

Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6615
DNRCOAH@mt.gov

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

**IN THE MATTER OF CHANGE APPLICATION)
NO. 41B-30123390 BY MEINE, ROBERT &) FINAL ORDER
DOROTHY REVOCABLE TRUST)**

On July 16, 2025, I conducted a hearing on the objection filed against the Department of Natural Resources and Conservation's ("Department" or "DNRC") Preliminary Determination to Grant ("PDG") the above-captioned application. For the reasons set forth below, I hereby GRANT IN MODIFIED FORM Meine, Robert & Dorothy Revocable Trust's ("Applicant") application on the terms and conditions set forth in the PDG, which DNRC issued on April 8, 2024.

BACKGROUND AND PROCEDURAL HISTORY

On April 5, 2019, the Robert and Dorothy Meine Revocable Trust (Applicant) submitted Application to Change Water Right No. 41B 30123390 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Application was determined to be correct and complete as of September 28, 2022. The Applicant submitted an amendment to the application on February 7, 2023, to add Claim 41B 88661-00 to the change, which reset timelines. The amended application was deemed correct and complete as of December 19, 2023.

The Department issued a Preliminary Determination to Grant Permit (PDG) on April 8, 2024. The Department found that the Applicants had proven by a preponderance of the evidence that all the applicable § 85-2-402, MCA, criteria had been met. The PDG concluded that the Applicant was authorized to change two water right claims to fill and maintain a reservoir.

Pursuant to § 85-2-307, MCA, the Department provided public notice of the PDG to potentially interested parties on April 30, 2024, and published public notice of the PDG on May 1,

2024, in the Dillon Tribune. The public notice established a deadline of June 14, 2024, for written objections to the Application.

The Application received one objection filed by Objector Renee Klakken (“Objector” or “Klakken”), and an Objection Deficiency Notice was sent as required by ARM 36.12.117(11) on June 10, 2024. The Objection Deficiency Notice informed the Objector they had 15 days to respond. Objector Klakken timely responded, and a Change Objection Validity Form was issued on July 3, 2024, deeming the objection valid for the criteria of adverse effect.

On July 10, 2024, DNRC assigned me as the Hearing Examiner to preside over this contested case. On July 30, 2024, I conducted a prehearing conference to establish a schedule to bring this matter to hearing; review the issues for the hearing; and discuss any other preliminary or procedural matters. The parties requested 30 days to discuss settlement, and I set another prehearing conference for September 4, 2024.

At the pre-hearing conference on September 4, 2024, Objector Klakken informed me that she would like a site visit and Applicant agreed to this request. On October 7, 2024, I conducted a site visit to view the reservoir. All parties were present, including Jean Bergeson, one of the attorneys for the Applicant.

Following the site visit, I held a status conference with all parties on October 23, 2024. At this conference I asked Objector Klakken to refine or restate their objection to Meine’s proposed water right change, as I had difficulty understanding the specific basis of the objection. Ms. Klakken offered to restate the objection and its basis in the form of a motion by January 6, 2025, and the Applicant would have until February 10, 2025, to respond.

On December 30, 2024, Objector Klakken filed a brief further explaining her objection to the application. Objector Klakken presented 11 different topics of argument.

On February 10, 2025, counsel for Applicants filed “Applicant’s Motion to Strike and Motion to Dismiss Objection.” Applicants assert that Objector did not have standing to object to the application and that the basis of the objection was vague and inconclusive.

On May 9, 2025, I issued an Order denying the Motion to Dismiss Objection and issued a ruling stating which of Objector Klakken’s proposed 11 topics were appropriate for hearing under the valid “adverse affect” objection.

On May 21, 2025, I held a final prehearing conference setting the remaining deadlines and scheduling a hearing date.

On July 16, 2025, I held a hearing on this matter in Dillon, MT. Upon conclusion of the hearing, I left the record open to allow filing of closing briefs from all parties with a deadline of August 18, 2025.

On August 15, 2025, I received a final filing of exhibits from Objector Klakken, and I deemed the record closed as of August 18, 2025. On November 14, 2025, I issued an Order Extending the Deadline for Issuance of the Final Order.

LEGAL STANDARD

Under Montana law, an applicant for a water right change retains the burden of proof to demonstrate by a preponderance of the evidence that the applicable criteria of § 85-2-402(2) MCA, are satisfied before DNRC may issue the permit. *Bostwick Properties v. DNRC*, 2013 MT 48, ¶ 18, 369 Mont. 150, 296 P.3d 1154 (2013). The Montana Supreme Court has defined the preponderance of the evidence standard as one that “requires proof sufficient to support a conclusion that the asserted existence, non-existence, occurrence, or non-occurrence of the subject fact or factual occurrence was, is, or will be more probable than not, i.e., more likely than not.” *Breuer v. State*, 2023 MT 242, ¶ 19 at n. 14, 414 Mont. 256, 274, 539 P.3d 1147, 1160 (2023). This a “relatively modest standard” that requires a showing only that it is “more probable than not” that the statutory criteria have been met. *Hohenlohe v. DNRC*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

Pursuant to §85-2-402(2)(a)-(d) the criteria an applicant must prove are:

- 1) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
- 2) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 3) the proposed use of water is a beneficial use;
- 4) 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

Section 85-2-402(2)(a)-(d), MCA.

Pursuant to § 85-2-307(2)(b), MCA, DNRC’s PDG reflects DNRC’s preliminary determination that Applicant has proven criteria § 85-2-402(2)(a)-(d), MCA, by the requisite standard in connection with the Application.

This hearing is an opportunity for the Objector to introduce evidence and argument that the Applicant has not satisfied their burden in proving the criteria of § 85-2-402(2), MCA.

UNCONTESTED CRITERIA

Because no valid objections were filed challenging beneficial use, Applicant's possessory interest, or adequacy of diversion, and because there is no evidence in the record that would cause me to revisit DNRC's findings and conclusions in the PDG as to those three criteria, I find that Applicant has met its burden of proof in regard to those criteria for the reasons set forth in the PDG. (PDG ¶¶ 23-28). Moreover, criteria § 85-2-402(2)(e)-(g), MCA, do not apply to this matter because the change does not involve salvaged water and no valid objection was submitted for (f) or (g). See, §§ 85-2-402(2)(e), 402(3), MCA.

THE CONTESTED CRITERIA

The Department initiated contested case proceedings based on Objector's valid objection to the adverse effect criteria. The contested case allows the Objector to produce evidence showing why the Department erred in issuing the Preliminary Determination to Grant in favor of Applicant. Applicant relies on the analysis and conclusions reached by the Department and may introduce rebuttal evidence. Objector asserts that Department's analysis was incorrect, and the Department should not have issued the Preliminary Determination to Grant.

APPEARANCES

At the hearing on July 16, 2025, Applicant Robert and Dorothy Meine Revocable Trust were represented by counsel Ryan Ballard, Vicevich Law. Jerry Meine testified at the hearing for Applicant. Objector Renee Klakken appeared *pro se* and did not call any witnesses to testify.

EXHIBITS

This Order cites the administrative record (AR) as it is scanned and filed by DNRC with a date of July 10, 2024. The initial citations of any document in the AR cite the name of the document then the pdf page number of the AR. Subsequent references refer to the document by name and internal page numbering only. Thus "Document title, AR at page #" followed by subsequent references as "Document title at page #". If the document does not have pages numbers or is not easily internally referenced the subsequent cites retain the "AR at page #" designation. The audio recording of the hearing is referred to as "HR" to signify "hearing recording" and noting the minute and second of the track at which the relevant evidence is presented.

In addition to the AR, and the audio recordings of the hearing, the record in this case includes the following exhibits offered by Applicant and Objectors that I admitted at the hearing.

Applicant offered, without objection, and I accepted the following exhibits into the record:

- 1) Exhibit A-1: April 12, 1982, Statement of Claim for Existing Water Rights Stock Water and Affidavit of Robert E. Meine
- 2) Exhibit A-2: September 30, 2016, Notice of Filing of Master's Report, Master's Report, and Post Decree of Abstract of Water Right Claim
- 3) Exhibit A-3: October 18, 2016, Order Adopting Master's Report
- 4) Exhibit A-4: Topo Hren Ranches 1 w/PODS
- 5) Exhibit A-5: Map Hren Ranches w/PODS
- 6) Exhibit A-6: Topo Hren Ranches 2 w/PODs
- 7) Exhibit A-7: Map Hren Ranches 2 w/PODs
- 8) Exhibit A-8: Topo Hren Ranches All w/PODs
- 9) Exhibit A-9: Map Hren Ranches All
- 10) Exhibit A-10: Hren Ranches Water Rights Spreadsheet
- 11) Exhibit A-11: Hren Ranches Water Right Abstracts (33 pgs.)
- 12) Exhibit A-12: Monument Hill Quadrangle Topo-Geological Survey

Objector offered the documents listed on their witness and exhibit list dated June 16, 2025, but nearly all listed exhibits were documents already part of the administrative record. I admitted one exhibit which was not already part of the administrative record, specifically:

- 1) Exhibit O-1 Montana Cadastral Mapping Property Summary for Relevant Properties

I kept the record open for 30 days to allow both parties the opportunity to submit any additional evidence that might assist in reaching a well-informed decision. Both parties agreed to this arrangement. The Applicant did not submit any further materials. The Objector, however, submitted nine pages of maps and photographs after the hearing but prior to the close of the record, and is labeled as follows:

- 1) Exhibit O-2: Objector's Last Exhibits, dated 8-15-2025.

In addition, this order references water right abstracts as "Water Right Abstract 41B XXX". These abstracts are found in the DNRC records at <https://gis.dnrc.mt.gov/apps/WRQS/>.

OBJECTOR'S PRE-HEARING BRIEF AND RESPONSE

At a pre-hearing conference I asked Objector Klakken to specifically state the factual basis for her objection. Accordingly, on December 30, 2024, Objector Klakken filed a document titled "Objection to Application 41 B 30123390". In response, on February 10, 2025, Applicant filed a "Motion to Strike and Motion to Dismiss Objection to Change Application No. 41B 30123390 and Brief in Support". On May 9, 2025, I issued a pre-hearing order which denied Applicant's Motion to Dismiss Objection and addressed Applicant's Motion to Strike and Objector's Motion. Based on the Objection I determined that Objector's argument and evidence is limited to the criterium of adverse effect found in § 85-2-402(2)(a), MCA, and I specifically limited the issues to be addressed at the hearing.

FINDINGS OF FACT

1. This Order references three water rights:
 - 1) Water right 41B 88648-00 referred to in this Order as the "Flood Right".
 - 2) Water right 41B 88661-00 referred to in this Order as the "Stock Right".
 - 3) Water right 41B 24930-00 referred to in this Order as the "Sprinkler Right".
2. The Order dated May 9, 2024, limited the Objector's arguments to the following:
 - The change might result in unspecified hydrologic impact to other water rights "in her area" including those of the Hren Ranch.
 - The change will result in an expansion of the Flood Right based on its historic use.
 - The Flood Right has been abandoned.
 - Moving the Flood Right will increase the use of the Sprinkler Right on the original place of use of both water rights.
 - The change will result in an expansion of the Stock Right because the Department used a historically unsubstantiated volume calculation.
 - The change will result in an expansion of the Stock Right from seasonal to year-round use.
3. The Applicant proposes to change the point of diversion, place of use, purpose, and to add storage to the Flood Right. Under the proposed change 35 acres in the S2S2 S24, T8S, R9W, Beaverhead County will no longer be irrigated from Sheep Creek. The Applicant also proposes to change the point of diversion, place of use, purpose, and to add storage to the Stock Right. Under the proposed change, 1100 head of livestock will no longer be permitted to drink from Sheep

Creek in the SWSENE S14, T10S, R9W, Beaverhead County. These changes together would authorize the Applicant to impound water in an 8-acre reservoir.¹

4. The proposal seeks to authorize Applicant to impound water from Sheep Creek in a reservoir for a fishery approximately 12 miles upstream from the Flood Right in the W2SENE S14, T10S, R9W, Beaverhead County. The Stock Right is fed by a spring that forms the headwaters of Sheep Creek and the livestock historically drank from Sheep Creek below the spring. After this change, the Applicant will fill and maintain the reservoir with 36.9 AF of water that is attributable to the Flood Right and 5.7 AF of water attributable to the Stock Right. The proposed period of use is January 1 through December 31, meaning that the Applicant will divert and retain water all year long. (PDG FOF 2). The reservoir is formed by a dam across Sheep Creek and has no outlet structure other than a spillway when the reservoir is full. (PDG FOF 19).

5. Meines and neighboring rancher, Rebish, ran cattle together. (HR #04 at 33:53). Jerry Meine testified that in 1973, or prior to 1973, he estimated that Meines and Rebishes had 1100 total cattle counting cows, calves, and bulls. (HR #04 at 58:33).

6. Jerry Meine helped fill out the claim filing for water right no. 41B 88661-00 in 1982. (HR #04 at 32:00).

7. Jerry Meine testified that he remembered that the original claim filing instructions did not say "AUM" but said "cattle" and that he followed the instructions, but he'd need to look at the original instructions. (HR #04 at 33:17, 56:20).

8. Jerry Meine testified that the number 1100 cattle were the total of cows, calves, and bulls that were pastured in that pasture and could drink out of that spring. (HR #04 at 33:10).

9. The water right abstract for the Stock Right does not specify the number of animals or animal units that the Stock Right served. The abstract provides "Animal units shall be based on reasonable carrying capacity and historical use of the area serviced by this water source." (Water Right Abstract No. 41B 88661).

¹ The reservoir in question is not actually new construction but has been in place for many years and Meines are now seeking to change two water rights to allow them to legally fill and maintain the reservoir. In 1979, the BLM designed and built a logging road across the Meine property. The road crossed Sheep Creek with a culvert and a levee. The culvert was often plugged by beaver, especially in the fall after Meines were no longer visiting the property for the winter. Meines were concerned about water impounded by the plugged culvert breaching the levee and flooding downstream. (HR #04 at 42:14). In 1987 Meines had a surveyor design a spillway and in 1988 they constructed the spillway. Meines deliberately plugged the culvert so that they could control the water level. Subsequently, they installed another spillway and eventually installed an earthen overflow spillway for safety. Excepting seepage or in periods of extremely high water where water might overtop the spillway the dam captures all of the water in Sheep Creek. (HR #04 at 41:18, 42:14, 42:32, 43:15, 44:43, 45:35, Water Right Application Supplemental Answers IR.3.B, AR at 38).

10. Objector Klakken included a page from the transcript of Cause No. DV-10-13454, Fifth Judicial District Court, Beaverhead County, in her filings. The transcript is identified in handwritten note as “testimony of Jerry Meine”.

Q. In terms of the near future, on a normal year, what kind of things would you need to do up Small Horn in the upcoming months?

A. Usually we'll go up early, as soon as we can, the end of May, to go up country and check mainly on the -- our reservoir that we have - - our fishing -- or our pond up there, to check stream flow, check overflows and make sure there's not going to be a problem. At that time, we can kind of get a little assessment on what the stage of the grass is. And then, as we get closer, we typically move our cattle to the summer pasture the end of June. Some years it's been as late as the first part of July. Before then, we like to get up country, go over the fences, just check everything and make sure it's ready, get some salt up country for the cattle and just get ready to bring the cattle up.

11. Ms. Klakken also submitted pages from various day calendars including portions of June 1982, September 1987, October 1987, June 1988, May 1989, June 1991, May 1994, June 1994, June 1996, July 1996, June 1998, September 1999, and June 2001. The calendars correlate various events of Meines moving cattle to and from the summer pasture where the reservoir is located. The notebooks also provide evidence that the Meines cattle were comprised mainly of cow/calf pairs and a smaller number of bulls. (Objector's Positions/ Objection Statement of 12-30-2024 at 13-26).

12. The Meines own land farther down Sheep Creek which can be irrigated with the Flood Right and the Sprinkler Right. (PDG FOF 2, 5).

13. Jerry Meine testified that they currently flood irrigate with Flood Right when water is available. (HR #04 at 50:18, 54:05).

14. Jerry Meine testified that they began to augment Flood Right irrigation with the Sprinkler Right when the parcel was subdivided and partially sold. The new owners drilled a well on their parcel in partnership with the Meines. This well is the source of water for the Sprinkler Right. After the well was drilled, the Meines began to use the Sprinkler Right in addition to the Flood Right on the portion of land that they retained. (HR #04 at 53:06).

15. The PDG explains that “Applicant states that flow in Sheep Creek became less reliable at the historical point of diversion as upstream use began to convert to sprinkler irrigation after 1973”. (PDG FOF 20).

16. After the proposed change, 61 acres of the historic place of use of the Flood Right will continue to be irrigated with the Sprinkler Right. (PDG FOF 20).
17. Ms. Klakken is part owner of the Hren Ranch and refers to the Hren Ranch in Small Horn Canyon as “our property”. (Klakken Objection at 4, HR #04 at 6:46).
18. Ms. Klakken testified that the whole west side of her family ranch is getting less and less water. She testified that they have had to move fences to account for dwindling stock water, a stock well has gone dry, and a spot that used to be too muddy to drive across is now dry. (HR #04 at 5:11, 23:13).
19. Ms. Klakken testified that she knew there had been a drought in the last several years in the area but didn’t know whether the issues she described could be attributable to the drought. (HR #04 at 6:02).
20. Ms. Klakken testified that she believed the problems she described with water availability on the Hren Ranch had existed since the Meine’s built the reservoir in the early 1980’s, but the recent drought had exacerbated them and made the water shortage more acute. (HR #04 at 15:58).
21. Ms. Klakken testified that she does not have evidence to support her contention that the Meine’s reservoir is drying up the springs and water sources on the west side of her family ranch property in Small Horn Canyon other than her own observations of the change in the water availability on the west side of the Hren Ranch; “just what I see on the ground”. (HR #04 at 18:23).
22. The Meine reservoir is approximately five miles from the affected portion of the Hren Ranch. The Meine Reservoir is in the Sheep Creek drainage and the Hren Ranch is in the Small Horn Canyon Drainage. The Sheep Creek Drainage and the Small Horn Canyon each run into Blacktail Deer Creek. The Sheep Creek Drainage and the Small Horn Canyon Drainage do not meet. (PDG FOF 1 and 2, A-4, A-8, Objector Filing of 12-20-2024 Figure 8).
23. Ms. Klakken testified that although she has no proof of its existence, she knows that there is an underground river that travels in Small Horn Canyon. (HR #4 at 103:06).
24. Ms. Klakken testified that she knows there is sprinkler irrigation on portions of the Meine subdivision and that other portions are on a hill unsuitable for flood irrigation and that some of the place of use is covered by houses. When asked if it was true that she didn’t have any evidence how much of the Flood Right was used on the Meine subdivision she answered that she “didn’t know how to answer that.” (HR #04 at 2:37).

25. Ms. Klakken testified that the correlation between the construction of the reservoir and the reduced water availability on the Hren Ranch is based on the pond being “right above these places that are going dry”. (HR #04 at 25:21).

26. Ms. Klakken further points to the Meine’s Application which notes that the spring below the dam of the reservoir is flowing better since the construction of the reservoir and Alan Conover’s Affidavit which says Sheep Creek is flowing better than it did before the reservoir. (Water Right Application Supplemental Answers IR.4.A, AR at 40, Affidavit of Alan Conover 12-30-2019, AR at 248, HR #04 at 26:12).

27. Alan Conover, a rancher/landowner on Sheep Creek below the Meine reservoir, stated by affidavit that “since Meines have been storing water in a pond on Sheep Creek on the Meine property, I have observed that the flows in Sheep Creek have stayed above ground for about 30 days longer allowing for my livestock to have access to water from the stream for a longer period of time”. (Affidavit of Alan Conover 12-30-2019, AR at 248).

28. Ms. Klakken submitted a map displaying the area of the Hren Ranch where the springs and stock tank have been going dry, in sections 15 and 21, Township 9 S, Range 9 W. (Objector’s Last Exhibits dated 8-15-2025 pages 3-4, Objector Filing dated 12-2-2024 Figure 8).

CONCLUSIONS OF LAW

ABANDONMENT

29. Objector Klakken asserts that the Flood Right is abandoned. In an Application to Change a Water Right contested case proceeding, the Hearing Examiner has no authority to consider whether a water right has been abandoned. The abandonment statutes are found in § 85-2-404 and § 85-2-405, MCA. Under those statutes, to abandon a water right “[i]f an appropriator ceases to use all or part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, appropriation right is, to that extent, considered abandoned and must immediately expire.” (§ 85-2-404(1), MCA). The statute also creates a prima facie presumption that if an appropriator ceases to use all or part of an appropriation for 10 successive years, the appropriator has abandoned the right for the portion not used. (§ 85-2-404(2), MCA). In addition, the legislature specifically provided for the procedure to be followed to implement § 85-2-404, MCA. The Department, sua sponte, or when a valid claim that an appropriator has been or will be injured by the resumption of a water right

that is alleged to have been abandoned, “shall petition the district court that determined the existing rights . . . to hold a hearing to determine whether the appropriation right has been abandoned.” (§ 85-2-405(1), MCA). At the district court hearing the Department has the burden of proof that the appropriation has been abandoned. (§ 85-2-405(2), MCA). See *In the Matter of Application No. 76H-30042357 to Change Water Right Claim No. 76H-108798-00 by Kuney, William D. and Hendrickson, Betty J*, Final Order, P. 3, (DNRC June 7, 2010)., *In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No. 76H 30046210 to Change a Non-Filed Water Right by Patricia Skergan and Jim Helmer*, Final Order, P.19-20, (DNRC October 18, 2010).

30. The instant proceeding is not a petition to determine abandonment before the District Court – it is solely a proceeding on an Application to Change a Water Right. This Hearing Examiner has no jurisdiction to consider whether this water right is abandoned.

USE OF THE FLOOD RIGHT AND THE SPRINKLER RIGHT

31. Objector argues that moving the Flood Right will increase the use of the Sprinkler Right on the original place of use of both water rights. ARM 36.12.1902(6) requires that the Department consider whether ceasing use of a water right will increase use of a different water right.

32. ARM 36.12.1902(6) provides:

For an application to change water rights that overlap the historic place of use, an applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the applicant shall explain how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

33. The Sprinkler Right is a well water right that was developed when Sheep Creek flows declined, making the Flood Right unreliable. (FOF 15).

34. The place of use of the Flood Right is the south half of the south half of Section 24, Township 8 South, Range 9 West. (Water Right Abstract No. 41B 8648-00). The place of use of the Sprinkler Right is the southeast quarter of the southwest quarter of the southeast quarter of Section 24, Township 8 South, Range 9 West. (Water Right Abstract No. 41 24930-00). I find that these two water rights' historic places of use overlap.

35. The Application describes the use of the Sprinkler Right once the Flood Right is changed. These descriptions occur in several sections:

- **IR.1.D Application Details**, the materials provided describe the development of the Sprinkler Right. (AR at 37).
- **IR.3.B Historic Use**, the materials provided described the diversion schedule of the Flood Right and augmenting it with the Sprinkler Right. (AR at 38).
- **IR.4.C Adverse Effect**, the materials provided describe that Applicants will no longer supplement the Sprinkler Right with the Flood Right. (AR at 40-41).

36. The Applicant also referred to the supplemental well water in their Response to Deficiency Letter.

- In response to section IR.1.D: *“Are you proposing to change all of the historic water right(s) associated with the place of use? If no, attach an explanation of why not”* –the Applicant provided materials which described the use of the Sprinkler Right. (Response to Deficiency Letter, AR at 198).
- In response to section IR.3.A: *“Attach a description of how the irrigation system operated from the point of diversion through the place of use. Include a description and quantification of how the supplemental water rights identified in IR.1.E were utilized historically”* the Applicant provided materials that described the use and eventual decline of water availability from the Flood Right. (Response to Deficiency Letter Addendum, AR at 200).
- In response to IR.4.C: *“Attach an explanation of when the last time water was appropriated and used beneficially to the extent identified in your water right. If there has been a period of non-use, explain why the water right was not used, and explain why a resumption of use will not adversely affect other water users.”* Applicant explained that water in Sheep Creek available for the Flood Right decreased over time and the Sprinkler Right was more efficient due to the application through sprinkler irrigation. (Response to Deficiency Letter, AR at 203).

37. The DNRC Technical Report does not address the continued use of the Sprinkler Right once the Flood Right is changed and concludes “No supplemental relationship will be evaluated as a part of this change analysis.” (Irrigation Change Application Technical Report at 1, AR at 193).

38. The PDG describes the continued use of the Sprinkler Right once the Flood Right is changed:

While the proposed use in this change will result in a reduction of 19.9 AF of return flows to these sources associated with the 35 acres of historical use under Claim 41B 88468-00, 61 acres including all of the historical place of use continues to be irrigated under Provisional Permit 41B 24930-00, with a flow rate of 600 GPM, a volume of 140.8 AF, and a period of use of April 15 to October 1. The Applicant states that flow in Sheep Creek became less reliable at the historical point of diversion as upstream irrigation use began to convert to sprinkler irrigation after 1973, therefore a well was drilled and groundwater permit 41B 24930-00 was issued March 21, 1980, to irrigate 80 acres. The Department identified 61 acres of current irrigation under this permit, resulting in return flows to Blacktail Deer Creek and Poindexter Slough of approximately 24.9 AF based on an estimated applied volume of 124.2 AF and an estimated consumed volume of 99.3 AF. The place of use continues to be irrigated under this permit, resulting in the continuation of return flows to Blacktail Deer Creek and Poindexter Slough, in excess of historic return flows.

(PDG FOF 20).

39. From the Application and the Responses to the Deficiency Letter I find that water from the Sprinkler Right will continue to be used at the historic place of use of the Flood Right.

40. Jerry Meine testified that the Meines began to irrigate with the Sprinkler Right when Sheep Creek flows became unreliable as a source of irrigation water. (FOF 16 and 17, COL 64).

41. Based on the testimony and evidence I find that the Applicant has been relying primarily on the Sprinkler Right to irrigate the place of use of the Flood Right and the Sprinkler Right since the advent of the Sprinkler Right.

42. Testimony and evidence describe a situation where there are significant water availability challenges in Sheep Creek that prevent the use of the Flood Right. The Applicant consistently describes decreased flows and increased reliance on the Flood Right beginning in the early 1980's. While the Applicant may not have *intended* to cease using the Flood Right testimony and evidence indicates that the Flood Right is not a significant source of irrigation water on the original place of use. Because the Applicant is already irrigating primarily with the Sprinkler Right, I find that no longer irrigating with the Flood Right will not result in increased use of the Sprinkler Right.

EXPANSION OF THE STOCK RIGHT

43. Objector argues that the change will result in an expansion of the Stock Right because the Department used a historically unsubstantiated volume calculation and that the change will

result in an expansion of the Stock Right from seasonal to year-round use.

44. ARM 36.12.1902 provides that DNRC must investigate and determine the historic use of a water right to be changed. Much of the rule pertains to historic use of an irrigation water right. The portion that pertains to all water rights is reproduced here:

(1) The description of the historic information is related to a date that is dependent on the type of water right being changed. The following dates are applicable for each type of water right:

(a) historic information for a statement of claim must be described as it was used prior to July 1, 1973, unless the Water Right Claim was subject to a previous change in which case it is the date of completion of the change;

(2) Final Water Court approved stipulations and master's reports related to the water right being changed must be referenced with the application; however, this information or an abstract of a water right from the Department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use.

(3) The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use.

(6) For an application to change water rights that overlap the historic place of use, an Applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the Applicant shall explain how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

(7) The Department will corroborate the historic use, including the following of each water right being changed:

(a) water right number and the priority date;

(b) most recent year the water right was used;

(c) historic point of diversion;

(d) historic period of diversion;

(e) historic means of diversion;

(f) typical historic diversion schedule and operation pattern;

(i) maximum historic flow rate diverted from each point of diversion and how the amount was determined;

(j) historic place of use for each purpose;

(l) typical historic period of use for each purpose;

(n) the annual or monthly historic consumptive volume for each purpose;

(8) The following information may be used by the Department to establish the requirements under (7):

(a) aerial photographs depicting irrigated land:

(i) 1979, 1997, and 2005 photos showing the irrigated land;

(b) aerial or other photographs showing diversion or conveyance structures;

(c) Water Resources Survey book information;

(d) Water Resources Survey field notes;

- (e) water commissioner field notes;
 - (f) Natural Resources Conservation Service (NRCS) information, such as field specific soils information;
 - (g) affidavits from persons with first-hand knowledge of historic use;
 - (h) calculation of historic ditch capacities;
 - (i) description of irrigation equipment, field treatments, means of conveyance, control structures, and other onsite features related to water use;
 - (j) description of water supply availability;
 - (k) log books or diaries of previous irrigators or farm operations, crop yield records, or diversion records; or
 - (l) an evaluation of the seniority of the water right in relation to other users.
- (12) Historic consumptive volume must be based on the acre-feet of water used for the beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that do not return to ground or surface water.

This Order considers the application of the pertinent sections of ARM 36.12.1902 sequentially below:

ARM 36.12.1902(1)

45. The Stock Right is a statement of claim and has not been the subject of a previous change. (Water Right Abstract No. 41B 88661-00).
46. I find based on ARM 36.12.1902(1)(a) the information of historic use of the Stock Right must be described as it was used prior to July 1, 1973.

ARM 36.12.1902(2)

47. Pursuant to ARM 36.12.1902(2) all Water Court approved stipulations and master's reports related to the water right being changed must be referenced with the application; however, this information or an abstract of a water right from the Department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use. (ARM 36.12.1902(2)).
48. The original application did not include the Stock Right. (PDG p. 1). The application amendment to include the Stock Right did not reference the required information. (AR 173-189).
49. Objector Klakken referenced previous Water Court actions in her initial Objection, dated May 31, 2024:

"I did not see mentioned that Claim 88661-00. The Stock Right [sic.] was part of an objection settled in water court case 41B- 285 (it consolidated multiple stock water rights). A settlement was reached in that case and signed by all parties. Priority date was changed to 4/1/1900 and a remark would be added to each claim.

THIS WATER SOURCE IS GENERALLY USED FROM SUMMER TO FALL AS STOCK ARE PUT OUT FOR SUMMER GRAZING. HOWEVER CLAIMANT(S) RETAINS THE RIGHT TO WATER STOCK THROUGHOUT THE YEAR AS WEATHER AND CLIMATIC CONDITIONS ALLOW.

In the agreement the parties agree the stipulation accurately reflects the pre-July 1, 1973 use of the water rights identified in the captions of this case.”

(Objection at 3, AR at 325).

50. Objector Klakken also included the following documents from the Montana Water Court in her Objection Deficiency response:

Order Adopting Masters Report, Notice of Filing of Masters Report, Masters Report, General Abstracts of Water Right No's 41B 88661-00, 41B 88652-00, 41B 88660-00, 41B 88667-00, 41B 192937-00, 41 192937-00, Settlement Report, 41B-285 Settlement Agreement, Order Setting Settlement Deadline, Settlement Conference Minutes and Order Setting Deadline, Correspondance, Order Appointing Settlement Master, Meeting Minutes And Order Setting Deadlines.

(Objection Deficiency Response Attachments, AR at 335-376.)

51. I find that the Stock Right had been subject to Water Court approved stipulations and Master's Reports and Applicant did not reference this information with their application in violation of ARM 36.12.1902(2). This omission is not necessarily fatal to this application but may explain why the PDG reached an unsupported conclusion to grant the change as it did.

ARM 36.12.1902(3) and (7).

52. The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use. The Applicant must demonstrate this using the methods described in ARM 36.12.1902(7).

ARM 36.12.1902(7) provides in part:

- (7) The Department will corroborate the historic use, including the following of each water right being changed:
 - (a) water right number and the priority date;
 - (b) most recent year the water right was used;
 - (c) historic point of diversion;
 - (d) historic period of diversion;
 - (e) historic means of diversion;
 - (f) typical historic diversion schedule and operation pattern;
 - (i) maximum historic flow rate diverted from each point of diversion and how the amount was determined;
 - (j) historic place of use for each purpose;
 - (l) typical historic period of use for each purpose;
 - (n) the annual or monthly historic consumptive volume for each purpose;

ARM 36.12.1902(7)(n) VOLUME CALCULATION

53. The DNRC determined the number of animal units from the information contained in the water right abstract and the Applicant's statements.

The decreed period of use and period of diversion for Claim 41B 88661-00 is January 1 to December 31. The decreed point of diversion and place of use are in the SWSENE S14, 10S, R9W, Beaverhead County. WRS aerial photo CXM-6FF-160, dated August 18, 1965, shows evidence of a spring in the claimed location. The Applicant states that up to 1100 head of cattle were pastured in this area and utilized the spring dependent on the seasonal conditions.

(PDG FOF 12).

54. The PDG notes that "Applicant states that up to 1100 head of cattle were pastured in this area and used the spring dependent on the seasonal conditions." (PDG FOF 12).

55. The PDG uses "1100 animal units" to determine consumptive volume (and thus the volume of water that may be changed). (PDG FOF 14).

56. Jerry Meine testified that Meine's and neighbors, Rebishes, ran approximately 1100 cattle together on summer pasture, which included cows, calves, and bulls. (FOF 6).

57. Jerry Meine testified that he was the individual who filled out the claim in the early 1980's. He counted cattle cows, calves, and bulls separately when he filed the claim for the Stock Right. (FOF 7-9).

58. The Department used an amount of 30 gallons per animal unit per day to calculate the flow rate for 1100 animal units on the water right abstract for the Stock Right. (PDG FOF 13).

59. The Applicant used an amount of 30 gallons per animal unit per day when submitting their (second or supplemental) Application to Change an Existing Non-Irrigation Water Right. (AR at 174).

60. A cow and calf comprise one animal unit. As stated in the DNRC WATER CALCULATION GUIDE: "An animal unit (AU) is a measurement of livestock numbers. A cow and calf pair is one animal unit." <https://dnrc.mt.gov/docs/water/Water-Rights-Forms/DNRC-Water-Calculation-Guide.pdf>.

61. Montana adjudication standards are the same:

RULE 2. DEFINITIONS Rule 2(a). Adjudication definitions. Unless the context requires otherwise, the following definitions apply in these rules.

(5) "Animal Unit" means a measurement of livestock numbers. For example, one cow and calf pair is one animal unit, three pigs are one animal unit, five sheep are one animal unit, and one horse is 1.5 animal units.

(Water Right Claim Examination Rules Amended by the Montana Supreme Court, effective December 5, 2006).

62. DNRC equated 1100 animals with 1100 Animal Units when determining the consumptive volume for the Stock Right. This equivalence does not comply with DNRC water use standards or the definition of the water right claim examination rules adopted by the Montana Supreme Court.

63. I find that the consumptive volume calculated in the PDG is not supported by the evidence because the calculation DNRC used to determine consumptive volume is based on animal units and the testimony and claim filing for the Stock Right is based in part on counting cows and calves separately.

64. I find that the Applicant did not fulfill the requirements of ARM 36.12.1902(7)(n) and failed to prove the historic consumed volume of Stock Right.

ARM 36.12.1902(7)(i) PERIOD OF USE

65. The PDG determined the historic period of use relying on the information from the water right abstracts and the Applicant's statements.

The decreed period of use and period of diversion for Claim 41B 88661-00 is January 1 to December 31. The decreed point of diversion and place of use are in the SWSENE S14, 10S, R9W, Beaverhead County. WRS aerial photo CXM-6FF-160, dated August 18, 1965, shows evidence of a spring in the claimed location. The Applicant states that up to 1100 head of cattle were pastured in this area and utilized the spring dependent on the seasonal conditions.

(PDG FOF 12).

66. The second portion of ARM 36.12.1902 states that "this [water court] information or an abstract of a water right from the Department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use."

67. The Water Right Abstract of the Stock Right does indicate a year-round period of use but it is modified by an "information remark", to wit:

THIS WATER SOURCE IS GENERALLY USED FROM SUMMER TO FALL AS STOCK ARE PUT OUT FOR SUMMER GRAZING. HOWEVER CLAIMANT(S) RETAINS THE RIGHT TO WATER STOCK THROUGHOUT THE YEAR AS WEATHER AND CLIMATIC CONDITIONS ALLOW.

(Water Right Abstract No. 41B 88648-00).

68. The Water Court information supplied by Objector Klakken shows that the dispute and settlement around Stock Right was based in part on period of use, as the following "Settlement Conference Minutes" show:

The period of use represents the period in the calendar year when water is used for a specified purpose. For stock claims, the period of use guideline is year round (January 1 to December 31). The claimants assert a year-round period of use for each of these claims. The Objector has the burden of showing the claimed period of use is incorrect.

The Objector has submitted evidence indicating that these sources are generally used as summer range, meaning cattle are trailed up in the spring and removed in the fall. The evidence includes entries from Jerry Meine's diary as well as testimony from District Court proceedings, which indicate the property has generally been used for stock grazing from early summer until early fall.

The claimants have put forth some evidence that stock, including wild horses and possibly bison, were historically left on the property during winter months. This would indicate that although the general practice is to use the property for summer pasture, the property has (at least occasionally) historically been used for stock grazing and watering purposes year round.

Recommendation -

In this case, it seems apparent that the area is generally used for summer grazing and stockwatering purposes. However, there are other considerations to take into account. Claimants are concerned that if they limit their period of use, they will be precluded from using the sources for stockwatering during any time period outside of the defined period of use. Additionally, claimants are concerned that further limitation on their stockwater rights will open them up to attack from the Objector. Given the history between parties, claimants' concerns are not without merit.

Objector's issue appears to be with the use of the claims. Objector's filings make it clear that they feel these water rights are being used for alternative purposes, i.e. recreation and fishing. It appears that the Objector's motive in limiting the period of use would (at least in theory) address this concern because it would mean that the water rights could only be used during the spring and not the rest of the year.

From the Settlement Master's perspective, it is difficult to understand how making changes to these stock claims will address Objector's concerns about alternative use. By its nature, a stockwater limited to stock use (sic.) and does not include any alternative uses. Similarly, if a stockwater right states a year-round period of use, it only protects the right to use the named source for stockwatering purposes during that period of the year. ***All of the water rights in this case represent instream stock use; the rights do not allow for any impoundment of water.***[emphasis added] Given these factors, crafting a working settlement is difficult.

In order to satisfy the Objector's concerns, protect the claimants' interests and reach a compromise without the need for a formal hearing, the Settlement Master recommends that the period of use remain unchanged and that the following information remark be added to the abstract of each water right that reads as follows:

“THIS WATER SOURCE IS GENERALLY USED FROM SPRING TO FALL AS STOCK ARE PUT OUT FOR SUMMER GRAZING. HOWEVER, CLAIMANT RETAINS THE RIGHT TO UTILIZE THIS WATER RIGHT THROUGHOUT THE YEAR AS WEATHER AND CLIMATIC CONDITIONS ALLOW “

(Settlement Conference Minutes and Order Setting Deadline pp.4-5, AR at 368-9).

69. Klakken's Objection also included a portion of a District Court transcript which contains two instances of testimony of Jerry Meine describing Applicant's use of the range around the Stock Right.

“And then, as we get closer, we typically move our cattle to the summer pasture the end of June. Some years its been as late as the first part of July. Before then we like to get up country, go over the fences, just check everything and make sure its ready, get some salt up-country for the cattle and just get ready to bring the cattle up.” (Page 68)

Q. Okay Mr. Meine, the Small Horn Canyon is high ground, correct?

A. Fairly high, yes.

Q. And the historical use for that cattle has been for summer pasture

A. In the summer?

Q. Yes. And –

Q. Okay.

(Page 90)

(Hr'g Transcript at 68, 90, April 12, 2011, Cause No. DV-10-13454 Montana Fifth Judicial District Court, Beaverhead County, AR at 385, 380).

70. The Department may rely on “affidavits from persons with first-hand knowledge of historic use.” ARM 36.12.1902(8)(g). The Department relied on the water right abstract and unspecified “Applicant's statements” in PDG FOF 12.

71. The Department calculated consumptive volume of the Stock Right based on stock use an overall period of use from January 1 - December 31. (PDG FOF 12,13, 14)²

2. PDG FOF 13 and 14 describe the consumptive volume calculation, but I was unable to make sense of the arithmetic and thus it is unclear how many days the Department used for its volume determination.

72. The Department does not make a clear determination of historic period of use supported by the evidence.

73. Objector introduced credible evidence that the Stock Right was not used to its full possible extent 365 days per year. (COL 75 and 76).

74. I find that the Applicant did not provide evidence of a period of use to substantiate the Department's findings pursuant to ARM 36.12.1902(7)(i).

ARM 36.12.1902(6) OVERLAPPING PLACE OF USE

75. ARM 36.12.1902(6) provides:

For an application to change water rights that overlap the historic place of use, an applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the applicant shall explain how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

76. Applicant's original Application to Change a Water Right only sought to change the Flood Right. In response to Application questions IR.1.D and IR.1.E, Applicants noted that the Flood Right shared a place of use with the Sprinkler Right and explained this relationship as noted in COL 31-42 of this Order. (AR 30-138).

77. On February 7, 2023, Applicants amended the original Application to include the Stock Right as well as the Flood Right to include in the change a water right with a year- round period of use that matched the proposed period of diversion (i.e. retention of water in the reservoir). (AR 172).

78. In answer to question NIR.1.G, Applicant answered that the Stock Right had overlapping places of use with water rights 41B 888670 00, 41B 88667 00, 41B 88668 00, 41B 88660 00, and 41B 192937 00. In the attached explanation Applicant stated:

There are three other water rights associated with the place of use that are not being included in this change application. Stock water right 41B 88667 00 and 41B 88668 00 do not flow into the pond. Claim 41B 88667 00 comes down through another draw and does not get to the place of use in the SENE of Sec 14. Claim 41B 88668 00 is downstream from the pond. There is one small irrigation claim, 41B 88670 00, with a flow rate of 157.08 gpm, for use on 4 acres of property in the SWSENE and the SWSWNE of Sec 14, T10S, R9W. It does

not flow sufficiently to add any benefit to the pond if any water from this claim would even be able to get to the pond.

There are two other stock water claims, 41B 88660 00 and 41B 192937 00 that the applicant and family are willing to change in the event that DNRC determines there is not sufficient waters being allocated through the two change applications, this one for 41B 88661 00 and the irrigation claim, 41B 88648 00. **Whether all three stock water rights are necessary to complete this application is unknown and assistance from DNRC in making that determination is hereby requested.** If the other two claims are not needed to complete the change application for the pond they will remain stock water claims. If all of the stock water claims are needed to establish sufficient capacity for the year round use claimant will file a change application for those rights to be included. In support of the inclusion of one or more of these stock water right, claimant is filing with the response to the DNRC deficiency letter and this change application a consent from each owner identified on water right claims 41B 88660 00, 41B 88661 00 and 41B 192937 00 to change those claims.

(AR at 181).

79. The Technical Report completed on December 19, 2023, included analysis of the Stock Right but did not mention any of the other supplemental rights noted by the Applicant in the Amended Application. (AR 149-158).

80. The record contains no information indicating whether the Department provided the assistance or analysis requested by the Applicant in Applicant's Amended Application Response NIR.1.G., but clearly the Department determined that the Applicant only needed the Stock Right as only the Stock Right was included in the Technical Report dated December 19, 2023.

81. The record, including the PDG, contains no information that the Department analyzed the existence or effect of water rights supplemental to the Stock Right pursuant to ARM 36.12.1902(6).

82. This analysis is important in part because it is not clear whether the claims rely on the same livestock as the Stock Claim and are therefore duplicative. If they are duplicative then the Applicant could ostensibly change the Stock Right and simultaneously still use another water right that was based in part on the same livestock in the same place of use, resulting in an impermissible expansion of the Applicant's water rights.

83. I find that the Applicant did not fulfill the requirements of ARM 36.12.1902(6) and failed to explain how the unchanged water right will be used and how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

OBJECTOR'S ARGUMENT OF HYDROLOGIC IMPACT

84. Objector also argued that the change might result in unspecified hydrologic impact to other water rights in Objector's area including those of the Hren Ranch.

85. Section 85-2-402(2)(a), MCA, provides that the Applicant must show that the proposed change in appropriation will not adversely affect the use of the existing water rights of other persons.

86. The Department analyzed adverse effect in PDG FOF's 17 - 22.

87. This analysis described the changes in flows in Sheep Creek and the return flows to Sheep Creek and downstream water sources. (PDG FOF 20 and 21).

88. Objector testified about changes in the water supply and availability on her family ranch in Small Horn Canyon. (FOF 19 - 21)

89. Small Horn Canyon is in a different drainage than Sheep Creek. (Exhibit A-8, A-9).

90. Objector did not provide evidence of any connection between the proposed change and the conditions she has observed.

91. I find that Objector did not provide any evidence of hydrologic impact to other water rights in her area including those of the Hren Ranch from the proposed change.

CONCLUSION

Did the Applicant prove that the change would not result in adverse effect?

92. The unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water right holders from encroachment by junior appropriators adversely affecting those senior rights. *Montana Power Company v. Carey* 211 MT 91 (1984). An adverse effect occurs where a junior water user's proposed use interferes with a senior water user's ability to reasonably exercise his water right.

93. It is a 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)

94. The change statute requires that the Applicant prove a lack of adverse effect. (§ 85-2-402, MCA).

95. ARM 36.12.1903, titled “Adverse Effect” lists the requirements an Applicant must prove to ensure that a change does not result in adverse effect.

- The first requirement in part (1) states: “Lack of adverse effect for change applications is generally based on the Applicant’s plan showing the diversion and use of water and operation of the *proposed project will not exceed historical use...*”[emphasis added]
- The final requirement is part (3) which states:
“The department must consider historical use in determining whether changing the water right would constitute an enlargement of the original water right.” (ARM 36.12.1903).

96. The historic use provisions of ARM 36.12.1902 ensure that a change does not constitute an enlargement of the original water right and are a required part of the adverse effect analysis that must be undertaken by the Department. (ARM 36.12.1902, 1903).

97. The Master’s Report reinforces the role of DNC’s historic use rules relative to the expansion of the Stock Right. The Objector could agree to a “year-round” period of use for the Stock Right because adjudication is a coarse filter which defines the outside parameters of the water right while the DNRC change process is a fine filter and acts as a safeguard against expansion.

98. Based on the PDG the Department determined the historic use based on unsubstantiated “statements of the Applicant” and the face value parameters of the decreed rights. The Applicant failed to “*provide final masters reports related to the water right being changed*” required by ARM 36.12.1902, and failed to show that “*the amount of water being changed for each water right [does not] exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the historic use* as required by ARM 36.12.1902(3) because they did not determine the historic consumptive volume.

99. The Department either did not make or made no record of its efforts to determine the effect of the use of Applicant’s water rights that share a place of use with Stock Right, as required by ARM 36.12.1902(6).

100. The Department either did not make or made no record of its efforts to “*corroborate the historic use, including historic period of diversion, typical historic diversion schedule and operation pattern, and the annual or monthly historic consumptive volume for each purpose*” as required by ARM 36.12.1902(7).

101. Montana law requires the Department to investigate the source of the information described in the claim filing or water right abstract, “*this information or an abstract of a water right from the department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use.*” ARM 36.12.1902(2). Nothing in the administrative file besides the source attribution “statements of the Applicant” lends support to the conclusion that the Department complied with ARM 36.12.1902(2).

102. In *Flathead Lakers* the Montana Supreme Court held that the aquifer testing requirements in ARM 36.12.121, are not mandatory requirements that must be satisfied before a permit can be granted. Rather, they are “designed to elicit pertinent information necessary for DNRC to evaluate the permit criteria.” The Court remanded the case to District Court to determine whether “DNRC’s consideration of the application without additional aquifer testing was arbitrary and capricious and whether its evaluation was clearly erroneous in light of the record.” *Flathead Lakers, Inc. v. Montana Dep’t of Nat. Res. And Conservation*, 2020 MT 132.

103. The aquifer testing rules section (2) describes minimum information that must be submitted with applications and section (3) describes minimum testing procedures. Section (4) provides that an applicant may make a written request for a variance from the aquifer testing requirements in (2) and (3). (ARM 36.12.121³).

104. According to the historic use rules “the department must consider historical use in determining whether changing the water right would constitute an enlargement of the original water right.” (ARM 36.12.1903).

105. There is no provision for a variance from the requirements of ARM 3.12.1903(3) and 1902(2).

106. The rules requiring aquifer testing, ARM 36.12.121, differ from the historic use rules of ARM 3.12.1903(3) and 1902(2) because an applicant can waive aquifer testing requirements but the Applicant in a change proceeding cannot waive the requirements of ARM 36.12.1902.

³ A previous version of the rule was in place at the time of *Flathead Lakers* with different numbering and the variance provision did not require a written variance or refer a specific rule outlining variance requirements, but the effect was the same.

107. The record contains no evidence that the Department considered historic use of the Stock Right and instead arrived at unsupported conclusions and made unsupported findings.

108. In addition, “Final Water Court approved stipulations and master's reports related to the water right being changed must be referenced with the application”. (ARM 36.12.1902(2)).

109. The Objector introduced evidence that the historic use conclusions of the Department were inaccurate and unsubstantiated. This evidence consisted of written notes of the Applicant, water court proceedings, a district court transcript, and the Applicant's own statements. All of these things might have been available to the DNRC had they followed the ARM 36.12.1902 historic use rules.

110. Based on the historic use information introduced by the Objector, I conclude the proposed change would combine two seasonal water rights traditionally used only in the warmer months into a single year-round water right, change a historic stock water right erroneously quantified in the PDG and leave the use of the other water rights sharing the Stock Right place of use in limbo.

111. I find that Applicant has proven historic use of the Flood Right in the amount of 36.9 AF for a period from March 20 – November 14 annually.

112. I find that Applicant did not prove historic use of the Stock Right, leaving the department unable to quantify a volume of period of use of the Stock Right.

RESERVOIR VOLUME

113. The PDG found that Applicant required 32.8 AF of water to fill the reservoir annually and 9.8 AF to account for annual evaporation for a total diverted volume of 42.6 AF. The 9.8 AF evaporates from the source (Sheep Creek). The remainder of the 32.8 AF is therefore either retained in the reservoir for the winter or seeps from the reservoir into Sheep Creek. The PDG determined that the Flood Right has a historic diverted volume of 56.8 AF and consumed volume of 36.9 AF. Historic diverted volume exceeds the diverted volume under the change by 14.2 AF. Moreover, the Flood Right historic consumed volume exceeds the 9.8 AF consumed volume of the change attributed to annual evaporation. The 32.8 AF diverted into the onstream pond either remains in the reservoir over the winter and reduces the required fill volume the following year, or seeps from the reservoir into Sheep Creek then it is not consumed from the source. In either case, the 32.8 AF is not consumed. Therefore, I conclude that the Flood Right's historic diverted volume of 56.8 AF and historic consumed volume of 36.9 AF provides ample consumptive and diverted volume for the proposed change. (PDG FOF 17).

FINAL ORDER

Change Application No. 41B-30123390 is hereby **GRANTED IN MODIFIED FORM** subject to the following conditions:

1. Based on the change of the Flood Right, the Stock Right change proposed in the amended application is not necessary. Accordingly, the proposed change to the Stock Right is denied without addressing the merits.
2. The period of diversion and use is from March 20 through November 14.
3. The maximum annual volume Applicants may impound is 36.9 AF.
4. From November 15 to March 19 Applicants must permit the waters of the source spring and Sheep Creek to bypass the reservoir.
5. Applicants must install a device which permits the waters of the source spring and Sheep Creek to bypass the reservoir during the periods they are not authorized to impound its waters.
6. Nothing in this order shall prevent the Applicant from retaining year-round the water impounded in the reservoir between March 20 and November 14.

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department 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 and payment 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 15th day of December 2025.

/Original signed by Martin Balukas/
Martin Balukas, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing was served upon all parties listed below on this 15th day of December 2025 by first class United States mail and/or by electronic mail (e-mail).

RYAN A. BALLARD
DAVID L. VICEVICH
VICEVICH LAW
3738 HARRISON AVE.
BUTTE, MT 59701
ryan@vicevichlaw.com
dave@vicevichlaw.com
Counsel for Meine, Robert & Dorothy Rev. Trust

JEAN BERGESON
SUENRAM & BERGESON
117 S. IDAHO ST., 2ND FLOOR
PO BOX 1366
DILLON, MT 59725
jbergeson@swmtlaw.com
Co-Counsel for Meine, Robert & Dorothy Rev. Trust

RENEE KLAKKEN
835 E MORSE ST
DILLON, MT 59725-3023
rklakken@acesincmt.com

/Original signed by Jamie Price/
Jamie Price, OAH Hearings Assistant
(406) 444-6615; jsprice@mt.gov