

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

<p>APPLICATION TO CHANGE WATER RIGHT NO. 41O 30138928 BY STATE OF MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS</p>)))	<p>PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE</p>
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On September 10, 2019, the State of Montana Department of Fish, Wildlife, and Parks (Applicant) submitted Application to Change Water Right No. 41O 30138928 to change the purpose and place of use of Water Right Statement of Claim Nos. 41O 178147-00 and 41O 178148-00 to the Havre Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete January 16, 2020. An Environmental Assessment for this Application was completed on March 31, 2020.

I. SUMMARY OF THE APPLICATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 606
- Change to Instream Flow Addendum
- Change in Purpose Addendum
- Temporary Change Addendum
- Historical Water Use Addendum

Information within the Department's Possession/Knowledge

- Statement of Claim file 41O 178147-00

- Statement of Claim file 41O 178148-00
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Havre Regional Office at 406-265-5516 to request copies of the following documents.
 - Return Flow Memo
 - Historic Diverted Volume Memo
 - Instream Flow Memo

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4 MCA).

A. Change Proposal

1. The Applicant seeks to temporarily change the purpose and place of use of Statements of Claim 41O 178147-00 and 41O 178148-00 from irrigation to instream flow protection within the Teton River. Statement of Claim specific information is located below in Table 1. Both Statements of Claim are located on the Teton River in Chouteau County approximately nine river miles upstream from Loma, MT. The Applicant also seeks to change the point of diversion for Statement of Claim 41O 178148-00 to a new location approximately 5,500 feet downstream to match the historic point of diversion for Statement of Claim 41O 178147-00.

The Applicant proposes to protect the combined historical flow rate (8.7 CFS) and the combined historically diverted volume (504.4 AF) at the historical point of diversion for Statement of Claim No. 41O 178147-00. The Applicant proposes to protect the combined historically consumed flow rate (4.35 CFS) and historically consumed volume (252.2 AF) for Statements of Claim 41O 178147-00 and 41O 178148-00 from the historical point of diversion for Statement of Claim No. 41O 178147-00 to the Teton River's confluence with the Marias River near Loma, MT. This reach is approximately nine river miles long. The proposed protected reach is a section of the Teton River which runs through Sections 12, 13, 14, 22, 23, 27, 28, 31, and 32, Township 25N, Range

9E, Chouteau County. Protection will be provided through the protected reach by the implementation of a measurement plan, which will be described in detail in the *Protected Reach and Measurement Plan* section below.

2. The Applicant has entered into a lease agreement with the owners of Statement of Claim Nos. 41O 178147-00 and 41O 178148-00 to lease the Claims for instream flow purposes in the lower Teton River. As this is a temporary change under § 85-2-436, MCA, the temporary period is ten years upon approval with the option to renew when the ten-year period comes to an end.

3. No water rights are supplemental or associated with either of these Statements of Claim and there have been no previous change authorizations on these Statements of Claim.

Table 1: Statements of Claim Proposed for Change

WR Number	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41O 178147-00	Irrigation	4.47 CFS	5/20 - 10/31	SWNESE Sec. 31 25N 9E Chouteau	*	8/2/1897	118.0
41O 178148-00	Irrigation	4.23 CFS	5/20 - 10/31	SESWNE Sec. 6 24N 9E Chouteau	^	8/3/1901	118.0

***Place of Use 41O 178147-00**

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	5.00		S2SENE	31	25N	9E	CHOUTEAU
2	25.00		NESE	31	25N	9E	CHOUTEAU
3	10.00		E2SESE	31	25N	9E	CHOUTEAU
4	17.00		NENW	32	25N	9E	CHOUTEAU
5	12.00		N2SENE	32	25N	9E	CHOUTEAU
6	9.00		SWNW	32	25N	9E	CHOUTEAU
7	28.00		NWSW	32	25N	9E	CHOUTEAU
8	12.00		W2SWSW	32	25N	9E	CHOUTEAU
Total:	118.00						

^Place of Use 41O 178148-00

Place of Use:							
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	20.25	3	NENW	5	24N	9E	CHOUTEAU
2	27.00	4	NWNW	5	24N	9E	CHOUTEAU
3	1.25		NWSENE	5	24N	9E	CHOUTEAU
4	22.00		SWNW	5	24N	9E	CHOUTEAU
5	13.00	1	NENE	6	24N	9E	CHOUTEAU
6	27.00		SENE	6	24N	9E	CHOUTEAU
7	6.25		S2SESE	31	25N	9E	CHOUTEAU
8	1.25		SESWSE	31	25N	9E	CHOUTEAU
Total:	118.00						

B. Change Criteria

4. The Department is authorized to approve a temporary change for instream flow filed by FWP where FWP proves the applicable §§ 85-2-402, and -436, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant’s burden to prove change criteria by a preponderance of evidence is “more probably than not.”); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. 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), (16), and (18) 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.

....

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

5. In addition to the §85-2-402(2)(a) and (c), MCA¹, criteria, an application by FWP for a temporary change authorization for an instream flow lease must comply with the requirements and conditions set forth in § 85-2-436, MCA. Section 85-2-436, MCA provides in part:

(2) The change in purpose of use or place of use must meet all of the criteria and process outlined in [85-2-307](#) through [85-2-309](#), [85-2-401](#), and [85-2-402](#) and the additional criteria and process described in subsection (3) of this section to protect the rights of other appropriators from adverse impacts.

(3) (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of protecting, maintaining, or enhancing streamflows to benefit the fishery resource.

¹Pursuant to §85-2-402 (2)(b) and -402(2)(d), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate and is not required to prove possessory interest in the place of use because this application involves a temporary change in appropriation right for instream flow pursuant to § 85-2-436 MCA.

(b) The department may not approve a change in appropriation right until all objections are resolved.

(c) The application for a change in appropriation right authorization must include specific information on the length and location of the stream reach in which the streamflow is to be protected, maintained, or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow must be measured.

(d) The maximum quantity of water that may be changed to instream flow is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the change in appropriation right authorization, may be used to protect, maintain, or enhance streamflows below the point of diversion that existed prior to the change in appropriation right.

These criteria are designed to protect other water users from potential adverse effects and ensure the proposal will benefit the fishery resource. § 85-2-436(2), MCA. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process and conditions only address the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8.

II. FINDINGS OF FACT

A. Historic Use

6. Statement of Claim Nos. 41O 178147-00 and 41O 178148-00 were filed by Roy and Calvin Huartson on 4/12/1982 for flood irrigation in Chouteau County. The original system was developed by William Embleton. The system first serviced the place of use (POU) identified under Statement of Claim No. 41O 178148-00. The ditch was eventually extended across the Teton River by means of a flume to service Statement of Claim No. 41O 178147-00's POU. The flume was replaced by a pump in the early 1900's; creating a new point of diversion (POD) on the north bank of the Teton River. The WRS 1964 Chouteau County Survey identifies both pump sites.

7. The WRS identified irrigation under both Statements of Claim² Statement of Claim No. 41O 178147-00 had 120 irrigable acres identified with 5 acres under active irrigation during the

² 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

site visit conducted on 9/24/1963. A review of a historical aerial image taken on 8/16/1956 found 112.0 acres of irrigation. Statement of Claim No. 41O 178148-00 had 95 acres irrigated during the site visit conducted on 9/24/1963. A review of a historical aerial image taken on 8/16/1956 found 110.5 acres of irrigation. A Department review of a historical aerial image taken on 10/3/1980 found 118 acres irrigated for Statement of Claim Nos. 41O 178147-00 and 41O 178148-00. The Department finds the maximum historically irrigated acres to be 118.0 for Statement of Claim No. 41O 178147-00 and 118.0 for 41O 178148-00 for a total of 236 acres under this proposed change.

8. The flow rate for Statement of Claim No. 41O 178148-00 is 4.23 CFS and is based on the pump curve for the historical pump. The pump information for Statement of Claim No. 41O 178147-00 was not available during the Statement of Claim's examination. Statement of Claim 41O 178147-00 was given a flow rate based upon the adjudication guideline of 17 GPM/AC which results in a flow rate of 4.47 CFS. Based on historical pump curves provided by the Applicant and the similarity between the two Statements of Claims, the Department finds a historical flow rate of 4.23 CFS for Statement of Claim No. 41O 178148-00 and 4.47 CFS for Statement of Claim No. 41O 178147-00.

9. The Department calculated the historical consumed and diverted volume using ARM 36.12.1902(10) and information provided in the Applicants Historical Water Use Addendum. The Applicant states that the method of irrigation has been graded border since prior to 1956. The Applicant supplied a county wide on-farm efficiency estimate of 45% in the submitted Historical Water Use Addendum based on information from a Soil Conservation Service report prepared in 1978, NRCS Web Soil Survey soil information, and an on-farm efficiency table from the Montana Irrigation Guide. The additional information supplied in the Historical Water Use addendum supports a lower on-farm efficiency than normally recommend by the Department's methodology.

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, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

10. The Applicant asserts that the historical PODs are adjacent to the fields and any conveyance losses that may have occurred are presumed to be part of the 5% irrecoverable losses within the field as provided for in ARM 36.12.1902(17)(a). No historical conveyance losses were calculated for Statements of Claim Nos. 41O 178147-00 and 41O 178148-00.

11. Statement of Claim 41O 178147-00 has a claimed priority date of August 2, 1897. Statement of Claim 41O 178148-00 has a claimed priority date of August 3, 1901. The Department did not find any information that contradicts the claimed priority dates.

12. The Department finds the following historic use:

Table 2: Historical Use

Statement of Claim No.	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Volume	Place of Use	Point of Diversion
41O 178147-00	8/2/1897	252.2 AF	4.47 CFS	Flood Irrigation 118.0 acres	126.1 AF	Sec. 31 and 32 25N 9E	SWNESE Sec. 31 25N 9E
41O 178148-00	8/3/1901	252.2 AF	4.23 CFS	Flood Irrigation 118.0 acres	126.1 AF	Sec. 5 and 6 24N 9E. Sec 31 25N 9E	SESWNE Sec. 6 24N 9E

B. Adverse Effect

13. The Applicant proposes to change 504.4 AF of historically diverted volume and 252.2 AF of historically consumed volume from flood irrigation to instream flow. The combined historical diverted flow rate (8.7 CFS) and combined historical diverted volume (504.4 AF) is to be protected instream up to the historical point of diversion for Statement of Claim No. 41O 178147-00. The combined historically consumed volume (252.2 AF) is to be protected below the historical point of diversion for Statement of Claim 41O 178147-00 to benefit the fishery at 4.35 CFS. Statement of Claim No. 41O 178147-00 contributes 2.24 CFS and Statement of Claim No. 41O 178148-00 contributes 2.11 CFS to the protected flow rate. The protected flow rate was calculated by dividing

the historically consumed volume by the historical days of diversion. The Applicant proposes to protect the combined historically diverted flow rate (4.35 CFS) and the combined historically consumed volume (252.2 AF) for Statements of Claim Nos. 41O 178147-00 and 41O 178148-00 from the historical point of diversion for Statement of Claim No. 41O 178147-00 to the confluence of the Teton River with the Marias River near Loma, MT. This proposed protected reach is approximately nine miles.

14. A Return Flow Report is not usually generated when return flows are expected to enter back into the source where they have historically returned, or if water is left instream so that historically diverted flows are available during the historic period of diversion as per the Department's Return Flow Memo dated 4/1/2016. However, a Return Flow Report was generated by the Department's Water Management Bureau for this application given the proposed change in POD for Statement of Claim No. 41O 178148-00. The Return Flow Report found that the annual volume returned to the source will remain unchanged; however, monthly return flows will be altered as volume is left instream. Flows in the protected reach of the Teton River are expected to be increased from May through August and slightly decreased from September through April. The return flow reductions attributed to the retirement of Statement of Claim No. 41O 178148-00's historically irrigated acres in these months range from 0.06 CFS to 0.22 CFS. In an average year, flow will remain available for all downstream water rights. No water rights are expected to be adversely affected by the change in the timing of return flows.

15. With the proposed change, the POD for Statement of Claim No. 41O 178148-00 will move downstream below intervening Statement of Claim's 41O 178149-00 POD. The Department finds that the proposed change will not alter the historical stream condition in that water previously consumed by Statement of Claim No. 41O 178148-00 was not historically available to Statement of Claim No. 41O 178149-00; therefore, Statement of Claim No. 41O 178149-00 is still subject to call, up to the amount that was consumed from above its POD without creating an adverse effect. This restriction in call applies only to Statement of Claim No. 41O 178149-00; all other upstream junior water rights will be subject to the proposed protection of the full diverted flow rate and volume at the historical POD for Statement of Claim No. 41O 178147-00. In practicality, there is

a large disparity in priority dates between Statement of Claim No. 41O 178148-00 and Statement of Claim No. 41O 178149-00. It is likely that by the time the time flow drops to the point that a call by Statement of Claim No. 41O 178148-00 is necessary, the Water Commissioner has likely already shut off 41O 178149-00 with its 1973 priority date. If a Water Commissioner is not actively distributing water, Statement of Claim No. 41O 178149-00 would still likely be out of priority by the time call is made by Statement of Claim No. 41O 178148-00.

16. The Teton River is currently operating under a Water Distribution Project; which allows Water Commissioners to admeasure and distribute water based on priority date to the parties owning water rights. The Teton River Water Distribution project is a basin wide enforcement project that was established in 2016 by the District Courts and administered by the Montana Water Court with assistance from the Department. MCA 85-5-101.

17. The Applicant proposes to protect water instream in a manner consistent with the pattern of historic irrigation use for Statements of Claim Nos. 41O 178147-00 and 41O 178148-00. Flow will be protected for a set number of days once a month between May and September, and no water will be requested during the fifteen days between the end of the preceding diversion period and the commencement of the subsequent period. Statement of Claim No. 41O 178147-00 is limited to 27.8 days of diversion at 4.47 CFS. Statement of Claim No. 41O 178148-00 is limited to 29.7 days of diversion at 4.23 CFS. In order to mimic historical irrigation practices, the days of diversion will not be split evenly across the months but will be initiated by the Applicant and conform to the schedule below.

Table 3: Proposed Diversion Schedule

Month	May	June	July	August	September
41O 178147-00 Days of Historical Irrigation	4.4	5.2	6.3	6.3	5.6
41O 178148-00 Days of Historical Irrigation	4.6	5.8	6.7	6.7	5.9

18. Both Statements of Claim have periods of non-use identified by the Applicant. Senior Water Master Douglas Ritter found both Statements of Claim had been abandoned on 10/20/2011. Water Master Ritter found at that time that Statement of Claim No. 41O 178147-00 had not been used for twenty years and that Statement of Claim No. 41O 178148-00 had not been used for thirty-two years. The Applicant states that Statement of Claim No. 41O 178147-00 was last used in 1978, and that Statement of Claim No. 41O 178148-00 was last used in 1980. Water Court Judge Russ McElyea of the Montana Water Court declined to adopt Ritter's Water Master Report because of private agreements, stipulations, and amendments that had been filed. Since the Water Court decision issued on 2/27/2013, no water has been used under either Statement of Claim.

19. The Applicant states that changes in ownership, extended periods of drought and persistent low-flows caused by out-of-priority water use have made it uneconomical to invest in updating the irrigation system. The Applicant also claims that only post 1978 water rights would potentially be subject to changes in the source conditions created by Statements of Claim Nos. 41O 178147-00 and 41O 178148-00 resumption of use and presents a case in the Application materials as to why each right would not be adversely affected.

C. Beneficial Use/ Fishery Resource

20. The Applicant proposes to use water for instream flow protection in the Teton River. The Teton River is listed as a dewatered stream by Montana Fish, Wildlife & Parks (FWP). Streams listed by FWP must support important fisheries or contribute to important fisheries and be significantly dewatered by anthropogenic depletions. In many years, the lower Teton River goes dry and lacks connectivity to the Marias River and ultimately to the Missouri River System. This instream flow protection is designed to support FWP goals for the Teton River by bringing conditions closer to the natural flow regime, which will benefit fishery habitat and river connectivity.

21. According to the Applicant, the lower Teton River historically supported a diverse fish community of 28 warm water species, including sauger, blue sucker and shovelnose sturgeon.

During high flows in 2019, radio telemetry data showed endangered pallid sturgeon entering the lower Teton River. The Applicant provided a written report by William Gardner, FWP fisheries biologist, that assesses instream flows for the lower Teton River. Gardner analyzed wetted perimeter of riffles, cross-sectional area, and average pool depth in relation to the flow in the Teton River to determine at what flows these fish habitat measures significantly changed. The changes proposed in Application to Change Water Right No. 41O 30138928 are designed to help maintain necessary riffle/pool inflection points, increase the period in which the desired instream flows are met, and ultimately help bring conditions closer to the historical flow regimes to benefit the fishery of the Teton River.

22. Gardner's assessment identified inflection points at 16 CFS, 18 CFS, and 22 CFS at river mile 17 (8 river miles above the proposed protected reach). The maintenance of riffles provides fish passage between pools, food production, spawning, and habitat for many warm water fish species found in the lower Teton River. The proposed instream flow will help maintain flows that meet the critical pool inflection points that occur at river mile 17 by calling on upstream users if the protected historically diverted volume is not available at the historical point of diversion for instream use. In the protected reach, the increased flow will support river and pool connectivity, fish habitat, and the natural flow regime.

D. Protected Reach and Measurement Plan

23. The Applicant proposes to protect the combined historical flow rate (8.7 CFS) and the combined historically diverted volume (504.4 AF) up to the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County). The Applicant proposes to protect the combined historically consumed flow rate (4.35 CFS) and historically consumed volume (252.2 AF) for Statements of Claim 41O 178147-00 and 41O 178148-00 from the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) to the Teton River's confluence with the Marias River near Loma, MT (NWSESE of Section 12, Township 25N, Range 9E, Chouteau County). This protected reach is approximately 9 river miles.

The proposed protected flow rate was calculated by dividing the historically consumed volume by the days of diversion.

24. The Applicant will measure, and develop a stage-discharge rating curve, to quantify the protected diverted amount near the beginning of the protected reach. The protected historical consumptive use amounts will be measured using USGS gage No. 06108800, which is near the end of the protected reach. In the event USGS gage No. 06108800 is discontinued, FWP will consult with the Department to determine an appropriate location to establish an FWP maintained rated section and staff gage prior to administering the temporary change to instream flow.

25. Both Statements of Claim Nos. 41O 178147-00 and 41O 178148-00 have individual protected flow rates, volumes, and diversion schedule so they can be used independently or together depending on priority date dependent call conditions on the Teton River. When a water commissioner has been appointed, FWP will order water in accordance with Table 4 below. The water commissioner will bill FWP in accordance with the historic diverted/consumed amounts protected. The order in which Statements of Claim Nos. 41O 178147-00 and 41O 178148-00 will be used will be identified by the Applicant. If a Water Commissioner is not actively distributing water, it will be the responsibility of the Applicant to make the necessary call to initiate instream flow protection.

Table 4: Proposed Diversion Schedule

Month	May	June	July	August	September
41O 178147-00 Days of Historical Irrigation	4.4	5.2	6.3	6.3	5.6
41O 178148-00 Days of Historical Irrigation	4.6	5.8	6.7	6.7	5.9

26. The instream flow will be managed differently depending on river conditions. Junior water rights upstream of the historic POD for Statement of Claim No. 41O 178147-00 will be called as necessary if the combined historic diverted flow rate (8.7 CFS) is not present at the beginning of the protected reach (historic POD for Statement of Claim No. 41O 178147-00). If the protected consumed flow rate is not present at USGS gage No. 06108800, upstream junior water rights will

be called as necessary. The applicant proposes the following management scenario for waters within the protected reach:

“For those water rights within the intervening reach between the Historic Diversion measurement point (historic POD for Statement of Claim No. 41O 178147-00) and USGS gage No. 06108800 will be called to the degree necessary if the flow rate they are diverting exceeds the difference between the flow rate present at the Historical Diversion measuring point less the protected flow rate.”

27. The Department finds the Applicant’s Protected Reach and Measurement Plan to be adequate to provide the temporary instream flow protection proposed in Application to Change Water Right No. 41O 30138928.

III. CONCLUSIONS OF LAW

A. Adverse Effect – Historic Use, Protected Reach and Measurement Plan

28. Montana’s change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator’s right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be Statement of Claimed lawfully under a prior

appropriation is limited to that quantity within the amount Statement of Claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied).

29. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.

30. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). In this case, the Applicant seeks to change existing water rights represented by its Water Right Statement of Claim. Therefore, analysis of historic use and adverse effect in requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973.

31. A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of Statement of Claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water

³A Statement of Claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The Statement of Claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, 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); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[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.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); 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); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (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.); 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

32. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 42-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731.

33. Under the current proposal and in consideration of the hydrology, the Department has determined that it is appropriate to apply the DNRC Return Flow Policy Memo, dated April 1st, 2016, for the proposed change to Statement of Claim Nos. 41O 178147-00 and 41O 178148-00. The Department conducted a comparative analysis of return flows for the proposed change to Statement of Claim Nos. 41O 178147-00 and 41O 178148-00.

34. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

35. 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

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.)

Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). 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. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

36. 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. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to submit a Historical Use Addendum and not proceed solely under Admin. R.M. 36.12.1902. (FOF No.9).

Accordingly, the Applicant was required to prove the historic consumptive use by a preponderance of the evidence for each of the water rights being changed. 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., supra; 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”).

37. In order to prove lack of adverse effect, for an FWP instream flow change in use, the applicant must demonstrate that the operation of the instream flow change will not adversely affect other water users. This requires consideration of the protected reach, the location and timing of historic return flows, and measurement plan in order to insure the applicants plan for operation of its change will not adversely affect other water users. §§ 85-2-402(2)(a) and -436(2) and (3), MCA. An instream flow change may be authorized to protect the full historic diverted flow

rate and volume to the historic point of diversion. The amount protected instream below the historic point of diversion depends upon the potential for adverse effect to other water users. 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 and to approve the change under such conditions as the Department considers necessary. §§ 85-2-402(2)(a) and - 436(2) and (3)(d), MCA; Hohenlohe, ¶¶ 37, 39, 42, 67 - 70.

38. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Statement of Claim No. 41O 178147-00 of 252.2 AF diverted volume at a 4.47 CFS flow rate with a consumptive use of 126.1 AF and Water Right Statement of Claim No. 41O 178148-00 of 252.2 AF diverted volume at a 4.23 CFS flow rate with a consumptive use of 126.1 AF. (FOF Nos. 6-12)

39. The Applicant established that the change authorization will be operated in a manner that ensures the amount of water protected instream does not exceed the maximum volume and flow rate during the period of use for the change authorization. Furthermore, the Applicant identified the reach in which instream flows will be protected and provided a detailed measurement plan to ensure that, as conditioned, the change authorization is operated in compliance with §85-2-408(1) and (7), MCA. (FOF Nos. 23-27)

40. The Department concludes that the Applicant's plan for operation and measurement of instream flow protection to protect the combined historical flow rate (8.7 CFS) and the combined historically diverted volume (504.4 AF) up to the historical point of diversion for Statement of Claim No. 41O 178147-00, and to protect the combined historically consumed flow rate (4.35 CFS) and historically consumed volume (252.2 AF) for Statements of Claim 41O 178147-00 and 41O 178148-00 from the historical point of diversion for Statement of Claim No. 41O 178147-00 to the Teton River's confluence with the Marias River near Loma, MT is sufficient as proposed to ensure that 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 will not be adversely affected. §85-2-402(2)(a) and -408(3)(a) MCA. (FOF Nos. 13-19)

41. The Department has considered whether “resumption of use” under a change authorization following an extended period of non-use of the underlying water right would result in adverse effect based upon a fully developed evidentiary record and legal arguments in a contested case proceeding where the issue has been raised by an objector. The analysis closely resembles the analysis applied for abandonment and focuses on the intent of the appropriator.⁵ Although there is a period of non-use for both water rights, the Water Court ultimately declined to adopt the Water Master’s report regarding abandonment. Water Court Order Water Court Cases 41O-453 and 41O-556, 10/20/2011. Order Adopting Stipulations and Closing Claims, 2/27/2013. Moreover, there was extensive argument and evidence regarding water availability and intent during the periods of non-use in response to the Master’s Report, none of which is currently before the Department. Considering the Water Court’s disposition of the issue, the proof of historic use of the underlying water rights, and the evidence that the proposed change would not alter historic return flows, the Department concludes that, alone, the periods of non-use for the water rights being changed are insufficient to trigger an analysis regarding whether “resumption of use” under the change would cause adverse effect.

B. Beneficial Use/Fishery Resource

42. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .”

⁵ See Matter of Application for Change of Appropriation Water Right No. GI90495-41a By United States of America, U.S. Fish and Wildlife Service, *Proposed Order* (Adopted by Final Order March 13, 1989); Matter of Application for Change of Appropriation Water Right V(W)099722-76h By Montana Department of Fish, Wildlife and Parks, *Proposed Order* (Adopted by Final Order June 6, 1995); Matter of Application for Change of Appropriation Water Right G(W)032359-76g By Virgil D. and Barbara J. Gochanour, *Proposed Order* (Adopted by Final Order June 6, 1997); Matter of Application for Change of Appropriation Water Right 41i-143072 By Smelco, *Proposed Order* (Adopted by Final Order December 24, 2002); Matter of Application No. 41h 30021139 to Change Water Right Nos. 41h 12231-00 And 41h-12232-00 By Utility Solutions LLC, *Final Order* (July 24, 2007); Matter of Application No. 76h 30012871 to Change Water Right Statement of Claim Nos. 76h 105194-00, 76h 107548-00, 76h 107549-00, 76h 212610-00 By Gary And Ramona Evans, *Final Order* (December 28, 2007); Matter of Application No. 76h-30042357 to Change Water Right Statement of Claim No. 76h-108798-00 By Kuney, William D and Hendrickson, Betty J, *Final Order* (June 7, 2010).

McDonald, 220 Mont. at 532, 722 P.2d at 606. 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. Admin.R.M. 36.12.1801.

43. Where the proposed beneficial use is instream flow to enhance the fishery resource, an applicant must prove that that amount of water proposed for change is needed to maintain or enhance instream flows to benefit the fishery resource. § 85-2-102(1)(d) and (4)(c); § 85-2-436(1) and (3), MCA. See In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company, DNRC Statement of Opinion (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).

44. The Applicant proposes to use water for instream flow to benefit the fishery in the Lower Teton River which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that instream flow protection of 504.4 AF of diverted volume and 8.7 CFS flow rate and 252.2 AF of historically consumed volume at 4.35 CFS of water requested is the amount needed to maintain and enhance the fishery resource and sustain the beneficial use. (FOF Nos. 20-22)

C. Protected Reach/Measurement Plan

45. The Department has determined that the Applicant may protect the historic diverted flow rate and volume, 8.7 CFS up to 504.4AF at the SWSWNE of Sec. 31, T24N R9E. The Department has determined that the Applicant may protect the historic consumed flow rate and volume, 4.35 CFS up to 252.2 AF from the SWNESE of Sec. 31, T25N R9E to the NWSESE of SEC. 12, T25N, R9E. The Department concludes the length and location of the stream reach in which instream flows will be maintained and enhanced along with the measurement plan satisfy the requirements of 85-2-408(1), MCA.

IV. PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41O 30138928 should be granted subject to the following.

The Applicant is authorized to temporarily protect for instream use the combined historical flow rate (8.7 CFS) and the combined historically diverted volume (504.4 AF) at the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County). The Applicant is authorized to protect the combined historically consumed flow rate (4.35 CFS) and historically consumed volume (252.2 AF) for Statements of Claim 41O 178147-00 and 41O 178148-00 from the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) to the Teton River's confluence with the Marias River near Loma, MT (NWSESE of Section 12, Township 25N, Range 9E, Chouteau County). This reach is approximately nine miles river miles long.

Statement of Claim No. 41O 178147-00 independently is authorized to temporarily protect for instream use a historical diverted flow rate of 4.47 CFS up to 252.2 AF to the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) and a historically consumed flow rate of 2.24 CFS and a historically consumed volume of 126.1 AF from the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) to the Teton River's confluence with the Marias River near Loma, MT (NWSESE of Section 12, Township 25N, Range 9E, Chouteau County).

Statement of Claim No. 41O 178148-00 independently is authorized to change the point of diversion in order to temporarily protect for instream use a historical diverted flow rate of 4.23 CFS up to 252.2 AF to the historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) and a historically consumed flow rate of 2.11 CFS and a historically consumed volume of 126.1 AF from the

historical point of diversion for Statement of Claim No. 41O 178147-00 (SWNESE of Section. 31, Township 25N, Range 9E, Chouteau County) to the Teton River's confluence with the Marias River near Loma, MT (NWSESE of Section 12, Township 25N, Range 9E, Chouteau County).

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 8th day of April 2020.

/Original signed by Matt Miles/
Matt Miles, Manager
Havre Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 8th day of April 2020, by first class United States mail.

STATE OF MONTANA, DEPARTMENT OF FISH, WILDLIFE & PARKS
C/O ANDY BRUMMOND
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