appointment or request for a water commissioner on the source.

52. The Department has no knowledge of calls on water made to upstream users. Based on information provided by the Applicant, no change in the call pattern is anticipated, so upstream junior water rights will not be adversely affected. If a call were made, statute allows for an objection to be raised by an appropriator during the term of the temporary change and during the renewal process.

53. This change will not adversely affect upstream or downstream senior water right holders, as all water for 41F 138425-00 (IR) is being left instream and use will remain within priority. If the instream right reverts back to its irrigation version, then the historical use will not be exceeded.

54. The only other irrigation water right from Horse Creek is owned by the Applicant and is located within the reach of Horse Creek affected by this change. In addition to 41F 127287-00 (ST), which is being changed in this application, there is only one stock right with a POD in the affected reach of Horse Creek; that right is also owned by the Applicant. There is a permit for the purpose of a fishery in an off-stream reservoir with an owner other than the Applicant that has a POD within the affected reach. The only other water rights served by Horse Creek have PODs

above the affected stretch and, as the Applicant has never before had to make a call on them for water, they are unlikely to be affected by this change. Water rights in the impacted stretch should not be affected because, instead of being diverted from the source, water will now be left instream, where it will enhance flow levels and not adversely effect any senior water right owners.

55. Under the proposed change for 41F 127287-00 (ST), water will be left instream and will no longer be diverted from Horse Creek into the D-6 Ditch. Instead, stock will drink directly from the creek. The Applicant is not increasing the number of stock served with this right, so the appropriation of water is not increasing. The same volume of water that was consumed from the D-6 Ditch will now be consumed from Horse Creek.

56. Approximately 32.1 percent of the return flows eventually returned to Horse Creek, while approximately 68.9 percent returned to the Madison River. Except for one permit, the only other water rights that could be impacted by this change are owned by the Applicant, and these water rights will not be adversely impacted, as nothing will be effectively changing on the source regarding water amounts available for use. Instead of diverting water from its source in Horse Creek, it will now be left instream. Water left instream in Horse Creek flows into the Madison River. Since water will be left instream instead of being diverted from the source, no adverse effect will occur. The timing of return flows will change, because now instead of accruing as return flows, water will simply be left instream. However, the Department's records did not identify any POUs between the irrigation POU and the Madison River, so no other rights are dependent on return flows from historic irrigation under the right proposed for change. According to the Return Flow Report, 97 percent or more of return flows accrued to Horse Creek or the Madison River within two months. Supplemental letters of support from Montana Department of Fish, Wildlife, and Parks and Urbani Fisheries indicate that leaving water instream during the summer months is more critical for the ecology of Horse Creek, as opposed to any return flows that may accrue after the irrigation season. Also, storage reservoirs on the Madison River upstream and downstream of the affected reach mitigate any timing changes.

57. As discussed previously, the Department's records indicate that irrigation right 41F 138425-00 (IR) is supplemental to two other irrigation rights. However, the layout of ditches in

the area, various aerial photographs, the Madison County Water Resources Survey, historical use information provided by the Applicant, and the original claim filing maps all indicate that, while these rights were exercised in the same general area, 41F 138425-00 (IR) was the only right exercised in its unique POU. The other two rights will continue to be exercised in their POUs, so the total volume of water used will not be increased from the historical beneficial use.

58. The Applicant has proposed to install staff gages at points upstream and downstream of this changed reach and to calibrate the gauges in order to measure flows to confirm the beneficial use. Should the Applicant need to make a call for water or should a water commissioner be appointed, the operation condition described in this document will ensure that the protected flow rate does not exceed the maximum historical diverted volume.

CONCLUSIONS OF LAW

59. The Applicant bears the affirmative burden of proving that 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. §85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

60. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (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, where 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 deprived the plaintiff of his subsequent right).

61. The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13; City of Bozeman (DNRC), supra; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 (1908)....

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow...

We do not dispute this interrelationship between historic consumptive use, return flow,

and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” Citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

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

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

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

62. Consumptive use of water may not increase when an existing water right is changed. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted Final Order (2003). Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC Proposal for Decision 2003); *In the Matter of Application to Change a Water Right No. 43B 30002710 by USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

63. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of a water right and an appropriator is not entitled to return flows in a

change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. see also, Doney, p. 21.

The Montana Supreme Court also recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43, *citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, supra.

64. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., Hohenlohe, supra; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra. The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

65. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA.(FOF Nos. 49 – 58)

Beneficial Use

FINDINGS OF FACT

66. The Applicant proposes to change water under 41F 138425-00 (IR) to instream fishery use for the purpose of supporting various fish species in Horse Creek. The amount requested is 5.95 CFS up to 247.83 AF. The volume historically consumed from the source, 178.85 AF,

would be protected for approximately 0.97 miles along the new protected reach. Instream flow for the benefit of fisheries is a recognized beneficial use in the State of Montana, and the Department finds it as such.

67. Under 41F 127287-00 (ST), the historical beneficial use of stock water was established at the time the water right was decreed. Stock use is a recognized beneficial use in the State of Montana, and the Department finds it as such.

68. Water Right Solutions, Inc., measured a flow rate of 9.7 CFS in Horse Creek on November 13, 2013. The historically diverted flow rate and the flow rate that is now proposed for instream flow represents 61.3 percent of the total flow in Horse Creek. The requested volume would enhance the fishery in the same manner as the requested flow rate. Furthermore, the Applicant submitted two letters of support to demonstrate the beneficial use of water left instream for the Horse Creek fishery.

a. Joseph Urbani, Fisheries Biologist/Principal of Urbani Fisheries, LLC, explained that Horse Creek is an important tributary of the Madison River for the spawning of rainbow and brown trout. Furthermore, the creek supports longnose dace, mottled sculpin, and Westslope cutthroat trout. The additional instream flows will:

- i. “Improve access and habitat for spawning rainbow and brown trout from the Madison River”;
- ii. Help maintain cooler stream temperatures in both Horse Creek and the Madison;
- iii. Maintain juvenile and adult fish habitat; and
- iv. Maintain aquatic macro-invertebrate habitat.

b. Michael W. Vaughn, Madison-Gallatin Fisheries Biologist for the Montana Department of Fish, Wildlife & Parks, explained that leaving water instream will “help existing resident trout populations and provide greater spawning and nursery habitats for Madison River fish.” The flows will also protect riparian habitat for other species and contribute to lower water temperatures in Horse Creek and the Madison.

69. The Montana Department of Fish, Wildlife, and Parks (DFWP) estimates that Montana's portion of the Madison River has about 102 tributaries, most of which are short and small. Many of these smaller tributaries have not yet been fully studied and do not appear on agency lists such as the DFWP list of chronically dewatered streams or the Montana Department of Environmental Quality Clean Water Act Information Center list. Horse Creek is a relatively small tributary arising in the Gravelly Range. Two sources have submitted evidence that Horse Creek is an important tributary to the Madison River. DFWP recognizes the Madison River as a blue-ribbon trout stream and one of Montana's "premier wild trout fisheries," and indeed this reputation is well known internationally. DFWP maintains statements of claim and instream flow reservations along the Madison. With high scenic values, good public access, and outstanding fishing, the Madison is one of the most important recreational streams in Montana. It is used annually by hundreds of thousands of fishermen, recreational boaters and "floaters," bird and wildlife watchers, and other recreationalists. For example, DFWP estimates that the Madison receives over 200,000 angler days per year. Additionally, the Madison has well-known issues with high summer water temperatures because the upper reaches of the Madison River flow through the most thermally active region of the United States and because much of the river is relatively wide and shallow. High water temperatures can adversely affect fisheries and the entire fluvial ecosystem. Flows on the Madison are regulated upstream by Hebgen Dam (Hebgen Reservoir) and downstream by Madison Dam (Ennis Lake), so leaving additional water instream in Madison tributaries will provide significant benefits to recreational opportunities and contribute toward lower water temperatures in Horse Creek and the Madison River.

CONCLUSIONS OF LAW

70. 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. §§85-2-301 and 311(1)(d), MCA.

71. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, 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; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *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 of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without

waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. The Department can also consider waste in a change proceeding. Hohenlohe ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

72. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005).

73. Applicant proposes to use water for instream flow to benefit fisheries and for stock use, which are recognized beneficial uses. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that instream flow for fisheries is a beneficial use and that 247.83 AF, of which 178.85 AF is legally protectable in the protected reach, and a flow rate of 5.95 CFS is the amount needed to sustain the beneficial use. Applicant has proven by a preponderance of the evidence that stock use is a beneficial use and that 7.00 AF of diverted and consumed volume is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 66 – 69)

Adequate Diversion

FINDINGS OF FACT

74. This application requests the temporary instream flow change of an irrigation right, with the POD being permanently changed to the SWSWNW of Section 20, in addition to the permanent change of the POD and POU of a multiple use stock right that was historically served from the same ditch that conveyed the irrigation water. The Applicant has proposed to install staff gages at the proposed new permanent POD and at a point in the NWNE of Section 20, near the lower reaches of Horse Creek.

75. In application item IR.1.C, the Applicant explained that the D-6 Ditch, which historically conveyed water from Horse Creek to the POU, is “no longer in use (by stipulation) and will never be used again...”. Therefore, it appears that, as the conveyance system currently exists, the means of diversion are not adequate to exercise the existing irrigation right and that allowing a

change to instream flow and stock direct from the creek would allow the Applicant to exercise their right fully.

76. The temporary change of appropriation water right 41F 138425-00 (IR) is to maintain or enhance stream flows to benefit the fishery resource pursuant to §85-2-402(2)(b)(ii), MCA, which, being for instream flow, does not require a diversion. Furthermore, the permanent POD and POU change of right 41F 127287-00 (ST) is to stock drinking directly from Horse Creek, so a diversion is not required.

CONCLUSIONS OF LAW

77. Pursuant to §85-2-402(2)(b)(ii), MCA, for a temporary change of appropriation right for instream flow pursuant to §85-2-408, MCA, the Applicant is exempt from proving by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

78. The adequate means of diversion statutory test merely codifies and encapsulates 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; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use*

Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior appropriators. *E.g., In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).*

79. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. §85-2-402 (2)(b), MCA. (FOF 74 – 76).

Possessory Interest

FINDINGS OF FACT

80. With regards to water right 41F 138425-00 (IR) , this application is for a temporary change in appropriation right for instream flow to protect, maintain, or enhance stream flows pursuant to §85-2-408, and is exempt from the possessory interest criteria found in §85-2-402(2d), MCA. However, with regards to both water rights 41F 138425-00 (IR) and 41F 127287-00 (ST), according to Montana Department of Revenue records, the Applicant owns all of the land surrounding Horse Creek from the proposed new permanent POD in the SWSWNW of Section 20 to the confluence of Horse Creek with the Madison River in the SESESW of Section 17, T10 S, R01 E, Madison County.

81. Furthermore, the applicant signed the affidavit on the application form, affirming that the applicant has 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.

CONCLUSIONS OF LAW

82. Pursuant to §85-2-402(2)(d)(ii), MCA, for a temporary change of appropriation right for instream flow pursuant to §85-2-408, MCA, the Applicant is exempt from proving by a preponderance of the evidence that it 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 or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

83. Pursuant to ARM. 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

84. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. §85-2-402(2)(d), MCA. (FOF No. 80 – 81)

Instream Flow Change Requirements

FINDINGS OF FACT

85. The stream to be protected is the 0.97-mile reach of Horse Creek from the proposed new permanent POD in the SWSWNW of Section 20 to the confluence of Horse Creek with the

Madison River in the SESESW of Section 17, T10 S, R01 E, Madison County. (FOF Nos. 6 – 12)

86. The Applicant's stream flow measurement plan indicated that staff gages would be installed and calibrated at the proposed new permanent upstream POD and at a point in the NWNE of Section 20, near the lower reaches of Horse Creek, in order to measure flows and monitor the source. A condition of this Change Authorization is that the appropriator take monthly measurements, which are to be available to the Department upon request. (FOF Nos. 6 – 12)

87. The maximum amount of water that can be changed to maintain and enhance stream flows to benefit the fishery resource for Temporary Change Authorization 41F 30070072 is up to the amount historically diverted into the D-6 Ditch, or the requested 5.95 CFS up to 247.83 AF. The maximum amount of water that can be protected within the requested reach is the amount historically consumed, 5.95 CFS up to 178.85 AF. The operation condition in this document describes how the the protected flow rate will be followed to prevent exceeding the volume limitation on this right, in the event that the Applicant makes a call for water or a water commissioner is appointed. (FOF Nos. 11, 29, 31)

88. This Temporary Change Authorization for water to maintain and enhance instream flow to benefit the fishery resource will not adversely affect the water rights of other persons. (FOF Nos. 49 – 58)

89. The flow rate and volume of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. (FOF Nos. 66 – 69)

90. The temporary change is for a period of 10 years.

CONCLUSIONS OF LAW

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

92. If the quantity of water that is subject to a temporary change in appropriation right is made available from the development of a new water conservation or storage project, a

temporary change in appropriation right may be approved for a period not to exceed 30 years unless a renewal is obtained. (§ 85-2-407(9), MCA)

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

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

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

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

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

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

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

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

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

96. Section 85-2-408(7), MCA provides:

The maximum quantity of water that may be changed to maintain and enhance stream flows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance stream flows to benefit the fishery resource below the existing point of diversion.

97. Pursuant to the District Court decision in *Hohenlohe v. DNRC*, Cause No. BDV-2008-750, Montana First Judicial District (June 10, 2009), *aff'd*, *Hohenlohe v. DNRC*, 2010 MT 203, an applicant in a change in appropriation right proceeding for instream flow can protect the full historic diverted flow rate and volume in certain circumstances. The full historic diverted amount (flow and volume) can be protected to the extent it does not return to the watercourse within the protected reach and it returns to those appropriators who rely on the return flow in accordance with the adverse effect criterion §85-2-402(2)(a), MCA. *Hohenlohe*, ¶¶42, 67 - 70. The determination under 85-2-408(7) as to the amount protected is within the Department's discretion. *Id.* at ¶¶37, 39. The Department has the discretion under appropriate circumstances to limit or reduce that portion suitable for instream flow from the amount historically diverted to the amount historically consumed, or a smaller amount, (§85-2-408(7), MCA) and to approve the change under such conditions as the Department considers necessary (§85-2-402(8), MCA). *Id.* at ¶¶67-69.

98. The Applicant has provided a detailed measurement plan and specific information on the stream reach to be protected, which runs from a point in the SWSWNW of Section 20 to the confluence of Horse Creek and the Madison River in the SESWSE of Section 17. The Applicant has agreed to an operation condition describing how the flow rate will be followed so as not to exceed the volume limitation on this water right in the event that the Applicant makes a call for water or a water commissioner is appointed. (FOF Nos. 85 – 90)

99. The Applicant has proven by a preponderance of the evidence that the temporary change authorization will not adversely affect the rights of other persons. (FOF Nos. 49 – 58)

100. The Applicant has proven by a preponderance of evidence that 5.95 CFS up to 247.83 AF, with 178.85 AF protected, is the amount needed to maintain or enhance instream flows to benefit the fishery resource. (FOF Nos. 66 – 69)

Salvage Water

FINDINGS OF FACT

101. This Application does not involve salvage water.

Conditions for 41F 138425-00 (IR)

WATER MEASUREMENT RECORDS REQUIRED (TEMPORARY CHANGE)

THE APPLICANT OR A DESIGNEE SHALL MEASURE THE PROTECTED REACH OF HORSE CREEK IN MADISON COUNTY MONTHLY FROM MAY THROUGH SEPTEMBER USING DEPARTMENT-APPROVED MEASURING DEVICES. MEASUREMENTS MUST BE TAKEN A MINIMUM OF MONTHLY DURING THE MEASUREMENT TIME PERIOD. MEASUREMENT RECORDS SHALL BE MADE AVAILABLE TO THE DEPARTMENT UPON REQUEST DURING THE TEMPORARY CHANGE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE ACCURATELY.

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (INSTREAM FLOW)

IN THE EVENT THAT THE APPLICANT MAKES A CALL FOR WATER OR A WATER COMMISSIONER IS APPOINTED, THE FOLLOWING OPERATION OF PROTECTION REPRESENTING UNDIVIDED, CONTINUOUS FLOW RATES OF THE WATER RIGHT MUST BE FOLLOWED TO PREVENT EXCEEDING VOLUME LIMITATIONS ON THE WATER RIGHT.

Month	Protected Reach Flow Rate	Days Diverted	Volume Diverted
(-)	(CFS)	(#)	(AF)
May	1.01	31	61.96
Jun	1.01	30	59.96
Jul	1.01	31	61.96
Aug	1.01	31	61.96
Sep	1.01	1	2.00
		SUM =	247.83

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 41F 30070072 for Water Right No. 41F 138425-00 (IR) should be granted subject to the following:

The Applicant may change the purpose of irrigation water right 41F 138425-00 (IR) to instream flow for the benefit of the fishery resource of Horse Creek, tributary to the Madison River. Under this Temporary Change Authorization, water will no longer longer be diverted from Horse Creek and historic irrigation will be discontinued. The right will have an instream flow rate of 5.95 CFS up to 247.83 AF, with 178.85 AF protected along the new protected reach. The point of diversion for this right will be temporarily changed to the SWSWNW of Section 20, T10 S, R01 E, Madison County. The place of use will be temporarily changed to the reach from a point in the SWSWNW of Section 20 to the confluence of Horse Creek with the Madison River in the SESWSE of Section 17, T10 S, R01 E, Madison County for a period of 10 years. This instream change may be renewed for a period not to exceed 10 years, pursuant to §85-2-407, MCA.

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 41F 30104013 for Water Right No. 41F 127287-00 (ST) should be granted subject to the following:

The Applicant may permanently change the point of diversion and place of use for multiple use stock water right 41F 127287-00 (ST) to the reach from a point in the SWSWNW of Section 20 to the confluence of Horse Creek with the Madison River in the SESWSE of Section 17, T10 S, R01 E, Madison County. The means of diversion is stock drinking directly from the creek. This water right will continue to serve the historical number of stock.

NOTICE

This Department will provide public notice of these Applications and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to these Applications pursuant to §§85-2-307, and -308, MCA. If one or both of these Applications receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If one (or both) Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant the Application as herein approved. If the Application(s) receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application(s) with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 9th day of December 2015.

/Original signed by Kerri Strasheim/
Kerri Strasheim, Regional Manager
Bozeman Regional Office
Department of Natural Resources and Conservation