

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

APPLICATION TO CHANGE WATER)	PRELIMINARY DETERMINATION TO GRANT CHANGE
RIGHT NO. 41F 30070510 BY SUN WEST)	
RANCH PROPERTY OWNERS ASSN)	

On August 15, 2014, Sun West Ranch Property Owners Association (Applicant) submitted Application to Change Water Right No. 41F 30070510 to change Water Right Claim Nos. 41F 30066080 and 41F 127289-00 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 February 4, 2015.

The Department met with the Applicant’s consultant, Dave Baldwin of Water Right Solutions, Inc., for a pre-application meeting on November 6, 2013. This pre-application meeting was renewed through another meeting on July 16, 2014. An Environmental Assessment for this Application was completed on February 4, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as Filed:

- Form 606 IR, Addenda, and Supplements
- Peter Fritsch Master’s Report authorizing split claim 41F 30066080 from original Statement of Claim 41F 138424-00, dated May 2, 2014.
- 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, and Parks) to Dave Baldwin (Water Right Solutions, Inc.), dated January 6, 2014

Information Received after Application Filed:

- Email Correspondence with Consultant

Information within the Department's Possession/Knowledge

- Environmental Assessment, dated February 4, 2015
- Water Right Claim Files 41F 138424-00, 41F 30066080, and 41F 127289-00
- Rusty Taylor June 18, 1991, field investigation notes and correspondence
- 1947 Madison 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. Statement of Claim No. 41F 30066080 is a split claim that was authorized by Water Master Peter Fritsch on May 2, 2014. This claim was authorized by the Montana Water Court based on information in Statement of Claim No. 41F 138424-00. Previously, the Sun West Ranch Property Owners Association and the Theodore E. Gildred Trust co-owned claim 41F 138424-00. The split authorization more accurately reflects the proportional ownership of the claimed place of use (POU) and flow rate. Claim 41F 30066080 is owned by the Applicant; claim 41F 138424-00 is owned by the Gildred Trust.

2. The purpose of Statement of Claim No. 41F 30066080 is flood irrigation on a POU of 69 acres in Sections 28 and 29; T10 S, R01 E, Madison County. This water right is for 3.50 cubic feet per second (CFS) of flow from Second Standard Creek, a tributary of the Madison River, with a priority date of May 15, 1888. No diverted volume has been decreed for this right. The period of use and the period of diversion are from May 1 to September 30. The point of diversion (POD) is located in the SENESW of Section 33, and water is conveyed to the POU through the Lyon Ditch, a.k.a., D-5 Ditch. The POU is located approximately 30 miles south of Ennis in Madison County.

3. Statement of Claim No. 41F 127289-00 is currently co-owned by the Sun West Ranch Property Owners Association (Applicant) and the Theodore E. Gildred Trust. A request to split the water right has been submitted to the Water Court. A copy of that request is included in this change application file.
4. The purpose of Statement of Claim No. 41F 127289-00 is stock use. This multiple use right originally claimed 506 animal units (AU) and 7.00 AF. The Applicant asserts that the maximum use under their portion of the right was 354 AU. This water right does not have a decreed flow rate or volume, as stock drank directly from the Lyon Ditch. The priority date is May 15, 1888, and the period of use is from May 1 to September 30. The POD is the same as the above-described irrigation right: the SENESW of Section 33. The POU is Sections 28, 29, and 33. Water was conveyed to the POU through the Lyon Ditch, from which stock drank directly.
5. Sun West Ranch Property Owners Association is the sole owner of irrigation claim 41F 30066080. Sun West Ranch Property Owners Association is a co-owner of stock claim 41F 127289-00. The Applicant has submitted a request to split this claim to the Water Court.
6. Department records do not list either of the rights being changed in this application as supplemental to other rights. Irrigation rights 41F 30066080 (Sun West) and 41F 138424-00 (Gildred Trust) are both conveyed to their POUs through the Lyon Ditch. The Applicant's POU is farther "down ditch" than the Gildred Trust POU.
7. No previous change authorizations have been issued on Statement of Claim 41F 30066080. This right is a split claim based on information in claim 41F 138424-00. The historical basis for this right is a filed notice of appropriation. No previous change authorizations have been issued on Statement of Claim 41F 127289-00. A request to split the Applicant's portion of this right is currently pending with the Water Court. The historical basis for this right is a use right that began on May 15, 1888. A Statement of Claim was filed with the Department on March 22, 1982. The stock right is a multiple use right with the irrigation right. Basin 41F is currently under a Temporary Preliminary Decree through the Water Court.

8. Table 1 reflects the existing water right details.

Table 1: Existing Water Right Details

Water Right Number	Flow Rate	Diverted Volume	Purpose	Period of Use	Place of Use	Point of Diversion	Priority Date
41F 30066080	3.50 CFS	--	Flood Irrigation	5/1 – 9/30	69 acres Sec. 28, 29, T10 S, R01 E	SENE SW, Sec. 33, T10 S, R01 E	5/15/1888
41F 127289-00	--	--	Stock	5/1 – 9/30	Sec. 28, 29, 33, T10 S, R01 E	SENE SW, Sec. 33, T10 S, R01 E	5/15/1888

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.

9. The purpose of 41F 30066080 would be temporarily changed to instream flow in order to maintain streamflow levels for the benefit of the fisheries in Second Standard Creek, which is tributary to the Madison River, for a period not to exceed 10 years with the option to renew the instream change. Under the instream change, the POU and POD would be temporarily changed to the reach of Second Standard Creek from the historical POD to the confluence of Second Standard Creek and the Madison River. This reach extends from a point in the SENESW of Section 33 to the confluence in the SWNWSE of Section 33; both T10 S, R01 E, Madison County. Water would no longer be diverted through Lyon Ditch under this right and would instead be left in Second Standard Creek. During the temporary change, no irrigation would occur under 41F 30066080. The full volume that was historically diverted under this water right would be protected along the reach from the headwaters of Second Standard Creek to the historical POD in the SENESW of Section 33. Only the total volume that was historically consumed would be protectable along the reach from the historical POD to the confluence of Second Standard Creek with the Madison River.

10. Concurrently, the Applicant also proposes to temporarily change the purpose of multiple use stock right 41F 127289-00 to instream flow in order to maintain streamflow levels for the benefit of the fisheries in Second Standard Creek and the Madison River for a period not to exceed 10 years with the option to renew the instream change. The protected reach would align exactly with the reach described above for the instream version of the irrigation right: a stretch from the SENESW of Section 33 extending to the SWNWSE of Section 33; both T10 S, R01 E, Madison County. During the temporary change, no stockwatering could occur under this right. Water would no longer be diverted through the Lyon Ditch under this right and would instead be left instream in Second Standard Creek.

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

12. The Applicant has proposed to install staff gages at the historical POD and at a point just above the confluence of Second Standard Creek and the Madison River in the SWNWSE of Section 33 in order to measure flows and monitor the source.

13. The following conditions will be incorporated into the analysis below:

WATER MEASUREMENT RECORDS REQUIRED (TEMPORARY CHANGE)
THE APPLICANT OR A DESIGNEE SHALL MEASURE THE PROTECTED REACH OF SECOND STANDARD 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 DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE ACCURATELY.

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (41F 30066080)

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	Flow Rate	Days Diverted	Volume Diverted
(-)	(CFS)	(#)	(AF)
May	0.48	31	29.54
Jun	0.48	30	28.59
Jul	0.48	31	29.54
Aug	0.48	31	29.54
Sep	0.48	30	28.59
		SUM =	145.79

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (41F 127289-00)

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	Flow Rate	Days Diverted	Volume Diverted
(-)	(GPM)	(#)	(AF)
May	7.38	31	1.01
Jun	7.38	30	0.98
Jul	7.38	31	1.01
Aug	7.38	31	1.01
Sep	7.38	30	0.98
		SUM =	4.99

Change Overview

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

Table 2: Proposed Water Right Change Details

Water Right No. (41F)	Flow Rate (CFS)	Volume (AF)	Purpose	Period of Use	Place of Use ²	Point of Diversion ²	Priority Date
30066080	3.50 CFS	<i>Total:</i> 145.79 ¹ <i>Protected Reach:</i> 107.38 ¹	Instream Fishery	5/1 – 9/30	<i>Reach:</i> SENESW, Sec. 33 to SWNWSE, Sec. 33	<i>Reach:</i> SENESW, Sec. 33 to SWNWSE, Sec. 33	5/15/1888
127287-00	--	4.99 AF	Instream Fishery	5/1 – 9/30	<i>Reach:</i> SENESW, Sec. 33 to SWNWSE, Sec. 33	<i>Reach:</i> SENESW, Sec. 33 to SWNWSE, Sec. 33	5/15/1888
<p>Notes: ¹The full historically diverted volume is protectable from the headwaters to the historical POD; only the historically consumed volume is protectable from the POD to the confluence of Second Standard Creek and the Madison River. The protected reach is approximately 0.42 miles long. ²Both the POU and POD are located in T10 S, R01 E, Madison County.</p>							

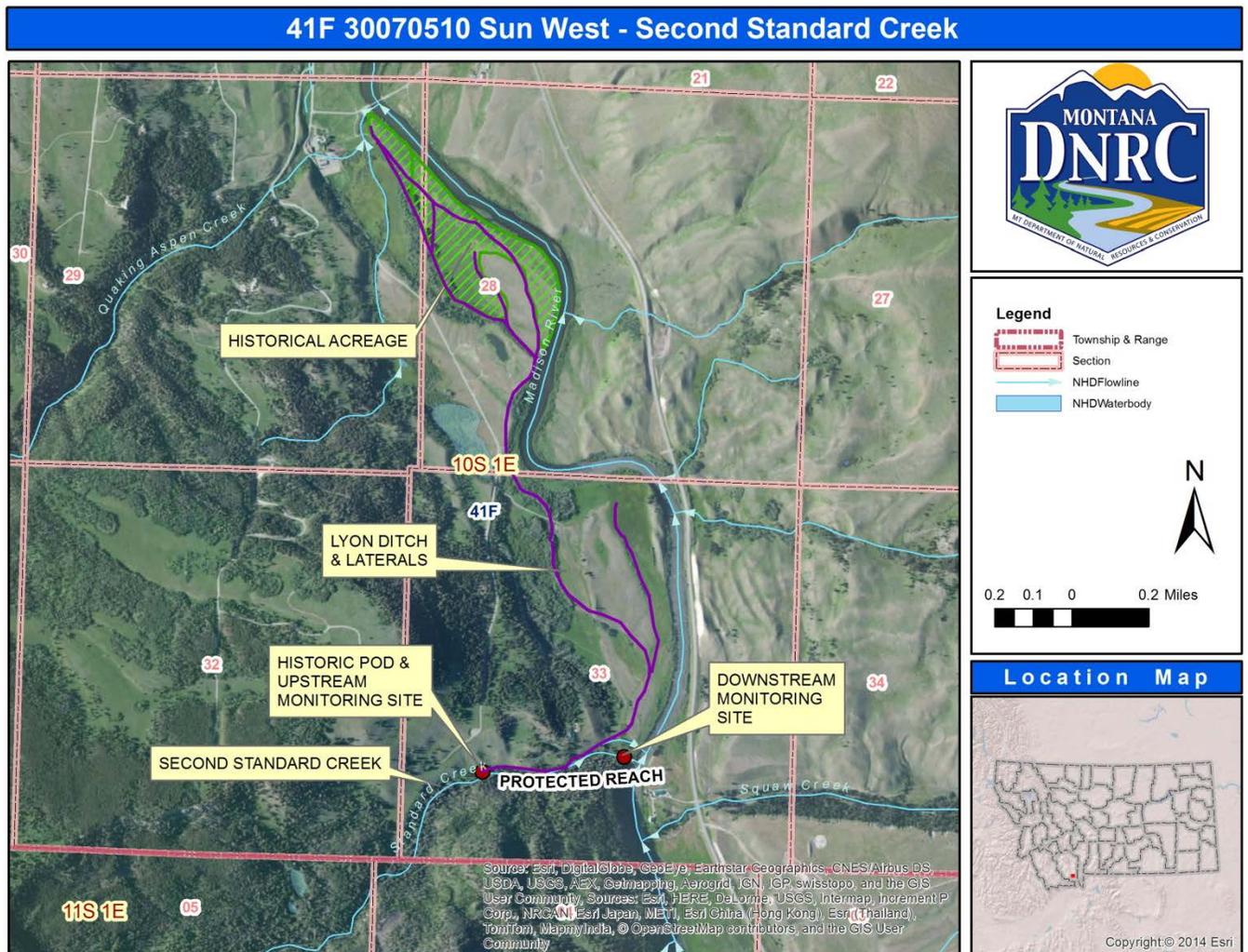


Figure 1: Area map for the proposed changes.

§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

15. 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.

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

17. 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).

18. 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.

19. 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*).

20. 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](#).

21. 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).

22. 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.

23. 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.

24. 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).

25. 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

26. Both of the water rights proposed for change share the same historical POD, located in the SENESW of Section 33, T10 S, R01 E, Madison County. From this POD, water was conveyed to the irrigated acres through the Lyon Ditch. Stock pastured in the area and drank directly from the ditch. This diversion and conveyance is shown in historical data sources, such as the Water Resources Survey for Madison County.

Place of Use

27. **Water Right No. 41F 30066080**

The claimed POU for this water right is 69 acres located in Sections 28 and 29, T10 S, R01 E, Madison County. DNRC analysis of the 1954 Madison County Water Resources Survey (aerial imagery date: 1947) found 50.22 irrigated acres. DNRC analysis of a 1980 USDA aerial photograph (imagery date 7/27/1980) found 47.28 irrigated acres. Dave Baldwin, Water Right Solutions, Inc., agreed to a maximum acreage of 50.22 acres in a January 30, 2015, email. See Figure 2 below for the maximum acreage mapped on the 1954 Water Resources Survey.

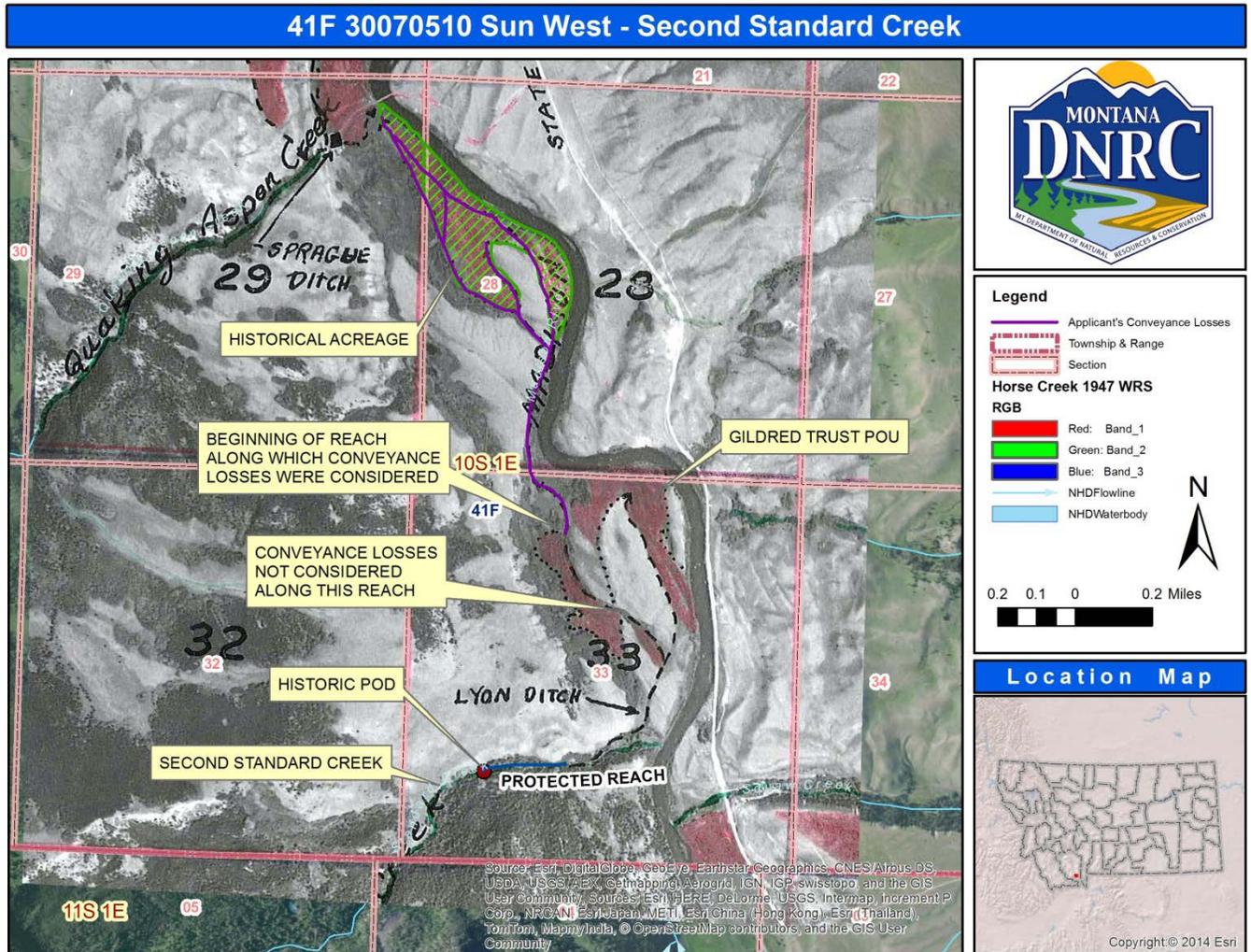


Figure 2: Place of use and irrigated acreage for water right 41F 30066080. Madison County Water Resources Survey (1954), aerial imagery dated 1947.

28. Water Right No. 41F 127289-00

The historical POU for this multiple use stock right is Sections 28, 29, and 33. Stock pastured in the area and had access to the ditch. Stock drank directly from the Lyon Ditch as it conveyed water across the Applicant's property.

Periods of Diversion and Use and Priority Date

29. **Water Right No. 41F 30066080**

The claimed and decreed period of diversion and period of use are from May 1 to September 30. 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 well within the guideline and is reasonable for the area. The priority date of May 15, 1888, for this multiple use right is based on a historical filed appropriation and is reasonable for the area.

30. **Water Right No. 41F 127289-00**

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 Lyon Ditch, which conveys water to the irrigation POU; stock drink directly from the ditch. This is reasonable for the area, and the water was diverted daily. The priority date of May 15, 1888, for this multiple use right is based on a historical filed appropriation and is reasonable for the area.

Flow Rate

31. **Water Right No. 41F 30066080**

The historical flow rate associated with water right 41F 138424-00 is 7.55 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 initially concluded that the maximum flow rate for Lyon Ditch was 5.95 CFS. The Applicant's then-attorney provided additional information on the operation of Lyon Ditch and its laterals, additional ditch measurements, and computations from an engineer hired by Sun West. After reviewing this information, Mr. Taylor suggested a "reasonable flow rate of ... 302 M.I." (7.55 CFS) for claim 41F 138424-00, based on the Sun West engineer's

measurements and the Department's calculations. This flow rate of 7.55 CFS was adopted by the Water Court. Subsequently, a motion was filed with the Water Court to split Sun West's portion of this right from the portion owned by Gildred Trust. Right 41F 30066080 is a split claim authorized by the Water Court and generated based on claim 41F 138424-00. Lyon Ditch first conveyed water to the Gildred POU, afterward continuing on to deliver water to the Sun West POU. The requested split was authorized, and Water Master Peter Fritsch found a proportionate flow rate of 3.50 CFS for right 41F 30066080. Right 41F 138424-00 retained the remaining 4.05 CFS. The sum of these two flow rates is 7.55 CFS. Mr. Taylor's 1991 investigation and steady uniform flow modeling of the ditch using Manning's equation confirm that the Lyon Ditch was capable of conveying 3.50 CFS to the Applicant's POU.

32. Water Right No. 41F 127289-00

The historical flow rate associated with water right 41F 127289-00 was not quantified because the right is for stock drinking directly from a ditch. The Applicant did not provide information about the use of this right that would allow for a quantification of the diverted volume under the stock right separate from the diverted volume under the irrigation right. In order to calculate a protectable instream flow rate, the total volume consumed by stock was used – 4.99 AF. Therefore, this flow rate represents the average rate at which water was consumed from the source, not necessarily the total flow rate that was diverted under the stock right. 4.99 AF over 153 days calculates to 7.38 GPM.

Diverted Volume and Consumed Volume

33. Water Right No. 41F 30066080

This water right was historically exercised at the full flow rate of 3.50 CFS for flood irrigation three times per season for seven days each, giving a total diverted volume of 145.79 AF. Under ARM 36.12.1902(10), the Department calculated a historic diverted volume of 127.78 AF. The Applicant's calculated volume is reasonable when compared to the Department's standards. Because the Applicant had this specific operational information regarding the historical operation of this water right, the value of 145.79 AF will be employed. 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 =	46.90	AF
(2) ditch evaporation =	7.05	AF
(3) plant evapotranspiration along the ditch =	2.66	AF
(4) irrecoverable field loss =	4.88	AF
(5) return flows consumed from source =	45.88	AF
Total consumptive use (1 – 4) =	61.50	AF
Total volume consumed from source (1 – 5) =	107.38	AF

The total consumed volume for this water right is 61.50 AF. However, additional volume was consumed from the source because the full return flow volume, 45.88 AF, accrued to the Madison River instead of returning to the source, Second Standard Creek. Therefore, the total historically consumed volume under this right is 61.50 AF, but up to 107.38 AF may be protected for instream flow along the protected reach because that volume was consumed from the source. The total diverted volume is 145.79 AF.

34. Water Right No. 41F 127289-00

Claim 41F 127289-00 is a right for stock drinking directly from the Lyon Ditch and is being changed to instream flow. The volume identified here is the consumed volume. The original claim was filed for 506 AU. The Applicant asserts that their maximum historical use was 354 AU. Using the standard of 30 gallons per day per animal from May 1 to September 30 (153 days) for 354 AU results in a volume of 4.99 AF per year.

Return Flows

35. The historical return flow volume for water right 41F 30066080 is the difference between the volume delivered to the field and the volume consumed by crops and irrecoverably lost in application: $97.67 - (46.90 + 4.88) = 45.88$ AF. The entire return flow volume accrued to the

Madison River and was lost to the source, making it legally protectable as instream flow under this change. The total volume protectable for instream flow is then 107.38 AF. See the Department’s February 4, 2014, Return Flow Memorandum for a full discussion of return flows for this right.

Supplemental Rights and Non-Use

36. Department records do not list water right 41F 30066080 as supplemental to any other rights. It is conveyed to its POU in the same ditch used by irrigation right 41F 138424-00, which is owned by the Gildred Trust. Stock right 41F 127289-00, also being changed in this application, is a multiple use right with this irrigation right.

37. In the Application, consultant Water Right Solutions, Inc., indicated that, while the Gildred Trust right was last used in 2013, irrigation right 41F 30066080 and stock right 41F 127289-00 have not been used “to the extent identified” since 1986. This period exceeds 10 years, so a non-use analysis is warranted. In his June 18, 1991, field investigation, Mr. Taylor noted that the Lyon Ditch “would require extensive work at the upper end to become functional as brush and small trees exist throughout the upper portions of the ditch. Mr. Henry [then-ranch manager] stated that this system was last used 4 or 5 years ago.” The timeline explained by Mr. Taylor corroborates a period of non-use beginning in approximately 1986. Resumption of use under these rights will be evaluated for adverse effect in the appropriate section.

Overview

38. Table 3 represents the historical use:

Table 3: HISTORICAL USE

Water Right Number	Priority Date	Diverted Volume	Consumptive Use	Flow Rate	Purpose	Place of Use	Point of Diversion
41F 30066080	5/15/1888	145.79 AF	61.50 AF ¹ 107.38 AF ²	3.50 CFS	Irrigation 50.22 acres	W½, Sec. 28; E½NE, Sec. 29, T10 S, R01 E	SENESEW, Sec. 33, T10 S, R01 E
41F 127289-	5/15/1888	--	4.99 AF	--	Stock 354 AU-	NW, Sec. 20; S2SW, Sec. 17,	SENESEW, Sec. 33,

00						T10 S, R01 E	T10 S, R01 E
Notes: ¹ Historic consumptive use. ² Consumed from the source and legally protectable under the instream flow change.							

CONCLUSIONS OF LAW

39. 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).

40. 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).

41. 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.

42. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

43. 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)

44. 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”).

45. 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)).

46. “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*.

47. 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.

48. 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. 33)

49. The Applicant has proven by a preponderance of the evidence that the historic use of Water Right Claim No. 41F 30066080 is 145.79 AF of diverted volume and 3.50 CFS flow rate with a consumptive use volume of 61.50 AF and a volume consumed from the source of 107.38 acre-feet. (FOF Nos. 26 – 38)

50. The Applicant has proven by a preponderance of the evidence that the historic use of Water Right Claim No. 41F 127289-00 is a historic consumptive volume of 4.99 acre-feet. (FOF Nos. 26 – 38)

Adverse Effect:

FINDINGS OF FACT

51. The source of water for irrigation right 41F 30066080 is Second Standard Creek. Under this Temporary Change Authorization, water in the amount of 3.50 CFS up to 145.79 AF will be

left in Second Standard Creek for the purpose of instream fisheries. The full amount of 145.79 AF will be protectable from the headwaters of Second Standard Creek to the new permanent POD. The volume that was historically consumed from the source, 107.38 AF, will be protectable from the historical POD to the confluence of Second Standard Creek with the Madison River. This project protects water that was historically consumed from the source instream.

52. The source of water for multiple use stock right 41F 127289-00 is Second Standard Creek. Under this Temporary Change Authorization, water in the amount of 7.38 GPM up to 4.99 AF per year will be left in Second Standard Creek downstream of the diversion for the purpose of instream fisheries. The full amount will be protectable from the headwaters of Second Standard Creek to the confluence of Second Standard Creek and the Madison River. This project protects water that was historically consumed from the source instream.

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

54. 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.

55. This change will not adversely affect upstream and downstream senior water right holders, as all water for 41F 30066080 and 41F 127289-00 is being left instream and use will remain within priority.

56. According to the Applicant and to a 1991 DNRC field investigation, the last time this right was fully exercised was in 1986, so a resumption of use must be analyzed to ensure it does not cause any adverse effect. The Department's records do not indicate any water users located downstream from this right on Second Standard Creek (either PODs or POUs). This change will not cause an adverse effect to downstream water users. Since water will be left instream from the headwaters to the confluence of Second Standard Creek and the Madison, the only possible

adverse effect to upstream users would be if the Applicant were to make a call for water. The rights being changed in this application and the rights owned by the Gildred Trust that also employ Lyon Ditch are the most senior rights on Second Standard Creek. The Applicant has provided information indicating that, when they were fully exercising their right prior to 1986, water was always available and they never had to make a call. The Department has not issued any claims, permits, certificates, or reservations with a source of surface water from Second Standard Creek or an unnamed tributary since the Applicant stopped fully exercising their right in 1986. (Montana DFWP does have a 1985 instream flow reservation, but leaving additional water instream would be beneficial in helping to meet this reservation. DFWP has submitted a letter of support for the current application.) As Second Standard is a small creek, no streamflow data are available for it. However, the Applicant measured a flow rate of 5.7 CFS on November 13, 2013, and estimated a flow rate of 15 CFS during the irrigation season, indicating that water is physically available in the creek. The Department does not have any records of enforcement actions or the appointment of or request for a water commissioner on Second Standard Creek, so no increase in calls for water is anticipated as a result of this change. If the Applicant's resumption of use of this water as an instream right does adversely affect another water user, statute allows for that appropriator to file an objection during the term of the temporary change and during the renewal process.

57. The entire volume of return flows from irrigation right 41F 30066080 accrued directly to the Madison River. The Applicant's POU is located immediately adjacent to the Madison River. There are no intervening POUs or PODs between the historically irrigated acreage and the Madison River that could have been dependent upon return flows. The Department's records do not identify any PODs or POUs between the Applicant's historical POD on Second Standard Creek and the Madison River confluence that could be affected by a loss of return flows. The timing of return flows will change, because now instead of accruing as return flows, water will simply be left instream. In a November 4, 2014, Return Flow Report, the Department calculated that 91% of return flows accrued to the Madison within one month and that 100% accrued within two months. This difference in timing is not significant, and no PODs or POUs were identified that could be impacted. Supplemental letters of support from Montana Department of Fish,

Wildlife, and Parks (DFWP) and Urbani Fisheries indicate that leaving water instream during the summer months is more critical for the ecology of Second Standard Creek, as opposed to any return flows that may accrue after the irrigation season.

58. This change will not adversely affect the ability of the Gildred Trust, which also employs the Lyon Ditch, to exercise their right. In this application, no conveyance losses were considered along the stretch of Lyon Ditch from the historical POD to the Gildred POU as conveyance losses will still occur since Gildred will continue to use the ditch in the same manner as it is currently used. The Applicant has received credit for conveyance losses extending only from the Gildred POU to the Applicant's POU, a reach along which they were the only appropriator diverting water. The Gildred Trust water right still retains sufficient carriage water to fully exercise their historical rights.

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

CONCLUSIONS OF LAW

60. 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).

61. 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).

62. 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.

63. 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).

64. 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*.

65. 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.

66. 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. 51 – 59)

Beneficial Use

FINDINGS OF FACT

67. The Applicant proposes to change water under 41F 30066080 to instream fishery use for the purpose of supporting various fish species in Second Standard Creek, tributary to the Madison River. The amount requested is 3.50 CFS up to 145.79 AF. The volume historically consumed from the source, 107.38 AF, would be protected for approximately 0.42 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.

68. The Applicant proposes to change water under 41F 127289-00 to instream fishery use for the purpose of supporting various fish species in Second Standard Creek, tributary to the Madison River. The amount requested is 7.38 GPM up to 4.99 AF. The volume historically consumed from the source, 4.99 AF, would be protected for approximately 0.42 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.

69. Water Right Solutions, Inc., measured a flow rate of 5.7 CFS in Second Standard Creek on November 13, 2013. The historically diverted flow rate now proposed for instream flow represents 61.4% of the total flow in Second Standard 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 Second Standard Creek and Madison River fisheries.

a. Joseph Urbani, Fisheries Biologist/Principal of Urbani Fisheries, LLC, explained that Second Standard 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 Second Standard 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 Second Standard Creek and the Madison.

70. Montana DFWP holds water reservation 41F 30017587 from the headwaters of Second Standard Creek to its confluence with the Madison River for an instream flow rate of 10 CFS year around. (This reservation and information from DFWP’s website list the source as “Standard Creek,” which is a historical name for this stream. The Department’s official source name and the source name decreed by the Water Court is “Second Standard Creek.”) As Second Standard is a small creek, no streamflow data are available for it. However, the Applicant’s November 13, 2013, measurement of 5.7 CFS indicates that there are periods of the year when DFWP’s instream reservation is not met. With a priority date of July 1, 1985, DFWP’s reservation is the most junior right on Second Standard Creek. DFWP’s permanent reservation and the temporary change proposed for these two water rights share the same purpose of ensuring that minimum streamflow levels are maintained for the benefit of fisheries and the fluvial ecology of Second Standard Creek and the Madison River.

71. Montana 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. Second Standard Creek is a relatively small tributary arising in the Gravelly Range. Two sources have submitted evidence that Second Standard Creek is an important tributary to the Madison River. Furthermore, DFWP does not hold instream reservations on all of the small tributaries of the Madison, but the agency deemed Second Standard Creek important enough to apply for an instream reservation. 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 Second Standard Creek and the Madison River.

CONCLUSIONS OF LAW

72. 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.

73. 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; Toohy. 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.

74. 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).

75. Applicant proposes to use water for instream flow to benefit fisheries, which is a recognized beneficial use. §85-2-102(4), MCA. For claim 41F 30066080, Applicant has proven

by a preponderance of the evidence that instream flow for fisheries is a beneficial use and that 145.79 AF, of which 107.38 AF is legally protectable in the protected reach, and a flow rate of 3.50 CFS is the amount needed to sustain the beneficial use. For claim 41F 127289-00, Applicant has proven by a preponderance of the evidence that instream flow for fisheries is a beneficial use and that 4.99 AF of diverted and consumed volume is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF Nos. 67 – 71)

Adequate Diversion

FINDINGS OF FACT

76. The temporary change of appropriation water rights 41F 30066080 and 41F 127289-00 is to protect, 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.

77. The Applicant has proposed to install staff gages at the historical POD and at a point just above the confluence of Second Standard Creek and the Madison River in order to measure flows and monitor the source.

CONCLUSIONS OF LAW

78. 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.

79. 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).

80. Applicant has proven by a preponderance of the evidence that this application is for instream flow to maintain or enhance stream flows to benefit the fishery resource and so is exempt from proving that the proposed means of diversion, construction, and operation of the appropriation works are adequate. §85-2-402 (2)(b)(ii), MCA. (FOF 76 – 77).

Possessory Interest

FINDINGS OF FACT

81. This application is for a temporary change in appropriation right for instream flow to protect, maintain, or enhance stream flows and, under §85-2-402(2)(d)(ii), MCA, is exempt from proving the possessory interest criteria.

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 this application is for instream flow to maintain or enhance stream flows for the fishery resource and so is exempt from proving the possessory interest criteria. §85-2-402(2)(d)(ii), MCA. (FOF No. 81)

Instream Flow Change Requirements

FINDINGS OF FACT

85. The stream to be protected is the 0.42-mile reach of Second Standard Creek from the historical POD in the SENESW of Section 33 to the confluence of Second Standard Creek with

the Madison River in the SWNWSE of Section 33, T10 S, R01 E, Madison County. (FOF Nos. 9 – 14)

86. The Applicant's stream flow measurement plan indicated that staff gages would be installed and calibrated at the historical POD and at a point in the SWNWSE of Section 33, near the confluence with the Madison River, 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. 9 – 14)

87. The maximum amount of water that can be changed to maintain and enhance stream flows to benefit the fishery resource under 41F 30066080 is up to the amount historically diverted into the Lyon Ditch, or the requested 3.50 CFS up to 145.79 AF. The maximum amount of water that can be protected within the requested reach is the amount historically consumed, 3.50 CFS up to 107.38 AF. The maximum amount of water that can be changed to maintain and enhance stream flows to benefit the fishery resource under 41F 127289-00 and protected within the requested reach is 7.38 GPM up to 4.99 AF. The operation conditions in this document describe how the the protected flow rates will be followed to prevent exceeding the volume limitations on these rights, in the event that the Applicant makes a call for water or a water commissioner is appointed. (FOF Nos. 13, 67 – 70)

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. 51 – 59)

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. 67 – 71)

90. The temporary change is for a period of 10 years, the time period requested by the Applicant and the maximum period allowed by statute.

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 SENESW of Section 33 to the confluence of Second Standard Creek and the Madison River in the SWNWSE of Section 33. 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. 86 – 91)

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. 51 – 59)

100. The Applicant has proven by a preponderance of the evidence that 3.50 CFS up to 145.79 AF, with 107.38 AF protected, is the amount needed to maintain or enhance instream flows to benefit the fishery resource under 41F 30066080. The Applicant has proven by a preponderance of the evidence that 7.38 GPM up to 4.99 AF is the amount needed to maintain or enhance instream flows to benefit the fishery resource under 41F 127289-00 (FOF Nos. 67 – 71)

Salvage Water

FINDINGS OF FACT

101. This Application does not involve salvage water.

Conditions

WATER MEASUREMENT RECORDS REQUIRED (TEMPORARY CHANGE)

THE APPLICANT OR A DESIGNEE SHALL MEASURE THE PROTECTED REACH OF SECOND STANDARD 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 DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE ACCURATELY.

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (41F 30066080)

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	Flow Rate	Days Diverted	Volume Diverted
(-)	(CFS)	(#)	(AF)
May	0.48	31	29.54
Jun	0.48	30	28.59
Jul	0.48	31	29.54
Aug	0.48	31	29.54
Sep	0.48	30	28.59
		SUM =	145.79

FLOW RATES NOT TO EXCEED VOLUME LIMITATION (41F 127289-00)

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	Flow Rate	Days Diverted	Volume Diverted
(-)	(GPM)	(#)	(AF)
May	7.38	31	1.01
Jun	7.38	30	0.98

Jul	7.38	31	1.01
Aug	7.38	31	1.01
Sep	7.38	30	0.98
		SUM =	4.99

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right Nos. 41F 30066080 and 41F 127289-00 should be granted subject to the following:

The Applicant may temporarily change the purpose of irrigation water right 41F 30066080 and multiple use stock right 41F 127289-00 to instream flow for the benefit of the fishery resource of Second Standard Creek, tributary to the Madison River. Under this Temporary Change Authorization, water will no longer longer be diverted from Second Standard Creek and historic irrigation and stockwatering will be discontinued. Right 41F 30066080 will have an instream flow rate of 3.50 CFS up to 145.79 AF, with 107.38 AF protected along the designated reach. Right 41F 127289-00 will have an instream flow rate of 7.38 GPM up to 4.99 AF protected from the headwaters of Second Standard Creek to its confluence with the Madison River. The point of diversion and place of use of both rights will be temporarily changed to the reach extending from a point in the SENESW of Section 33 to the confluence of Second Standard Creek with the Madison River in the SWNWSE of Section 33, 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.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application 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 this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application 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 with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 5th day of June 2015.

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