

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

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 41O 30138934 BY STATE OF MONTANA ) DEPARTMENT OF FISH, WILDLIFE, AND ) PARKS</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE</b>
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On September 10, 2019, the State of Montana Department of Fish, Wildlife, and Parks (FWP) (Applicant) submitted Application to Change Water Right No. 41O 30138934 to the Havre Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) to change the purpose and place of use of Water Right Claim Nos. 41O 178054-00 and 41O 171394-00 to temporary instream flow for the benefit of the fishery resource of the Teton River. 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 to Change Water Right, Form 606
- Change to Instream Flow Addendum
- Change in Purpose Addendum
- Temporary Change Addendum
- Historical Water Use Addendum

Information Received after Application Filed

- Email Correspondence between Applicant and DNRC

Information within the Department's Possession/Knowledge

- Statement of Claim file 41O 171394-00
- Statement of Claim file 41O 178054-00
- 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 Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 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 Teton County approximately 5.5 miles north of Dutton, MT.

2. The Applicant proposes to protect the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical point of diversion (POD) for Statements of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant also proposes to protect the combined historically consumed flow rate (3.54 CFS) and historically consumed volume (264.9 AF) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historical POD to a point immediately below USGS gage No. 06108000 on the Teton River. This reach is approximately 17 river miles long. The proposed protected reach is a section of the Teton River which runs through Sections 10, 12, 13, 14, and 15 Township (T) 25N, Range (R) 1W and

Sections 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, and 18 T25N, R1E, Teton 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.

3. The Applicant has entered into a lease agreement with the owners of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 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.

4. Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 are supplemental over their entire place of use, share a pump at the point of diversion, and share the same ditch system. The historical system was originally serviced by a diversion dam, which was later replaced by a pump. The system was developed in phases as demonstrated in the original notices filed in 1890 and 1901. This junior claim also provided for an increased flow rate for the system. By claimed flow rates, 41O 178054-00 is responsible for 66.7% of the supplemental relationship while 41O 171394-00 contributes the remaining 33.3%. The furthest field served by the ditch system is divided between Sections 14 and 13. This field contains 33.5 % of the total supplemental acres. Claim 41O 178054 -00 will be given 66.7% of the historical use while Claim 41O 171394-00 will receive 33.3% of the historical use. No other water rights are supplemental to these claims or their place of use.

5. There have been no previous Change Authorizations issued for Statements of Claim Nos. 41O 178054-00 and 41O 171394-00.

**Table 1: Statements of Claim Proposed for Change**

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of diversion</b>	<b>Place of use</b>	<b>Priority date</b>	<b>Acres</b>
41O 178054-00	Irrigation	5.9 CFS	4/1 to 11/4	NWNENE Sec. 15, T25N R1W Teton County	See Below	10/20/1890	206.2
41O 171394-00	Irrigation	5.9 CFS	4/1 to 11/4	NWNENE Sec. 15, T25N R1W Teton County	See Below	02/13/1901	206.2

**Place of use for both 41O 178054-00 & 41O 171394-00:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	1.30		SESE	10	25N	1W	TETON
2	9.20		S2SW	11	25N	1W	TETON
3	1.70		SWSE	11	25N	1W	TETON
4	34.20		NW	13	25N	1W	TETON
5	15.50		SW	13	25N	1W	TETON
6	67.30		NE	14	25N	1W	TETON
7	69.80		NW	14	25N	1W	TETON
8	7.20		NENE	15	25N	1W	TETON
<b>Total:</b>	206.20						

B. Change Criteria

6. 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.

7. In addition to the §85-2-402(2)(a) and (c), MCA<sup>1</sup>, criteria, an application by FWP for a temporary change authorization for instream flow 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.

(b) The department may not approve a change in appropriation right until all

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<sup>1</sup>Pursuant 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.

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. Historical Use

8. Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 were filed by Thomas Michel on 2/25/1982 for flood irrigation on the same 178.2 acres in Sections 10, 11, 13, 14, and 15 T25N, R1W, Teton County. An addendum was filed on 12/8/1982 adding additional acres increasing the total claimed acres to 222.2. The original Notice of Appropriation Statement of Claim No. 41O 178054-00 was filed by John Hobdins on 10/20/1890 for irrigation in Section 14 T25N, R1W, Teton County from a POD on the north bank of the Teton River in Section 16 T25N, R1W, Teton County at a flow rate of 2,000 miner's inches (50 CFS). The original Notice of Appropriation for Statement of Claim No. 41O 171394-00 was filed by B.M. Richardson on 2/13/1901 for irrigation in Section 14 and 13 T25N, R1W, Teton County from a POD on the north bank of the Teton River in Section 16 T25N, R1W at a flow rate of 1,000 miner's inches (25 CFS). In the late 1950s, the

means of diversion for both Statements of Claim were changed to a single pump with a 5.9 CFS capacity.

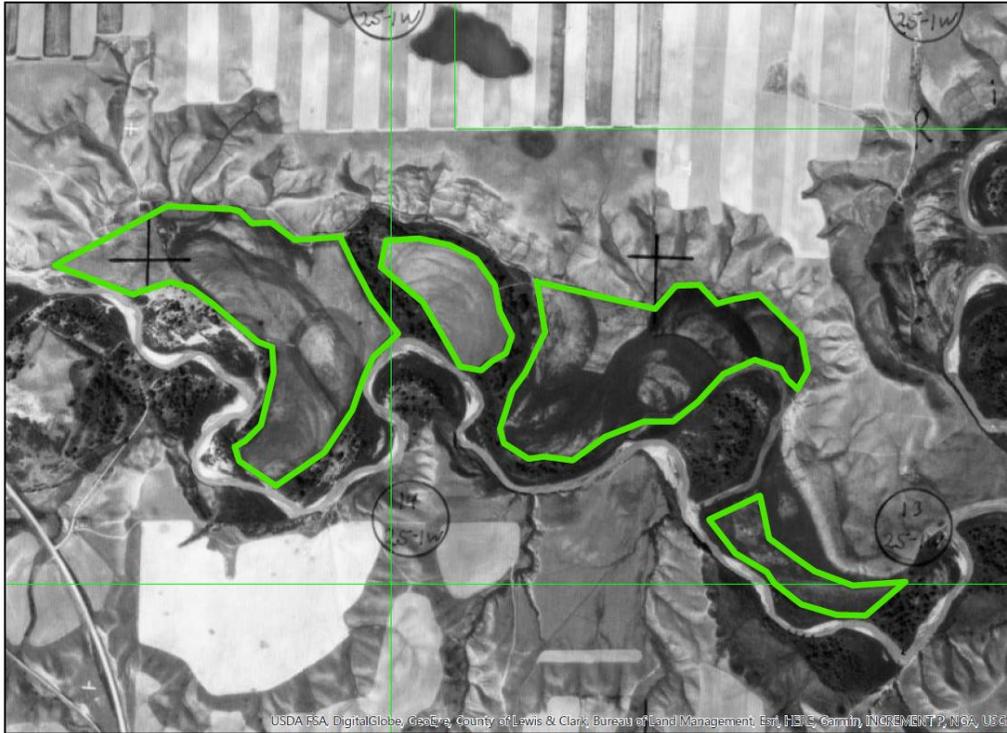
9. Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 are supplemental over their entire place of use, share a pump at the point of diversion, and share the same ditch system. Claim 41O 171394-00, filed in 1901, claimed acres in both Sections 13 and 14. This junior claim also provided for an increased flow rate for the system. By claimed flow rates, 41O 178054-00 is responsible for 66.7% of the supplemental relationship while 41O 171394-00 contributes the remaining 33.3%. The furthest field served by the ditch system is divided between Sections 14 and 13. This field contains 33.5 % of the total supplemental acres. Claim 41O 178054 -00 will be given 66.7% of the historical use while Claim 41O 171394-00 will receive 33.3% of the historical use. No other water rights are supplemental to these claims or their place of use.

10. The WRS identified 43 acres of irrigation and 136 acres of potential irrigation on an 8/10/1961 site visit.<sup>2</sup> The Montana Water Court found a total of 206.2 acres irrigated in a Water Masters Reported (case 41O-173) filed on 9/14/2011. The Applicant provided justification for 206.2 acres of historical irrigation in the application materials, and a recent Department review of USDA Photo #178-253 dated 8/3/1978 confirms 206.2 acres of historical irrigation. The Department finds the maximum combined historically irrigated acres to be 206.2 for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 under this proposed change. Figure 1 below identifies the historical place of use for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00.

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<sup>2</sup> 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, 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).

**Figure 1: Historical place of use for Statement of Claim Nos. 41O 178054-00 & 41O 171394-00**



11. The claimed flow rate for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 is based on information provided to the Department during claims examination. Based on pump and lift information the Department calculated a flow rate of 2670 GPM (5.9 CFS). The Department finds a combined historical flow rate of 5.9 CFS for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 under this proposed change.

12. The Department calculated the historical consumed and diverted volume using ARM 36.12.1902(10) and information provided in the Applicant's Historical Water Use Addendum. The Applicant states that the historical method of irrigation was contour ditch. The Applicant supplied a county wide on-farm efficiency estimate of 55% from a Soil Conservation Service report prepared in 1978, NRCS Web Soil Survey soil information, and on-farm efficiency tables from the Montana Irrigation Guide to justify the 55% on-farm efficiency. The additional information supplied in the Historical Water Use addendum supports a lower on-farm efficiency than normally recommend by the Department's methodology.

13. The Applicant asserts that the historical PODs are directly adjacent to the fields and any conveyance losses that may have occurred are presumed to be part of the 5% irrecoverable losses.

14. Statement of Claim 41O 178054-00 has a claimed priority date of October 20, 1890. Statement of Claim 41O 171394-00 has a claimed priority date of February 13, 1901. The Department did not find any information that contradicts the claimed priority dates.

15. 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 178054-00	10/20/1890	294.5 AF	5.9 CFS	Irrigation 206.2 acres*	176.7 AF	Sec 10, 11, 14, 13 and 15 of 25N 1W	NWNENE Sec 15, T25N, R1W, Teton County
41O 171394-00	2/13/1901	147.0 AF	5.9 CFS	Irrigation 206.2 acres*	88.2 AF	Sec 10, 11, 14, 13 and 15 of 25N 1W	NWNENE Sec 15, T25N, R1W, Teton County

\* Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 are supplemental over their entire place of use

**B. Adverse Effect**

16. The Applicant proposes to protect the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical POD for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant also proposes to protect the combined historically consumed flow rate (3.54 CFS) and historically consumed volume (264.9 AF) for

Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historical POD to a point immediately below USGS gage No. 06108000 on the Teton River. This reach is approximately 17 river miles long.

17. Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 have a period of non-use identified by the Applicant. Ownership of the place of use has changed since the time of claim examination and no water use has occurred since the change in ownership. Based on information contained in the files for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00, it appears irrigation occurred at least through the year 2000.

18. No consumptive use water rights have been issued for the Teton River since the early 1980's. The most junior consumptive use water right is beneficial water use permit 41O 29495-00 with a priority date of 7/3/1980. Beneficial water use permit 41O 73638-00 has a priority date of 5/22/1990; however, this permit is for non-consumptive use and the Applicant claims this permit would not be subject to call. The Teton River basin has been generally closed to new consumptive use appropriations since 1993. The Applicant asserts that no water users have come onto the source since 2000; therefore, no water users could be adversely affected by the resumption of use of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant also claims in the application material that other water users will not see a change in conditions on the source of supply resulting from the resumption of water use that they did not experience previously.

19. According to a review by the Department of this Application to Change Water Right No. 41O 30138934, all return flows will return back to the Teton River prior to the next downstream appropriator. Historic return flows begin accreting at the historic POD and gradually increase to the total return flow amount of 176.3 AF in the Teton River. Per Department Return Flow Policy Memorandum, dated April 1, 2016, the Department will not develop a monthly return flow analysis for change authorizations absent a valid objection received by the Department, if criteria in the memo are met. In this case, historically diverted flows are left instream below the point of diversion and no further return flow analysis will be undertaken by the Department unless a valid objection is received.

20. Statement of Claim Nos. 41O 178054-00 (irrigation water right) and 41O 178047-00 (stock water right) share a POD and ditch system and are identified as multiple uses of the same water right. According to the Applicant, it is unlikely that Statement of Claim 41O 178047-00 will be diverting during the term of the temporary change to instream flow given that the historical irrigation pump is not functional, and no plans are in place to replace it at this time. However, to prevent any potential expansion/adverse effect of using Statement of Claim Nos. 41O 178054-00 and 41O 178047-00 at the same time, the Department will add the following condition:

THE APPROPRIATOR SHALL NOT USE STATEMENT OF CLAIM NO. 41O 148047-00 WHEN STATEMENT OF CLAIM NO. 41O 178054-00 IS IN USE FOR TEMPORARY INSTREAM FLOW PROTECTION AS AUTHORIZED IN APPLICATION TO TEMPORARILY CHANGE WATER RIGHT NO. 41O 30138934. STATEMENT OF CLAIM NO. 41O 148047-00 AND STATEMENT OF CLAIM NO. 41O 178054-00 ARE MULTIPLE USES OF THE SAME RIGHT. THE TWO RIGHTS MAY NOT BE USED SIMULTANEOUSLY TO PREVENT AN EXPANSION OF BOTH RIGHTS.

21. The Applicant proposes to protect water instream in a manner consistent with the pattern of historic irrigation use for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. 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 Nos. 41O 178054-00 and 41O 171394-00 are limited to a maximum of 37.7 days of instream flow protection combined. 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
Days of Historical Irrigation	7	7	9	9	5.7

22. The Applicant's proposal to protect the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical POD for Statements of Claim Nos. 41O 171394-00 and 41O 178054-00 and the Applicant's proposal to protect the combined historically consumed flow rate (3.54 CFS) and historically consumed volume (264.9 AF) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historic POD to a point immediately below USGS gage No. 06108000 on the Teton River does not increase historical use. In addition, the Applicants proposed monthly instream flow protection plan mimics historical irrigation demands on the source. The Department finds that the Applicant's proposed change to temporary instream flow protection does not create an adverse effect.

C. Beneficial Use/ Fisheries Resource

23. The Applicant proposes to use water for temporary 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 temporary instream flow protection is designed to support FWP's goals for the Teton River by bringing conditions closer to the natural flow regime, which will benefit fishery habitat and river connectivity.

24. 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 this Application to Change Water Right No. 41O 30138934 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.

25. Gardner's assessment identified lower and upper inflection points at 14 and 26 CFS respectively at pool location near Dutton MT. The same pool, as well as others in the area also exhibit lower and upper inflection points at 16 and 26 CFS respectively. As flow in the Teton River near Dutton MT drops below the pool inflection points, the proposed change to temporary instream flow protection would increase the periods in which the desired flows are met and in turn provide a benefit to the fishery. At extremely low flows, the change to temporary instream flow protection would help provide, or improve, connectivity between pools. The Applicant also asserts that during higher conditions the temporary change to instream flow protection would help bring conditions within the Teton River closer to the natural flow regime; which in turn would provide a benefit to the fishery as well.

26. 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 in the proposed protected reach 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*

27. The Applicant proposes to protect the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical point of diversion (NWNENE

Section 15, T25N, R1W, Teton County for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant also proposes to protect the combined historically consumed flow rate (3.54 CFS) and historically consumed volume (264.9 AF) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historical point of diversion (NWNENE Section 15 T25N, R1W, Teton County) to a point immediately below USGS gage No. 06108000 (SESESW Section 12, T25N, R1E, Teton County) on the Teton River. This reach is approximately 17 river miles long.

28. Both Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 have individual protected volumes based on priority date so they can be used independently or together depending on priority date dependent call conditions on the Teton River.

29. 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 historical consumptive use amounts will be measured near the end of the protected reach at USGS gage No. 06108000. In the event USGS gage No. 06108000 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.

30. 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. 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**

<b>Month</b>	<b>May</b>	<b>June</b>	<b>July</b>	<b>August</b>	<b>September</b>
Days of Historical Irrigation	7	7	9	9	5.7

31. 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 court and administered by the Montana Water Court with assistance from the Department. § 85-5-101, MCA.

32. The instream flow will be managed differently depending on river conditions. Junior water rights upstream of the historic POD for Statements of Claim Nos. 41O 171394-00 and 41O 178054-00 will be called as necessary if the combined historic flow rate (5.9 CFS) is not present at the beginning of the protected reach (NWNENE Section 15, T25N, R1W, Teton County). If the protected consumed flow rate (3.54 CFS) is not present at USGS gage No. 06108000, 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 (NWNENE Section 15, T25N, R1W, Teton County) and USGS gage No. 06108000 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 minus the protected flow rate.”

33. 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 30138934.

### **III. CONCLUSIONS OF LAW**

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

34. 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).

35. 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.

36. 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.

37. 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.<sup>3</sup> A comparative analysis of the historic use of the water 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).<sup>4</sup>

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<sup>3</sup>A 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

<sup>4</sup> 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

38. 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.

39. 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 1<sup>st</sup>, 2016, for the proposed change to Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Department conducted a comparative analysis of return flows for the proposed change to Statement of Claim Nos. 41O 178054-00 and 41O 171394-00.

40. 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.

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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 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.)

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.

41. 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., 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).

42. 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.12).

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”).

43. 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 applicant’s 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.

44. 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 178054-00 of 294.5 AF diverted volume at a 5.9 CFS flow rate with a consumptive use of 176.7 AF and Water Right Statement of Claim No. 41O 171394-00 of 147.0 AF diverted volume at a 5.9 CFS flow rate with a consumptive use of 88.2 AF. (FOF Nos. 8-15)

45. 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.27-33)

46. The Department concludes that the Applicant’s plan for operation and measurement of instream flow protection to protect the historical flow rate (5.9 CFS) and the combined historically

diverted volume (441.5 AF) up to the historical point of diversion for Statements of Claim Nos. 41O 178054-00 and 41O 171394-00 and to protect the historically consumed flow rate (3.54 CFS) and combined historically consumed volume (264.9 AF) for Statements of Claim Nos. 41O 178054-00 and 41O 171394-00 from the historical point of diversion for Statements of Claim Nos. 41O 178054-00 and 41O 171394-00 to a point immediately below USGS gage No. 06108000 on the Teton River 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.16-22)

47. 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.<sup>5</sup> Although there is a period of non-use for both water rights proposed for change in this Application, the Department concludes that the resumption in use of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 will not result in adverse effect because the Teton River basin has been generally closed to new consumptive use appropriations since 1993 and no water users have come onto the source since 2000, the most recent date the water rights were exercised. Therefore, no water users could be adversely affected by the resumption of use of Statement of Claim Nos. 41O 178054-00 and 41O 171394-00

***B. Beneficial Use/Fishery Resource***

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<sup>5</sup> 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).

48. 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 . . .” 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.

49. 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).

50. 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 441.5 AF of diverted volume at 5.9 CFS flow rate and 264.9 AF of historically consumed volume at 3.54 CFS of water requested is the amount needed to maintain and enhance the fishery resource and sustain the beneficial use. (FOF Nos.23-26)

C. Protected Reach/Measurement Plan

51. The Department has determined that the Applicant may protect the historic diverted flow rate and volume, 5.9 CFS up to 441.5 AF at the NWNENE Section 15, 25N1W. The Department has determined that the Applicant may protect the historic consumed flow rate

and volume, 3.54 CFS up to 264.9 AF from the NWNENE Section 15, T25N, R1W, Teton County to the SESESW Section 12, T25N, R1E, Teton County. 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 30138934 should be granted subject to the following.

The Applicant is authorized to temporarily protect for instream use the combined historical flow rate (5.9 CFS) and the combined historically diverted volume (441.5 AF) at the historical point of diversion (NWNENE Section 15, T25N, R1W, Teton County) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00. The Applicant is authorized to temporarily protect for instream use the combined historically consumed flow rate (3.54 CFS) and combined historically consumed volume (264.9 AF) for Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 from their historical point of diversion (NWNENE Section 15 T25N, R1W, Teton County) to a point immediately below USGS gage No. 06108000 (SESESW Section 12, T25N, R1E, Teton County) on the Teton River. This reach is approximately 17 river miles long. Both Statement of Claim Nos. 41O 178054-00 and 41O 171394-00 have individual protected volumes based on priority date so they can be used independently or together depending on priority date dependent call conditions on the Teton River.

This Authorization is subject to the following condition:

THE APPROPRIATOR SHALL NOT USE STATEMENT OF CLAIM NO. 41O 148047-00 WHEN STATEMENT OF CLAIM NO. 41O 178054-00 IS IN USE FOR TEMPORARY INSTREAM FLOW PROTECTION AS AUTHORIZED IN APPLICATION TO TEMPORARILY CHANGE WATER RIGHT NO. 41O 30138934. STATEMENT OF CLAIM NO. 41O 148047-00 AND STATEMENT OF CLAIM NO. 41O 178054-00 ARE MULTIPLE USES OF THE SAME RIGHT. THE TWO RIGHTS MAY NOT BE USED SIMULTANEOUSLY TO PREVENT AN EXPANSION OF BOTH RIGHTS

### **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 8<sup>th</sup> day of April 2020.

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

**NOTICE**

**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  
PO BOX 938  
LEWISTOWN, MT 59457

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Havre Regional Office, (406) 265-5516