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

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| **IN THE MATTER OF APPLICATION NO. 76GJ 30012925 TO CHANGE WATER RIGHT CLAIM NO(S) 76GJ 40733-00, 76GJ 94401-00, 76GJ 94402-00 BY GRANITE COUNTY** | **)**<br>**)**<br>**)**<br>**)** | **FINAL ORDER** |

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## BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on December 27, 2007. Applicant Granite County filed timely exceptions to the PFD on January 16, 2008, through counsel Mark Jones. On January 17, 2008, objector Georgetown Lake Homeowners Association (GLHA), through counsel Stephen Brown, filed a "Notice of Joinder" to the exceptions filed by Granite County. Objectors Verlanic, Nelson and Johnson, through counsel Charles Johnson, filed a response to the exceptions on January 28, 2008. No request for oral argument was made by any party.

The PFD recommends denial of Change Application No. 76GJ 30012925 because the Hearing Examiner found that the Applicant did not prove by clear and convincing evidence that the quantity of water proposed to be used is the amount necessary for the proposed beneficial uses and the amount of water requested for the added purposes is not a waste of water. Mont. Code Ann. §§ 85-2-402(2)(c) and 402(5)(a). The PFD found that the other criteria under Mont. Code Ann. §§ 85-2-402(2), (4), and (5)(a) were met.

The Water Right Claims proposed for change are Water Right Claim Nos. 76GJ 40733-00, 76GJ 94401-00, and 76GJ 94402-00. The volume of water being changed is the claimed volume of water shown on the three water rights being changed, or approximately 52,766 acre-feet. Applicant proposes to add the purposes of recreation and fish and wildlife to all three water

right claims and add a place of use at the dam in addition to the powerhouse location for the power generation right, and in the reservoir for the storage water rights to validate asserted traditional, long-standing public and private uses of the water in claimed storage in Georgetown Lake. Evaporation from Georgetown Lake is 40 acre-feet per day or 20 cubic feet per second for the period April through September. Forty acre-feet per day for 183 days is 7,320 acre-feet. Thus, the statutory trigger for the "clear and convincing" standard is met under Mont. Code Ann. 85-2-402(5).

## STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

> reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

I have considered the exceptions and reviewed the record under these standards.

## EXCEPTIONS TO FINDINGS OF FACT

**Finding of Fact No. 14**. Applicant takes exception to the Hearing Examiner's statement "[a]pplicant's motivation to add purposes and place of use to these water rights is to avoid the presumption of abandonment . . ."

**Response:** The Hearing Examiner did not rely on Finding of Fact No. 14 to make his determination that the beneficial use criterion was not met. In fact, the Hearing Examiner relied on Finding of Fact No. 14 to find that the adverse affect criterion, i.e. proof of no adverse effect to the use of existing water rights of other persons had been met. Mont. Code Ann. § 85-2-404(2)(a). The Department is not required to consider exceptions of findings that do not adversely affect a party. Finding of Fact No. 14 is clearly not adverse to the Applicant. *See* ARM 36.12.229. Finding of Fact No. 14 will not be rejected or modified.

**Finding of Fact 19**. Applicant takes exception to the Hearing Examiner's statement "[h]ow this natural flow was determined is not known, but the estimates of inflows regularly exceed 30 cfs during the irrigation season."

**Response:** Finding of Fact No. 19 also addresses the adverse effect criterion. See Response to Finding of Fact No. 14, above. Finding of Fact No. 19 will not be rejected or modified.

**Finding of Fact Nos. 22 – 25**. Applicant argues that the Hearing Examiner misconstrues the information submitted and the intent of the Application. Applicant emphasizes that the Application is for the "benefit of the Public" and appears to imply the Public use is, in and of itself, a beneficial use irrespective of the enumerated uses in statute. Applicant argues that fish, wildlife and recreation have always been beneficial uses of the lake as an adjunct to the original power uses and that they "wish to acknowledge and protect these uses."

**Response:** The Hearing Examiner clearly saw that the waters of Georgetown Lake have been used for fish, wildlife and recreation purposes. What the Hearing Examiner did not find in the record is a *quantification* (i.e. amount) of water needed for those purposes. As the Hearing Examiner noted "[t]he record does not show how storing water in Georgetown Lake for later release of 30 cfs at the dam is necessary for fish and wildlife, or for recreation, as it was for the historic power generation. . . . Applicant has not shown that the proposed changed use requires the amount of water that was historically used for the power generation purpose." The Hearing Examiner clearly saw that the Applicant had to show more than simply a relationship that fish live in and people recreate on the lake. Some *quantification* of the relationship between the fish and wildlife and/or recreation use must be shown in the record. The record does not

contain such a quantification. E.g., *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, DNRC Final Order (2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter Of Application For Beneficial Water Use Permit 76LJ 30008762 By Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006). Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003). Finding of Fact Nos. 22, 23, 24, 25 will not be rejected or modified.

**Finding of Fact No. 28**. Applicant takes exception to the following language in the PFD. "Because there is no support for the amount of water for the added purposes it is not known whether the proposed added purposes would waste water that could otherwise be used by downstream irrigators?" [sic]. Applicant excepts to the form of the sentence, i.e. that it is phrased as a question.

**Response:** It is apparent from the context of the entire PFD that the Hearing Examiner meant this to be a statement of fact. I find that the form of the sentence is a scrivener's error and that the sentence should properly read "Because there is no support for the amount of water for the added purposes it is not known whether the proposed added purposes would waste water that could otherwise be used by downstream irrigators." That scrivener's change not withstanding, it is noted that Finding of Fact No. 28 was not relied upon in determining the only criteria that the Applicant failed to meet, that is beneficial use. Finding of Fact was relied upon, in the Applicant's favor, in the determination that the uses are a reasonable use under the criteria in Mont. Code Ann. § 85-2-402(4). Finding of Fact No. 28 is clearly not adverse to the Applicant. Finding of Fact No. 28 will be modified as discussed above.

## EXCEPTIONS TO CONCLUSIONS OF LAW

**Conclusion of Law No. 8**. Applicant takes exception to Conclusion of Law No. 8 and specifically cites the language of the PFD "[t]he Applicant has not proven by a clear and convincing evidence [sic] that the quantity of water proposed to be used is the amount necessary for the proposed beneficial uses and the amount of water requested for the added purposes is not a waste of water." Applicant argues that the Hearing Examiner's analysis is "based upon the presumption that the facts in this case are analogous to another decision that the Examiner ruled upon. *Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 108 P.3d 518 (2005)"* [sic]. Applicant again argues that the proposed uses are for the "**Public**" and that "[i]t is well known and has been stated repeatedly, the entire full pool of Georgetown Lake has been used for the benefit of the Public . . .." Applicant also cites DNRC's response brief in *Siebel* regarding the 'reasonable amount necessary' for beneficial use versus the 'minimum amount necessary' question. In addition, Applicant argues that the DNRC's decision *In the Matter of Applications No. 41H-30013196 and No. 41H-30013197 by Simpson* is contrary to the PFD here at issue and that the Department "cannot hold this Applicant to a higher measure and standard especially in regards to the public recreational uses than another applicant that "desires" such a use for private recreational purposes.

**Response:** Applicant's characterization that the Hearing Examiner's analysis was based on a presumption in *Siebel* are misplaced. The Hearing Examiner cites *Siebel* (along with Mont. Code Ann. §§ 85-2-311(d), 85-2-402(c) and *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900)) only for the proposition that "[s]tatutory and case law does not allow appropriations for anything but a beneficial use. The Hearing Examiner explains in plain language that "no argument has been made explaining why fish and wildlife, or recreation, require the same amount of water [as the historic power generation]." Applicant's reliance on DNRC's response brief in *Siebel* (which question was never ruled on by the Supreme Court) is of no help to the Applicant in this proceeding. Here the Hearing Examiner simply found no evidence in the record establishing a quantification of the needs for fish, wildlife or recreational uses.

Montana water law and the Department precedent have historically required justification of the amount of water needed for beneficial use. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the*

*Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, DNRC Final Order (2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter Of Application For Beneficial Water Use Permit 76LJ 30008762 By Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, In the Matter of Beneficial Water use Permit No. 41H-30013678 by Baker Ditch Company (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); Bitterroot River Protective Association v. Siebel*,* Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003). The decision cited by Applicant, *In the Matter of Applications No. 41H-30013196 and No. 41H-30013197,* is an aberration and clear departure from Department and Montana water law precedent; the Department does not acknowledge any precedent value of this decision. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel*,* Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451. Moreover, the Department is specifically prohibited, "[t]he department . . . may not issue a permit for more water than . . . can be beneficially used without waste for the purpose stated in the application." §85-2-312(1)(a), MCA. Waste is defined to include the "application of water to anything but a beneficial use." §85-2-102(23), MCA. Applicant failed to justify the amount of water it sought as needed to sustain the beneficial use. Conclusion of Law No. 8 will not be rejected or modified.

Wherefore, the Department makes the following:

## ORDER

The Department hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

On page 13, line 30 in Finding of Fact No. 28, the "?" following "irrigators" is changed to a "." .

It is therefore **ORDERED** that Application No. 76GJ 30012925 to Change Water Right Claim Nos. 76GJ 40733-00, 76GJ 94401-00, 76GJ 94402-00 by Granite County is **DENIED**.

## NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 7th day of August 2008.

/Original signed by David A Vogler

David A Vogler
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 7th day of August 2008 by first-class United States mail.

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/Original signed by Jamie Price/

Jamie Price, Hearings Assistant
HEARINGS UNIT, 406-444-6615

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

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| **IN THE MATTER OF APPLICATION NO. 76GJ 30012925 TO CHANGE WATER RIGHT CLAIM NO(S) 76GJ 40733-00, 76GJ 94401-00, 76GJ 94402-00 BY GRANITE COUNTY** | **)**<br>**)**<br>**)**<br>**)** | **PROPOSAL FOR DECISION** |

*** * * * * * * * ***

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on July 10, 2007, in Phillipsburg, Montana, to determine whether an authorization to change a water right should be issued to Granite County, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. § 85-2-402(5). All water right claims involved in the change application were listed in the required public notice. The Water Right Claims proposed for change are Claim Nos. 76GJ 40733-00, 76GJ 94401-00, and 76GJ 94402-00.

## APPEARANCES

Applicant Granite County appeared at the hearing by and through counsel, Mark E. Jones, Granite County Attorney. Tracey Turek, Turek Water Right Research, was called to testify on behalf of the Applicant. Ms. Turek also provided rebuttal testimony on behalf of the Applicant.

Objectors Joe and Sheila Verlanic, Objector Carl Nelson Ranch Company, and Objector Johnson Tuning Fork Ranch (collectively, "Verlanic Group") appeared at the hearing by and through counsel, Charles R. Johnson. James Struna, and Joe Verlanic were called to testify for the Verlanic Group.

Objector Georgetown Lake Homeowners Association (hereafter, "GLHA") appeared at the hearing by and through counsel, Stephen R. Brown. Chuck Stokke, member of the Georgetown Lake Homeowners Association, was called to testify on behalf of the GLHA.

Objector Jean Waldbillig, Objector Vincent Burgmeier, and Objector John McDonald appeared at the hearing in their own behalf.

## EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Applicant offered two exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1, A2.

**Applicant's Exhibit A1** consists of copies of various documents which contain information which is a part of the file, but in a different format, beginning with a document entitled “A BRIEF HISTORY OF THE FLINT CREEK PROJECT AND GEORGETOWN LAKE DAM.” To the extent information in Exhibit A1 is not in the Department file, it is now admitted through this Exhibit.

**Applicant's Exhibit A2** is a copy of the United States Ninth Circuit, District of Montana, document referred to as the “Schuh Decree” which was filed and entered March 31, 1906.

Objector Verlanic Group offered two exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector Verlanic Group’s Exhibit Nos. OV1 and OV2.

**Objector Verlanic Group’s Exhibit OV1** is a two-page copy entitled “STIPULATION REGARDING WATER RIGHTS OF OBJECTORS VERLANIC, CARL NELSON, AND JOHNSON.” The Hearing Examiner took official notice at hearing of the Department water right records for the water right numbers listed in this exhibit without objection by any party.

**Objector Verlanic Group’s Exhibit OV2** is a copy of Case No. 719 otherwise known as the “Featherman Decree” entered on September 18, 1909.

Objector McDonald offered three exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector McDonald’s Exhibit Nos. OM1 and OM2.

**Objector McDonald’s Exhibit OM1** consists of a document entitled “ASSET TRANSFER AGREEMENT” with multiple attachments.

**Objector McDonald’s Exhibit OM2** is a copy of an August 9, 1988 press release entitled “MPC OKAYS EMERGENCY FLOWS FROM GEORGETOWN LAKE.”

**Objector McDonald’s Exhibit OM3** was not admitted into the record. The admittance of the Exhibit (abstract of Water Right No. 76GJ-W-027385-00 by Agnes and Bernhardt Hendrickson) into the record was objected to by Applicant and by Objector GLHA based on relevancy.

Objector GLHA offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector GLHA’s Exhibit Nos. GLHA1, GLHA2, GLHA3, GLHA4.

**Objector GLHA's Exhibit No. GLHA1** is a copy of a document entitled "SETTLEMENT AGREEMENT FOR THE FLINT CREEK DAM" made in August 29, 2000, by the Georgetown Lake Homeowner's Association and Granite County and the Granite County Commissioners.

**Objector GLHA's Exhibit No. GLHA2** consists of copies from Federal Energy Regulatory Commission documents (Order Issuing Major License and Dismissing Transfer and Accepting Surrender of License, Issued May 8, 1992, by Fred E. Springer, Director, Office of Hydropower Licensing) regarding the Flint Creek Project.

**Objector GLHA's Exhibit No. GLHA3** is a copy of a June 8, 1994 letter from the Granite County Commissioners to the Anaconda – Deer Lodge County Commission.

**Objector GLHA's Exhibit No. GLHA4** is a copy of a September 6, 2001, letter to the Granite County Commission from Mack Long of the Montana Department of Fish, Wildlife and Parks.

## PRELIMINARY MATTERS

Objector James Dinsmore and Objector Rocking Chair Ranch did not appear at the hearing. The Hearing Examiner hereby finds Objector Dinsmore and Objector Rocking Chair Ranch both to be in default and their interests in this proceeding are dismissed. Mont. Admin. R. 36.12.208(1). Objector Dinsmore and Objector Rocking Chair Ranch are no longer Parties in this matter.

Prior to taking testimony Charles Johnson asked the Hearing Examiner to clarify the standard of proof required in this matter because of the amount of water being changed. Mr. Johnson was of the opinion that Mont. Code Ann. § 85-2-402 requires the Applicant to prove the criteria at issue by clearing and convincing evidence rather than a preponderance of the evidence. The Applicant believed the standard of clear and convincing to be the required burden. The request was taken under advisement. After reviewing the Department file, the Hearing Examiner ruled after Applicant had presented its case that the February 9, 2005, letter from the Missoula Water Resources Regional Office informed the Applicant that the requirements of Mont. Code Ann. § 85-2-402(4) must be met, and that he saw no reason to change that. The Hearing Examiner clarified at hearing that the Applicant must meet the requirements of Mont. Code Ann. § 85-2-402(4) which requires that the Applicant must prove the relevant criteria by a preponderance of the evidence. The Hearing Examiner did not see at that time that the changes proposed in the Application contemplate a change in use that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being

consumed. Water amounts greater than these triggers require the Applicant to prove the relevant criteria by clear and convincing evidence. See Mont. Code Ann. § 85-2-402(5). Following the hearing this Hearing Examiner saw evidence in the Department file (Applicant's second deficiency response) which is a part of the record that states that evaporation from Georgetown Lake is 40 acre-feet per day or 20 cubic feet per second for the period April through September. Forty acre-feet per day for 183 days is 7,320 acre-feet. Thus, the statutory trigger for the clear and convincing evidence is surpassed. The original ruling on the motion came after Applicant's case in chief had ended, and the Applicant believed it had to meet the higher burden before ending its case, so I see no prejudice in reversing my earlier decision. Thus, it is **ORDERED** that Applicant must meet the requirements of Mont. Code Ann. § 85-2-402(5) which requires that the Applicant must prove the relevant criteria by clear and convincing evidence in this matter.

Objector McDonald asked that Mr. Johnson, counsel for the Verlanic Group but not Objector McDonald, be allowed to ask him questions to get his evidence into the record. Without objection, the request was allowed.

Objector Vincent Burgmeier made a brief opening statement and then asked to be excused because of the press of other business. Without objection, Objector Burgmeier was excused after his opening statement.

Objector Jean Waldbillig made an opening statement, and participated in the portion of the hearing containing Tracey Turek's testimony. Objector Waldbillig did not actively participate in the remainder of the hearing with the exception of a brief closing statement.

Charles R Johnson, counsel for the Verlanic Group, is also an objector. In lieu of presenting his own direct testimony, Mr. Johnson asked that the testimony of Mr. Jim Struna and Mr. Joe Verlanic be adopted as his own to save time. Without objection, the request was granted.

During the testimony of Charles Struna, a hearsay objection by GLHA was sustained to the testimony of Mr. Struna regarding what Chief Water Judge Loble said at a meeting regarding Georgetown Lake. Charles R. Johnson made an offer of proof of what the testimony would prove if the testimony were allowed to go into the record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

# FINDINGS OF FACT

## General

1. Application To Change A Water Right No. 76GJ 30012925 in the name of Granite County, and signed by Joann Huffsmith, Earl Morten, and Clifford Nelson (Granite County Commissioners) was filed with the Department on November 5, 2004. (Department file)

2. A public notice describing facts pertinent to this application was published in the *Phillipsburg Mail*, a newspaper of general circulation on January 5, 2006, and was mailed to persons listed in the Department file on January 4, 2006. (Department file)

3. The Environmental Assessment (EA) prepared by the Department for this application, dated December 2, 2005, was reviewed and is included in the record of this proceeding. (Department file)

4. Applicant proposes to change all of Water Right Claim Nos. 76GJ 94401-00 (30 cubic feet per second [cfs] flow rate and 21,773.34 acre-feet volume released at the dam for power generation), 76GJ 40733-00 (power generation for the storage capacity added to the reservoir / Georgetown Lake of 14,140 acre-feet), and 76GJ 94402-00 (power generation for the original storage capacity of reservoir / Georgetown Lake of 16,853 acre-feet) by adding additional purposes to these three rights and adding a place of use at the dam in addition to the powerhouse location for the power generation right, and in the reservoir for the storage water rights to validate asserted traditional, long-standing public and private uses of the water in claimed storage in Georgetown Lake. The proposed volume of water to be changed is the sum of the volumes claimed, 52,766.34 acre-feet. Applicant proposes to add the [non-consumptive] purposes of recreation, and fish and wildlife to all three water right claims. The recreation uses include, but are not limited to boat docks, derbies, water slides, tourism, and resort facilities. The additional place of use for Water Right Nos. 76GJ 94401-00, 76GJ 94402, and 76GJ 40773-00 is requested to add Georgetown Lake reservoir as the place of use; as claimed the water rights only show Georgetown Lake as the place of storage for the hydropower generation water right. The surface area of the reservoir at the full pool elevation of 6,429.5 is approximately 2,850 acres; the storage capacity of the reservoir at full pool is 31,040 acre-feet. Applicant proposes to manage outflows from Georgetown Lake based on the 1906 Schuh Decree with consideration for reservoir levels in accordance with the Georgetown Reservoir Management Plan, dated May 13, 2003. (Public Notice, Department file)

5. The published notice indicates the volume of water being changed is the claimed volume of water shown on the three water rights being changed, or 52,166 acre-feet. The volumes of water being changed (listed in the application materials and in the public notice) is the sum of 21,773 acre-feet, 16,853 acre-feet, and 14,140 acre-feet. This Hearing Examiner calculates this sum to be 52,766 acre-feet, not 52,166 acre-feet. This appears to be a scrivener's error. Because the public notice contains the correct volumes to be added followed by the incorrect sum, the amount proposed for change is 52,766 acre-feet. (Public Notice, Department file)

6. The water rights to be changed each list the place of use as the power plant located in the SE¼ of Section 36, Township 6 North, Range 14 West, and are Water Right Claim Nos.:

- 76GJ 94401-00: is for the flow and volume diverted from Georgetown Lake at the dam with a November 15, 1888, priority date. The claimed maximum flow rate is 30 cubic feet per second (cfs) [1], and claimed annual volume is 21,773 acre-feet. The claimed period of diversion and period of use is January 1 through December 31. (Water Right Claim, abstract, Department file)
- 76GJ 94402-00: is for the volume of water stored in Georgetown Lake behind the dam with a November 15, 1888 priority date. This water right is for water stored in the original reservoir in the amount of 16,853 acre-feet for release for hydropower generation downstream. The claimed period of diversion and period of use is January 1 through December 31. (Department file)
- 76GJ 40733-00: is for the volume of water stored in Georgetown Lake behind the dam with a December 31, 1919 priority date. This water right is for additional water stored behind the enlarged reservoir in the amount of 14,140 acre-feet for release for hydropower generation downstream. The added capacity is the result of raising the level of the dam in 1919. The claimed period of diversion and period of use is January 1 through December 31. (Department file)

7. The Asset Transfer Agreement between Applicant and Montana Power Company (MPC), predecessor in interest to the water rights being changed, did not convey the water rights to the Applicant. However, the water right interests were conveyed to the Applicant at a later point in time and applicant is the owner of record in the Department's database of these water right claims. (Exhibit No. OM1, testimony of Tracey Turek, John McDonald)

[1] 30 cfs = (1200 MI * 11.22 gpm / MI) / (448.8 gpm / cfs)

8. The Hearing Examiner notified the Parties at hearing that he intended to take official notice of the Department Water Right Records listed on Exhibit No. OV1. These records are: 76GJ-W-101727-00, 76GJ-W-101726-00, 76GJ-W-140447-00, 76GJ-W-012676-00, 76GJ-W-012675-00, 76GJ-W-012674-00, 76GJ-W-012673-00, 76GJ-W-010120-00, 76GJ-W-012670-00, 76GJ-W-012671-00, 76GJ-W-012672-00, 76GJ-W-101674-00, 76GJ-W-101675-00, 76GJ-W-[1]01676-00, 76GJ-W-101677-00, 76GJ-W-101678-00, 76GJ-W-101679-00. No Party contested the materials so noticed at hearing. Mont. Admin. R. 36.12.221.

**Historic Use**

9. The water rights being changed have been used historically to generate hydroelectric power at the Flint Creek power plant. Water was diverted from Georgetown Lake at the dam and conveyed via a flume/pipeline to a powerhouse and turbine located approximately 1.5 miles downstream from the dam. However, no power has been produced since 1989 when the flume ruptured. The turbine claimed in Water Right No. 76GJ 94401-00 had a capacity of 30 cfs. Applicant's predecessor claimed this right is for a constant flow throughout the annual period of use and claimed that flow rate and volume. The records of releases from Georgetown Lake do not substantiate continuous releases of 30 cfs. The outflow records from Georgetown Lake between 1941 and 1989 average 29.6 cfs for all months of the period of record, but show occasional releases less than and occasional releases greater than the 30 cfs claimed in the water right. In addition, there have been releases greater than 30 cfs during drought times or when downstream crops are suffering. Since construction of the Flint Creek plant and reservoir, Applicant's predecessors have used pondage and long-term storage to provide head as well as short-term and long-term increases in generator output. The average annual production from the Flint Creek plant since 1942 is 6, 740,000 kilowatt hours. (Department file, testimony of Jim Struna, Joe Verlanic, John McDonald)

10. The Schuh Decree was filed and entered by the Circuit Court of the United States, Ninth Circuit, District of Montana, March 31, 1906 to determine water rights on Flint Creek. Generally, the decree sets the flow rate and priority of the (complainant) power generation facility and the downstream appropriators party to the case (defendants). Therein it states: "the complainant is the owner of and entitled to maintain and use for the purpose of storing and conserving therein the waters of said Flint Creek, the said dam and said reservoir, and is entitled to store therein the waters of said Flint Creek, provided the complainant uses the water in such manner that every appropriator further down the stream shall have, during the irrigating season of each year,

the use and enjoyment of it substantially according to its natural flow, subject only to such interruptions as is necessary and unavoidable by the reasonable and proper use of the water in propelling and running the machinery in the electric plant of the complainant, and the supply of water running in said creek below the electric plant of the complainant during the irrigating season must not depend upon the mere convenience or caprice of the complainant, nor upon accident of mere chance such as leakage, but the said complainant must, at all times during the irrigating season of each year, let, turn down and cause to flow in the channel of said creek, to-wit, Flint Creek, below its electric plant, not less than 1200 miners inches of water; and that except in so far as is necessary to the use and enjoyment thereof in the manner and for the purposes herein decreed . . . " ¶ 19. The decree goes on to state: " . . . said defendants, and each thereof, are enjoined and restrained from demanding from complainant or its successors in interest that it or they let or cause to flow down the channel of said Flint Creek any greater amount of water than the average natural flow said stream, which in the irrigating season of each year does not exceed 1200 miners inches, or 30 cubic feet per second of water . . . " ¶ 20 (Department file, Exhibit No. A2)

11. The Featherman Decree, Case No. 719, was filed and entered by Judge Geo. B. Winston for the waters of Flint Creek situated in Granite County September 18, 1909, to determine water rights on Flint Creek. Generally, the decree sets the flow rate and priority of the plaintiffs and defendants for the use of water from Flint Creek. (Department file, Exhibit No. **Exhibit OV2**)

12. Under the proposed changes to the existing water rights, the operation and management will not change. In the August 2000 Settlement Agreement Granite County agrees that it does not intend to change the historic operation of the Flint Creek dam, or deviate from the terms and conditions of the County's former FERC License, or the 1906 Schuh decree. In this change Application, Applicant proposes to manage outflows from Georgetown Lake based on the 1906 Schuh Decree with consideration for reservoir levels in accordance with the Georgetown Reservoir Management Plan, dated May 13, 2003. The 2003 Management Plan states its purpose as maximizing Georgetown Lake levels while fulfilling its rights and obligations mandated in the Schuh decree. These two documents attempt to, but do not fully describe the historic operation. When the historic operation of storage and releases in Georgetown Lake are maintained, the amounts proposed for change will not exceed the historically diverted rates or

volumes, or increase the historically consumed volume. (Department file, testimony of Tracey Turek)

13. The only historic consumption was evaporation. The surface area of Georgetown Lake increased from ~ 1760 acres to 2850 acres after the reservoir was raised in 1919. The seasonal evaporation from the 2850 surface acres of Georgetown Lake, ~0.17 inches per day for 183 days, amounts to ~7320 acre-feet. In making its evaporation estimate, Applicant's predecessor, Montana Power Company, stated it could be reasonably assumed that minimal evaporation occurs in the months November through March. This seasonal volume amounts to ~40 acre-feet per day, or ~20 cfs. This consumed water would not represent a change in the amount of evaporation if the operation of the outlet is the same under the proposed change as it was under the historical operation for hydropower purposes. (Department file, testimony of Tracey Turek)

**Adverse Effect**

14. Applicant's motivation to add purposes and place of use to these water rights is to avoid the presumption of abandonment. Hydropower has not been generated since 1989. Applicant is pursuing the ability to generate hydropower, but until that is possible Applicant does not want the water rights they purchased to be lost through presumptive abandonment. Applicant proposes no physical change in the historic hydropower generation purpose; only to add the purposes of fish and wildlife, and recreation to the three hydropower water rights. Applicant's plan is operate the reservoir and release water as it has historically. (Department file, testimony of Tracey Turek, John McDonald)

15. One of Objector Carl Nelson Ranch Company's (CNRC) concerns is that changing Georgetown Lake from a place of storage to a place of use for the two storage rights in order to maintain the lake level, amounts to giving fish and wildlife, and recreation uses an 1888 priority date when the original storage rights were for later release to generate hydropower. As proposed, there is no independent downstream fish and wildlife or recreation beneficial use for which water is stored – the use is in Georgetown Lake itself. If Georgetown Lake outflows are determined for the management of lake levels, there is concern that the downstream irrigators will suffer. The basis of CNRC's downstream irrigation water rights for 300 acres of grass hay is the Featherman Decree (Water Right claim Nos. 76GJ-W-101727-00, 76GJ-W-101726-00, 76GJ-W-140447-00). The historic operation (of releases from Georgetown Lake) includes times when flows greater than the 30 cfs required in the 1906 Schuh Decree have been released for downstream appropriators during drought periods or when crops are suffering. Objector CNRC

has not made call for releases from Georgetown Lake. Objector McDonald has made call under his Schuh Decree water rights to irrigate some 800 acres (Water Right claim Nos. 76GJ W 138409, 76GJ W 138410, 76GJ W 138411, 76GJ W 138412, 76GJ W 138413, 76GJ W 138414). During the last 10 - 12 years a water commissioner has been appointed to administer diversions downstream of Georgetown Lake (Department file, testimony of Jim Struna, Joe Verlanic, John McDonald)

16. The Application does not specifically acknowledge the appropriators (or their successors) listed in the 1909 Featherman Decree when discussing operation of Georgetown Lake if the change is authorized. The only signatories to the August 2000 Settlement Agreement were GLHA and Granite County; no downstream irrigators were parties to the agreement. Objectors believe that any management plan for the operation of Georgetown Lake must take into account their downstream water rights, especially the Schuh Decree and Featherman Decree appropriators. However, Applicant has stated they will honor all priority dates found in the Department records. (Testimony of Tracey Turek, Jim Struna, Chuck Stokke)

17. Objectors argue that when the dam was raised in 1919 the surface area increased by 1090 acres from the original 1760 acres to the present 2850 acres. This increase in surface area assuredly increased the amount of evaporation from the surface of Georgetown Lake. However, this increase in surface area and evaporation began in 1919, was not caused by the proposed change, and is not proposed for change by this Application. (Department file, testimony of Tracey Turek, Jim Struna, John McDonald)

18. Objectors also argue that when the original Flint Creek Dam (on Georgetown Lake) was raised four feet, it was to store water from Storm Lake and Twin Lake for ACM's [Anaconda Copper Mining Company] winter smelter use and not for hydropower. However, the storage added in 1919 was claimed in the state-wide water adjudication for power generation use and not for "smelter use." The date when the change from storage for "winter smelter use" to storage for "power generation use" is not in the record. The original Federal Energy Regulatory Commission (FERC) license was issued to Montana Power Company in January 25, 1940 with an effective date of July 1, 1938. (Department file, testimony of Joe Verlanic, John McDonald, Tracey Turek)

19. Objector GLHA's concern regarding the management of Georgetown Lake is that flows greater than the 30 cfs releases required in the Schuh Decree and the Settlement Agreement signed in August 2000 will cause the lake levels to drop. GLHA believes the Settlement

Agreement is consistent with the Schuh Decree. GLHA also is involved in efforts to quantify inflows to Georgetown Lake, and to model inflows and outflows from the Lake. Applicant intends to release a minimum of 30 cfs as required by the 1906 Schuh Decree in its operation of Georgetown Lake. Paragraph 19 of the Schuh Decree requires the dam owner to "at all times during the irrigation season of each year, let, turn down and cause to flow in the channel of said creek, to-wit, Flint Creek, below its electric plant, not less than 1200 miners inches of water. . .". Paragraph 20 of the Schuh Decree enjoins the downstream defendants from demanding any greater amount of water than the average natural flow of said stream, which in the irrigation season of each year does not exceed 1200 miners inches, or 30 cfs of water to be released. How this natural flow was determined is not known, but the estimates of inflows regularly exceed 30 cfs during the irrigation season. (Department file, Exhibit No. A2, testimony of Tracey Turek, Chuck Stokke)

20. The record does not total or summarize the flows determined in the 1909 Featherman decree that would be in addition to the releases required in the 1906 Schuh Decree. There are water rights downstream of Georgetown Lake that have been determined in the Featherman Decree. Applicant has stated it will acknowledge and honor all priority dates found in the Department records. (Testimony of Tracey Turek, Jim Struna)

**Adequacy of Appropriation Works**

21. The Flint Creek Dam as enlarged in 1919 has stored and released water since that time. The appropriation works are adequate to store and release water. (Department file, testimony of Tracey Turek)

**Beneficial Use**

22. The Supplement To Application To Change A Water Right offers as proof that the proposed addition of purposes is a beneficial use the following statement: " . . . Fish and Wildlife, and Recreation are all considered beneficial uses under Montana Water Law (MCA 85-2-102)." November 28, 2005, the Missoula Regional Office prepared a preliminary criteria assessment review which reviewed information presented by the Applicant relative to the applicable change criteria. Therein, Patrick Ryan, of the Missoula Water Resources Division Office, stated: "The Applicant has not identified what amount of water is required for either recreation or fish and wildlife other than to indicate that the place of use would be Georgetown Reservoir. With the current and historical management of water in the reservoir, the lake levels fluctuate with the dam releases that are tied to downstream senior water right requirements. No

basis for the amount of water or lake level for the proposed recreation purpose was offered by the Applicant. No basis for the amount of water or lake level for the proposed fish and wildlife purpose was offered by the Applicant." (Department file)

23. The Hearing Examiner requested the Parties to submit prehearing briefs to summarize the evidence and theory(ies) of the case. The issues to be briefed included beneficial use. Specifically, how much water is the minimum necessary for recreation use, and fish and wildlife use? Applicant's Prehearing Memorandum attachment states "the question raised here [by the Hearing Examiner] applies to criteria for a new permit applications and does not necessarily pertain to the change process. The attachment goes on to explain the change requested is for existing water rights that have always historically been utilized for these purposes but were not "claimed" during the adjudication filing period. The maximum historic flow rates and volumes have been used for these additional purposes and the Application is to continue these historic practices. Thus, the historic appropriation defines both the minimum and maximum amounts necessary to sustain the usage. The lake at full pool and the release of "at least" 30 cfs is the minimum necessary to sustain the historic uses and thus is the amount necessary to sustain the proposed beneficial uses." Applicant did not provide evidence on the amount of water necessary to carry out the proposed purposes. Instead the justification was based upon the historic power generation use and not the proposed recreation or fish and wildlife uses. (Department file, testimony of Tracey Turek)

24. The proposed wildlife use is for natural wildlife use from Georgetown Lake. (Department file, testimony of Tracey Turek)

25. The information provided throughout the record by the Applicant does not explain why the amount of water proposed for the additional purposes, under any or all of the three water rights, is necessary to accomplish the proposed additional uses. The record does not show how storing water in Georgetown Lake for later release of 30 cfs at the dam is necessary for fish and wildlife, or for recreation, as it was for the historic power generation. The record does not show that the volume of stored water proposed for change with a place of use in Georgetown Lake is necessary to accomplish fish and wildlife, or recreation use. Although Applicant has been very clear that the proposed change amounts only to adding two uses to the historic power generation use, and not altering the historic management of Georgetown Lake water levels or outflows, Applicant has not shown that the proposed changed use requires the amount of water that was historically used for the power generation purpose. The Applicant has shown no

relationship between fish and wildlife, or recreation use of water and any amount of water requested other than fish live in and people recreate on Georgetown Lake. Applicant has not shown the amount of water proposed for these uses are beneficial uses of water. (Department file, testimony of Tracey Turek)

**Possessory Interest**

26. Applicant argues it has a possessory interest in the place of use by the historic and continuous use since the dam was raised in 1919. Applicant has affirmed that it has the possessory interest, or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. (Department file)

**Water Quality Issues**

27. Valid objections relative to water quality were filed against this Application by Objectors Verlanic and Objector GLHA. There were no objections relative to the ability of a discharge permitholder to satisfy effluent limitations of his permit filed in this Application. The GLHA water quality objections voiced concerns about turnover in Georgetown Lake. GLHA believes the Settlement Agreement signed in August 2000 helps maintain the water quality in Georgetown Lake. Objector Verlanic believes any management plan for Georgetown Lake must include scientifically based procedures to ensure that the water being released does not adversely affect the quality of the water below the dam. Objectors presented concerns rather than factual evidence that the proposed change would adversely affect the water quality of a prior appropriator. Applicant proposes no change in the historic operation of the facility, so there should be no change in the water quality. The water quality of a prior appropriator will not be adversely affected by this proposed change. (Department file, testimony of Tracey Turek, Jim Struna, Chuck Stokke)

**Reasonable Use Mont. Code Ann. §85-2-402(4)(b).**

28. The additional uses will not change the existing demands upon the state water supply or alter the historic supplies. In this case there is an existing demand for irrigation water downstream after it is released whether historically for hydropower or as promised consistent with historic operation. Because there is no support for the amount of water for the added purposes it is not known whether the proposed added purposes would waste water that could otherwise be used downstream by irrigators? There are no water reservations or projected increased demands for water because the basin is closed to any new appropriations of surface water. Water will be stored behind the Georgetown Lake dam and water will be released into the

Flint Creek channel to supply water to downstream users as well as maintaining the fishery and wildlife associated with both the Lake and Creek. Downstream irrigators are concerned that management based on lake levels will affect their water uses. The proposed management of Georgetown Lake under this change is to release water based on past operational practice, but also acknowledging water rights found in the Department Water Right Records. Exactly what is meant by “acknowledging water rights in the Department records” means is not clear, however, the proposed management is not based solely on Georgetown Lake water levels. Applicant’s proof that this criterion is met is that there will be no change from the historical water management. Under the proposed management scheme acknowledging water rights found in the Department Water Right records according to their priority date, the additional uses will not change the existing demands upon the state water supply, nor alter the historic supply. (Department file, testimony of Tracey Turek, Jim Struna)

29. Applicant argues the benefits to the Applicant and the State are more than reasonable. Georgetown Lake has always been, and hopefully will continue to be, a benefit to the public and state for recreation, fish and wildlife, tourism and economic stability. No Party presented evidence to the contrary. Under the proposed management scheme, the benefits from the additional uses to the Applicant and to the State are that there would be a right to use or store water in Georgetown Lake for purposes other than generation of power. (Department file)

30. Applicant argues there will be no effect on the water quantity or quality in the source of supply for existing uses because this water has and will continue to be managed according to historic practices. No Party presented evidence to the contrary. Under the proposed management scheme, the additional uses will not change the water quantity or quality in the source of supply for existing uses. (Department file)

31. Applicant argues there is no available or feasible low-quality water for the proposed additional uses. The same water as historically used, will be used for the new purposes. Under the proposed management scheme, the additional uses cannot use low-quality water for the proposed additional uses. (Department file)

32. Applicant argues there will be no creation or contribution to saline seep. There will be no effects on private property rights by any creation of or contribution to saline seep because the historic operation does not change. Under the proposed management scheme, the additional uses will not change private property rights by the creation of or contribution to saline seep. (Department file)

33. Applicant argues there are no probable significant adverse environmental impacts of the proposed use of water. The water has been appropriated and managed since 1888 and will continue to be appropriated and managed in the same manner. The new proposed uses are not for the generation or transmission of energy. The historic uses of the water have been hydropower generation. There are no probable significant adverse environmental impacts by the proposed use of water as determined by the Department pursuant to Title 75, chapter 1, or Title 75, chapter 20 because the water will be managed in the same manner as historically. No Party presented evidence to the contrary. Under the proposed management scheme, the additional uses will not create probable significant adverse environmental impacts as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20. (Department file)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

## CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.

2. The Department shall approve a change in appropriation right if the appropriator proves 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; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be

adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless the appropriator proves by clear and convincing evidence that: the criteria in Mont. Code Ann. § 85-2-402(2) (see Conclusion of Law No. 2 above) and Mont. Code Ann. § 85-2-402 (4) are met (the proposed change is a reasonable use). A finding of reasonable use must be based on a consideration of: (i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life; (ii) the benefits to the applicant and the state; (iii) the effects on the quantity and quality of water for existing uses in the source of supply; (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made; (v) the effects on private property rights by any creation of or contribution to saline seep; and (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

4. A public notice containing the facts pertinent to the change application was published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. Mont. Code Ann. § 85-2-307. See Finding of Fact No. 2.

5. The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in the proposal for decision of the material noticed. Parties may contest the materials first noticed in this proposal for decision by filing exceptions to the proposal for decision. Here, the matters to be noticed were announced at the hearing and received no objection. ARM 36.12.221(4); ARM 36.12.229. See Finding of Fact No. 8

**Historic Use**

In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute simply codifies

western water law.[2] One commentator describes the general requirements in change proceedings as follows:

> Perhaps the most common issue in a reallocation dispute is whether other appropriators, especially junior appropriators, will be injured because of an increase in the consumptive use of water. Consumptive use may be defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream system through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." An appropriator may not increase, through reallocation [changes] or otherwise, the historic *consumptive* use of water to the injury of other appropriators. *In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use*. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriations.

Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

This Hearing Examiner sees that if the operation and maintenance of Georgetown Lake is not changed from historic practice, and the Applicant agrees to acknowledge all priority dates found in the Department records, there should be no harm to existing water rights by enlargement of the historic use and rights because there is no enlargement. This Order does not determine or confirm the amount of water used by these water right claims on the entire places of use. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 9, 12.

**Adverse Effect**

6. The Applicant has proven by a clear and convincing evidence that the water rights of other appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected when Georgetown Lake management is subject to call of downstream appropriators according to priority, the requirements of the Schuh Decree, and is managed in accord with historic practice. Historically, call of the source by downstream appropriators has not been constant. Although measurement of inflows is currently being attempted (GLHA and others), inflows have not been historically measured. Inflow estimates were made based on the measured outflows, estimates of evaporation, and the change in storage. Inflow estimates are important to make sure downstream irrigators are getting the water historically available at the time their appropriation was perfected, and also to assure that water stored at Applicant's expense is not released to the sole benefit of the downstream irrigators who have no stored

[2] E.g., Wyo. Stat. § 41-3-104.

water in Georgetown Lake. Historic operation was to maximize power generation at flows of 30 cfs at the powerhouse downstream of the Georgetown Lake dam, however, it appears that some water was released from storage, or inflows were passed through Georgetown Lake, to meet downstream irrigation call. Whether releases greater than 30 cfs during irrigation season are 'good neighbor' releases from storage, or pass-through of inflows is not clearly understood from the record. Regardless, this is the historic use of the applicant's water right claims and the dam must be operated as it was historically. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 9, 14, 15, 16, 17, 18, 19, 20.

**Adequacy of Appropriation Works**

7. The Applicant has proven by a clear and convincing evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 21.

**Beneficial Use**

8. The Applicant has not proven by a clear and convincing evidence that the quantity of water proposed to be used is the amount necessary for the proposed beneficial uses and the amount of water requested for the added purposes is not a waste of water. Without this proof a determination that the proposed use is beneficial cannot be made.

The Hearing Examiner asked the Parties to brief a list of issues prior to the hearing to summarize the evidence and theory(ies) of the case. The issues to be briefed included beneficial use. Specifically, how much water is the minimum necessary for recreation use, and fish and wildlife use? Applicant's Prehearing Memorandum attachment states the issue raised by the Hearing Examiner applies to criteria for new permit applications and does not necessarily pertain to the change process. The attachment goes on to explain the change requested is for existing water rights that have always historically been utilized for these purposes but were not "claimed" during the adjudication filing period. The maximum historic flow rates and volumes have been used for these additional purposes and the Application is to continue these historic practices. All claims for existing rights were required to be filed by April 30, 1982, however, a provision for filing late claims by July 1, 1996, allowed appropriators to avoid the forfeiture provisions of the statute. Failure to file a claim as required by law results in a conclusive presumption the water right has been abandoned. See Mont. Code Ann. §§ 85-2-212, 221. No claims were made for these "historic uses." The existing claims are for power generation. The

Applicant provided no connection or evidence between the amount of water being changed for the proposed uses to be added and the amount necessary to sustain the added purposes.

I find Applicant's argument analogous to the argument that an appropriator has a right to a flow of water based on historic practice, even when no beneficial use is contemplated. Statutory and case law does not allow appropriations for anything but a beneficial use. Mont. Code Ann. §§ 85-2-311(d), 402(c); See Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Bitterroot River Protective Ass'n, Inc. v. Siebel**,** 2005 MT 60, 108 P.3d 518 (2005). Thus, the historic power generation appropriation defines both the minimum and maximum amounts necessary to sustain that usage, but no argument has been made explaining why fish and wildlife, or recreation, require the same amount of water. That is, does the amount of water proposed for the additional purposes require the same amount of water as the hydropower purpose. The Applicant argues it has the legal right to utilize the full extent of the historic appropriation for the proposed additional purposes, but provides no support.

Under Applicant's proposed changes, the water rights of prior appropriators will continue to be satisfied, as the operation and management of Georgetown Lake is not intended to be altered by this change. However, what would appear to be a subtle change from a place of storage to a place of use is not so subtle. Case law on storage of water in Montana has stated:

> Generally, and briefly, in this state what are the reservoir rights of any person? We would say that, in any year, to store for use in that or succeeding years what he has a right to use, and also any additional amounts that others would not have the right to use, and that would otherwise go to waste, seems to cover the situation in this case.
>
> Federal Land Bank v. Morris 116 P.2d 1007, *1012 (Mont. 1941)

Key in this cite is the phrase "has a right to use." The stored water must have an underlying beneficial use. Without the power generation use, there is no reason (underlying right) to store water for later use. Storage in and of itself is not a beneficial use of water. Storing water for which there is no later use in short amounts to a waste of water. This Hearing Examiner understands that the Applicant plans no changes from the historic operation of Georgetown Lake. There can be no independent right for storage. Here, there is no measure to show the added uses are in fact beneficial and not a waste of water. Applicant must prove the amount of water necessary to sustain the proposed purposes and they have not done that here. See In the Matter of Application No. 43B-30002710 by USA (Department of Agriculture – Forest

Service), Final Order (2005); In the Matter of Application No. 41K-11226000 by Poulson, Final Order (2002). Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 22, 23, 24, 25.

**Possessory Interest**

9. The Applicant has proven by a clear and convincing evidence a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 26.

**Water Quality Issues**

10. The water quality of a prior appropriator will not be adversely affected. The objections raised were concerns that the water quality of Georgetown Lake may change if the operation and management of Georgetown Lake is allowed to change. The Applicant intends to operate the Georgetown Lake facility as it has historically been operated, so no change to water quality can come by adding the fish and wildlife, and recreation purposes. No valid objections to the ability of a discharge permit holder to satisfy effluent limitation of a permit was raised. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of Fact Nos. 27.

**Reasonable Use**

11. The uses proposed by this change are a reasonable use of water according to the statutory criteria set out in Mont. Code Ann. § 85-2-402(4). See Finding of Fact Nos. 28, 29, 30, 31, 32, 33.

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

## PROPOSAL FOR DECISION

Application No. 76GJ 30012925 to Change Water Right Claim Nos. 76GJ 40733-00, 76GJ 94401-00, and 76GJ 94402-00 by Granite County is **DENIED**.

## NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by January 16, 2008, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by January 28, 2008, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 27th day of December 2007.

/ Original Signed By Charles F Brasen /

Charles F Brasen
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 27th day of December 2007 by first-class United States mail

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/ Original Signed By Jamie Price /

JAMIE PRICE
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