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Attorneys for Applicant Christian C. and Nora R. Hohenlohe

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
WATER RESOURCES DIVISION
STATE OF MONTANA

**IN THE MATTER OF APPLICATION NO.
41QJ 30013407 TO CHANGE WATER
RIGHT CLAIM NOS. 41QJ 17073-00 AND
41QJ 17074-00 BY CHRISTIAN C. AND
NORA R. HOEHNLOHE**

**MOTION FOR ISSUANCE OF CHANGE
AUTHORIZATION**

COME NOW the Applicants in the above-captioned matter, Christian C. and Nora R. Hohenlohe (hereinafter collectively referred to as "Hohenlohes"), by and through their undersigned counsel of record, and pursuant to Admin. R. Mont. 36.12.213 hereby move the Montana Department of Natural Resources and Conservation (hereinafter referred to as "DNRC") for the immediate issuance of authorization to change Water Right Claim Nos. 41QJ 17073-00 and 41QJ 17074-00 as such authorization is requested in Application No. 41QJ 30013407, which application has been determined by DNRC to be correct and complete.

On May 12, 2008, Hon. John C. Brown, District Court Judge for the Montana 18th Judicial District Court, Gallatin County, issued Findings of Fact, Conclusions of Law and Writ of Mandate and Order in Bostwick Props, Inc. v. Mont. Dept. of Nat. Resources & Conservation, Cause No. DV-07-917AX. In his Conclusions of Law, Judge Brown held that where objections have been filed on an application for a beneficial use permit or an application to change water

rights, pursuant to Mont. Code Ann. § 85-2-310(1), DNRC “**shall grant, deny, or condition an application for a permit** or change in appropriation right in whole or in party within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received.” Bostwick Props., Inc., Conclusion of Law ¶ 18 (emphasis in original); *see also, id.* at ¶¶ 29, 33. Judge Brown further held that even if objections are later settled and withdrawn, “the applicable statutes do not grant the DNRC authority to issue a statement of opinion if objections are timely filed.” *Id.* at ¶ 14. Where valid objections on an application for a beneficial use permit or to change a water right have been timely filed and if DNRC’s action on such application is to issue a statement of opinion, “DNRC has not issued a decision, as required by law.” *Id.* at ¶ 44 (emphasis in original); *see also, id.* at ¶¶ 45, 47-48. In short, the timely filing of a valid objection negates any statutory authority DNRC may otherwise have to issue a statement of opinion on an application, even if the objection is later resolved and withdrawn.

In the instant matter, the application was publically noticed on November 17, 2005, with the objection deadline set for December 17, 2005. One valid objection was timely filed, but was later settled and withdrawn on June 5, 2007. Subsequently, DNRC remanded the matter to the regional office, which issued a statement of opinion on January 28, 2008. Pursuant to Bostwick Props., Inc. and Mont. Code Ann. § 85-2-310(1), DNRC has not issued a decision in this matter as required by law.

Additionally, based on the statutory definitions of “correct and complete” and “substantial credible evidence” as set forth in Mont. Code Ann. § 85-2-102(8) and (22), respectively, Judge Brown determined that when DNRC determines that an application is correct and complete, it has “determined that [the application] contained probably, believable facts

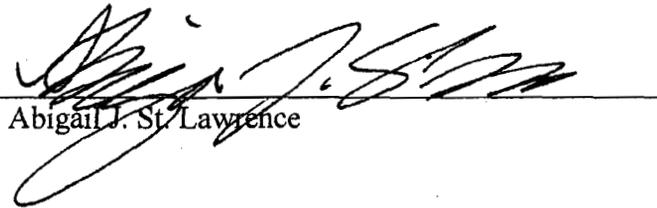
sufficient to support a reasonably legal theory upon which the DNRC should proceed with the issuance of the permit.” Bostwick Props. Inc., Conclusion of Law ¶ 52; *see also, id.* at ¶¶ 50-51, 59-61. Once an application is deemed correct and complete, as a matter of law, DNRC has, at the most, 180 days from the last date of publication to conduct a hearing on the objections and, if the objections are resolved, to issue the permit. “By clear statutory mandate, the only remaining option is the ministerial action of granting the permit.” *Id.* at ¶ 67; *see also, id.* at ¶¶ 69-70.

Although the present matter is an application to change a water right, the same statutory definitions for “correct and complete” and “substantial and credible evidence” set forth in Mont. Code Ann. Mont. Code Ann. § 85-2-102(8) and (22), respectively, apply to applications for beneficial use permits and to change a water right. Furthermore, the regulatory standards for determining that an application to change a water right is correct and complete are substantively similar to those standards applicable to an application for a beneficial use permit. *Cp.* Admin. R. Mont. 36.12.1601(4) and (5). In the present matter, Hohenlohes’ application was deemed correct and complete on October 4, 2005 after extensive communication by DNRC personnel with Hohenlohes’ consultant, John Westenberg, and a site visit to the Hohenlohes’ property. Because DNRC has determined that Hohenlohes’ application is correct and complete, more than 180 days has passed since the last date of publication of the notice of Hohenlohes’ application, and all valid timely filed objections have been resolved, pursuant to Bostwick Props., Inc. and Mont. Code Ann. § 85-2-310(1), the only action now required of DNRC is the ministerial action of issuing Hohenlohes a change authorization as applied for in Application No. 41QJ 30013407. Therefore, Hohenlohes move DNRC to issue said change authorization immediately and without delay.

RESPECTFULLY SUBMITTED this 14th day of May, 2008.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.
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44 West Sixth Avenue
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*Attorneys for Applicants Christian C. and Nora R.
Hohenlohe*

By:


Abigail J. St. Lawrence

CERTIFICATE OF SERVICE

This is to certify that the foregoing *Motion for Issuance of Change Authorization* was served via first class U.S. mail, postage prepaid, on this 14th day of May, 2008, upon the following:

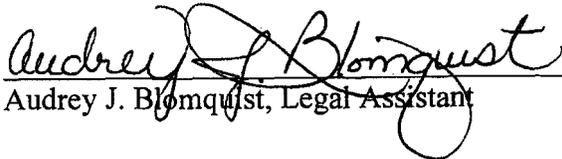
Christian C. and Nora R. Hohenlohe
1824 Phelps Place NW, Unit 1816
Washington, DC 20008

cc:

John Westenberg
PBS&J
1120 Cedar Street
Missoula, MT 59802]

This is to further certify that the foregoing *Motion for Issuance of Change Authorization* was served via hand delivery, on this 14th day of May, 2008, upon the following:

Department of Natural Resources and Conservation
Helena Regional Office
1424 Ninth Ave
P.O. Box 201601
Helena, MT 59620-1601


Audrey J. Blomquist, Legal Assistant

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

IN THE MATTER OF APPLICATION NO.) 41QJ-30013407 TO CHANGE WATER RIGHT) CLAIM NOS. 41QJ-17073-00 AND 41QJ-) 17074-00 BY CHRISTIAN C AND NORA R) HOHENLOHE)	DENIAL OF MOTION FOR CHANGE AUTHORIZATION
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On May 14, 2008, Applicant submitted a Motion for Issuance of Change Authorization requesting that the Department issue a change authorization for this Application based on Bostwick Properties v. DNRC, Cause No. DV-07-917AX, Hon. John Brown, Findings of Fact and Conclusions of Law, Writ of Mandate and Order, Eighteenth Judicial District, Gallatin County (May 12, 2008). In support Applicant states: 1) that according to the Bostwick Order, its application was correct and complete and therefore is deemed to meet the criteria under Mont. Code Ann. §85-2-402; 2) the Department has no authority to issue a statement of opinion when objections are settled and withdrawn; and 3) the Department has exceeded the 180-day timeline under Mont. Code Ann. §85-2-310. This Application is subject to *inter alia*, Mont. Code Ann. §§85-2-402 and 408 (instream flow).

The change of use authorization seeks to salvage water under Mont. Code Ann. § 85-2-419 by changing flood irrigation to sprinkler irrigation, continuing to irrigate the same acres, as follows. The Applicant proposes to change a portion of two irrigation water rights (Statements of Claim No. 17073-41QJ and 17074-41QJ) to instream flow to benefit the fishery resource. The source is Little Prickly Pear Creek. Irrigation water is diverted by a headgate from Little Prickly Pear Creek into ditch for about ½ mile to the place of use. The Applicant intends to continue existing irrigation on 155.3 acres under a pivot and 37 acres of flood irrigation for a total of 192.3 acres. The Applicant wants to use 29 CFS up to 3837.24 acre-feet of water salvaged from the installation of the new irrigation system to benefit the Prickly Pear Creek fishery. The amount of water requested in the Application to run the pivots and provide adequate flood irrigation water is 3.50 CFS up to 515.2 acre-feet per year. Applicant states that the pivot system irrigation requirement is 3.03 cfs and .47 cfs to compensate for ditch losses occurring between the Prickly Pear Creek and the fish screen in the SESESW, Section 36, TWP 15N, RGE 4W. The Applicant would continue to irrigate the same places of use claimed in the water rights.

The Application received one objection. The Applicant pursued settlement with the objector. Applicant's counsel notified the Department June 5, 2007, that the objection was settled and the objector voluntarily withdrew her objection from the process. Counsel further stated that no hearing was necessary and requested that the contested case hearing under the Montana Administrative Procedure Act (MAPA) be vacated.

On January 28, 2008, the Department issued a Statement of Opinion denying the Application. Exhibit A, *Statement of Opinion, In The Matter Of Application No. 41qj-30013407 to Change Water Right Claim Nos. 41qj-17073-00 And 41qj-17074-00 by Christian C and Nora R Hohenlohe*. In relevant part, the Department found under the requirements of Mont. Code Ann. §§85-2-402 and 408 that:

- **Historic Use** – One must prove the actual extent of historic use so as to demonstrate no adverse effect to other appropriators through expansion of the historic use. The Applicant has not provided information needed to support the historic use of water. There is no information on water availability, the pattern of historic system operation or whether full service irrigation was ever received. Applicant consultant's estimate of the volume of water use based on ditch capacity and estimated days in the absence of actual historic evidence far exceeded any reasonable calculation based on crop consumption even with assumed full service irrigation. The Applicant did not provide information regarding the actual historic consumptive volume which is available to change.
- **Adverse Effect** - No calculations or analysis of change in return flows or timing of change of return flows were provided. There are no pivot specifications included in the file. The Applicant did not address how this change may affect the other water user on the source, instead only stating that the change will not decrease flows available to downstream users. The Applicant did not provide any calculation on consumptive use for the changed project. They did not submit plans to control the headgate to reduce flows or to monitor diversions to ensure they don't adversely affect other water users. In addition, because Applicant did not present sufficient evidence to support the claimed historical consumptive use it is impossible to determine whether the proposed change to instream flow and continued irrigation will adversely affect other appropriators.
- **Beneficial Use** - The Department does not believe there is any water left for instream flow. The number of acres irrigated remains the same as does the water consumed by the crop. The applicant has not included in the application the requirements of Mont. Code Ann. § 85-2-408. Applicant provided no basis for the amount of water required for the fishery purpose.
- **Salvage Water** - The Department finds that changing from sprinkler irrigation to flood irrigation does not change the amount of water consumed by the crop and in this case the historic crop consumption is unknown. The large amounts asserted to be historically diverted were not utilized by the crop and likely returned to the system. The applicant did not provide an analysis of return flow.

- Under Mont. Code Ann. 85-2-408(1)(b), Applicant failed to provide, "a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured."
- Under Mont. Code Ann. 85-2-408(3)(a), Applicant failed to prove that "the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons."
- Under Mont. Code Ann. 85-2-408(3)(b), Applicant failed to prove "the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource."
- Under Mont. Code Ann. 85-2-408(7), Applicant has failed to prove the historic diversion rates, volumes, and consumptive use. The applicant did not analyze return flows. In addition, there is no evidence that there will be any water salvaged because the Applicant proposes to continue all of the irrigation.

As required by Mont. Code Ann. §85-2-310, the Department offered Applicant a hearing on the Statement of Opinion under MAPA. The Applicant requested a hearing and the Department set the hearing for April 2, 2008. By Motion dated February 29, 2008, the Applicant requested postponement of the hearing until an undecided date due to work conflict of their legal counsel. They also requested disqualification of the Hearing Examiner (Langel). The Motion for Continuance was granted and the Motion for Disqualification denied. A telephone conference was held on May 6, 2008, to set a date for hearing. The hearing is scheduled for June 24, 2008.

The Department has reviewed the pending Motion and denies it for reasons including the following. First, the Bostwick Order is controlling only in the Eighteenth Judicial District. The Bostwick Order was appealed to the Montana Supreme Court on May 22, 2008, and the Department has moved for a stay of that Order. The Department believes that the Bostwick Order is in error and seriously misconstrues the Montana Water Use Act to the detriment of applicants and water right holders alike. Second, the Bostwick Order applied only to permit decisions not change in use authorizations or instream flow under Mont. Code Ann. §§85-2-402 and 408. Third, under the Bostwick Order, assuming *arguendo* it did apply, the Applicant has waived the timeline by not raising it before a decision was issued. Fourth, this Application falls far short of proving all of the statutory criteria by a preponderance of the evidence as indicated in the Statement of Opinion and above, and issuance would be in contravention of Mont. Code Ann. §§85-2-402 and 408, and protection of all water right holders. See also Mont. Code Ann. § 85-2-402(13)(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in

appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.”). Fifth, the Applicant failed to provide any information on some of the statutory requirements of Mont. Code Ann. §85-2-408, less prove all of the requirements by a preponderance of the evidence. Sixth, changes of water rights are not protected by priority of appropriation as a change issued in violation of Mont. Code Ann. §85-2-402 can greatly expand senior water rights to the detriment of all water right users who have come on the stream since the priority date of the right to be changed. See Mont. Code Ann. §85-2-402(2)(a).

In a change proceeding, including this one, 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 § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute Mont. Code Ann. §85-2-402 reads in part :

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.*

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

Montana's change statute simply codifies western water law.¹ One commentator

¹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the Court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right. (italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)("A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops.

Carriage losses are usually added to the amount consumed by the crops.”); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate). Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right). The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....
When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....
Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986).

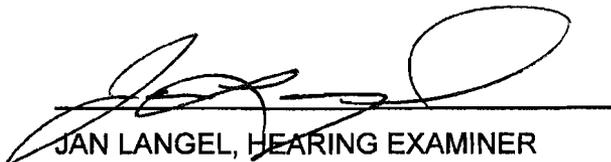
As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

The Department has denied changes where the applicant has not carried its burden of proof. *See In the Matter of Application for Beneficial Water Use Permit No. 41H-30003523 and In the matter of Application for Change No. 41H-30000806 by Montana Golf Enterprises LLC, DNRC Proposal for Decision (2003); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision, adopted by DNRC Final Order (2005); In The Matter Of Application To Change A Water Right No. 43bv 30001540 By Brockway Family Partnership, DNRC Proposal for Decision, adopted by DNRC Final Order (2006).*

In the present case, the Department issued a Statement of Opinion, denying the Application in order to protect other appropriators on the stream, because Applicant failed to prove all of the criteria mandated by the Legislature. The Applicant has previously stated that a contested case hearing with the objector is not necessary. The Department is providing the Applicant with a hearing opportunity on June 24, 2008, to explain why the Department's decision is in error.

Accordingly, this Motion is **DENIED**.

Dated this 2nd day of June 2008.



JAN LANGEL, HEARING EXAMINER
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6602

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **DENIAL OF MOTION FOR CHANGE AUTHORIZATION** was served upon all parties listed below on this 2nd day of June 2008, by first-class United States mail.

JOHN E BLOOMQUIST, ESQ
ABIGAIL J ST LAWRENCE, ESQ
DONEY CROWLEY BLOOMQUIST PAYNE UDA PC
PO BOX 1185
HELENA MT 59624-1185



Jamie Price
Hearings Unit, 406-444-6615

CHANGE APPLICATION STATEMENT OF OPINION

Application No.:	41QJ 30013407 (Hohenlohe)
Date:	January 28, 2008
Final Decision Maker:	Jan Langel
<input type="checkbox"/> GRANT APPLICATION: The findings and conclusions show that the criteria have been met.	
<input checked="" type="checkbox"/> DENY APPLICATION: The findings and conclusions do not show that the criteria have been met.	
<input type="checkbox"/> MODIFY APPLICATION: The findings and conclusions show the criteria have been met, however application modifications are required. Specific modifications are addressed at the end of this document.	
The following criteria must be met by an applicant: Complete this form if no objections were received to an application or if the objections were settled.	

Application Details:

Christian C. & Nora R. Hohenlohe applied for this change in December of 2004. Land and Water Consulting, currently PBS&J prepared the change application. The applicant proposes to change a portion of two irrigation water rights (Statements of Claim No. 17073-41QJ and 17074-41QJ) to instream flow to benefit the fishery resource. The source is Little Prickly Pear Creek. Irrigation water is diverted by a headgate from Little Prickly Pear Creek into ditch for about ½ mile to the place of use. The applicant intends to continue irrigation on 155.3 acres under a pivot and 37 acres of flood irrigation for a total of 192.3 acres. The applicant wants to use 29 CFS up to 3837.24 acre-feet of water salvaged from the installation of the new irrigation system to benefit the Prickly Pear Creek fishery. The amount of water requested in the application to run the pivots and provide adequate flood irrigation water is 3.50 CFS up to 515.2 acre-feet per year. The pivot system irrigation requirement is 3.03 cfs and .47 cfs to compensate for ditch losses occurring between the Prickly Pear Creek and the fish screen in the SESESW, Section 36, TWP 15N, RGE 4W. The Applicant would continue to irrigate the same places of use claimed in the water rights.

This application is for a temporary change to instream flow for fisheries for 10 years, with a contract for 30 years pursuant to §85-2-408 MCA. A Supplement to Application for Change Appropriation Water Right (Form 606ASW) for salvage water was submitted. As required by §85-2-408, MCA a notice of their intent was published in the Independent Record. The additional new purpose would be fishery. The additional place of use to be protected will be the reach approximately 200 feet downstream from the headgate located in the SESWSW of Sec 36, Twp 15N, Rge 4W, Lewis and Clark County.

Historic Use: The applicant must prove the amount of water being changed for each water right will not 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.

FINDINGS OF FACT:

The basis for the change includes two Statements of Claim which divert water from Little Prickly Pear Creek by a headgate into Baxter Ditch. A letter dated 3/20/1980 from the USDA-Soil Conservation Service to Carl Kantorowicz included in the files stated the headgate structure was designed to flow at a rate of 36 to 40 CFS. The claims remained as filed until June 18, 2004 when they were both amended according to the consultant 'to more accurately reflect the full extent of historic irrigation practices'. These rights are used on the same place of use.

CLAIM #	PRIORITY	FILED	FLOW RATE	VOLUME	ACRES	PERIOD OF DIVERSION
17073	8/22/1892	4/3/1981	12.5 cfs	240 af	60	4/15 to 10/15
Amended	6/18/2004			2500 af	193	4/15 to 10/15
17074	5/17/1890	5/15/1981	20 cfs	780 af	193	4/15 to 10/15
Amended	6/18/2004			4000	193	4/15 to 10/15

The Lewis & Clark County Water Resources Survey, dated 1957 does not show 193 acres being irrigated. The field notes from an interview with the previous owner, Carl Kantorowicz, show irrigation from the Baxter Ditch totaling 113.00 acres within the place of use identified in the amended claim. DNRC wrote a letter to the Applicant's consultant questioning that 117 acres were irrigated in the past. The Applicant's consultant responded in a letter dated June 1, 2005, that they believed the

Water Resources Survey's depiction of 117 acres is in error. DNRC's review of the aerial photos used when compiling the survey show that additional acres were either being irrigated or irrigable under the historic ditch system. The ditch diversion and flood irrigation has gone unchanged until the recent installation of several small pivots. The same system consisting of a headgate from Little Prickly Pear Creek into Baxter Ditch and flood irrigation was in place at the time of the 1979 aerial and was in place just prior to the recent change to pivots, and DNRC claims examination indicated flood irrigation of 189 acres rather than 193 acres. There is no information from the Applicant documenting historic use of the additional 4 acres claimed, but not included in DNRC's examination. The information concerning the Lewis & Clark Water Resources Survey was determined by review of files in the Helena Regional Office.

A letter from DFWP dated May 5, 1988 provided by the Applicant document that large quantities of water were diverted by the previous owner of the Hohenlohe property and water rights. A letter from Arnold E. Quale, District Conservationist of the Soil Conservation Service (now the NRCS) to Carl Kantorowicz dated March 20, 1980 stated that according to SCS records and engineering computations, the headgate (same as the current headgate) is designed to flow at a rate of 36-40 cubic feet per second or 1600 miners inches.

During the field investigation, Jim Beck, HRO Engineer measured the ditch near the headgate and calculated the ditch capacity and velocity. The calculations are in his memorandum dated August 25, 2005. He wrote, for a ditch this size it is probable that the velocity is 1.0 to 1.5 ft/sec. This would mean the ditch capacity, at the high water mark, is 23 to 34 cubic feet per second. Information is already in the file from the NRCS indicating that the headgate has a capacity of 36-40 CFS. Refer to preceding paragraph. There is no information that supports or explains the discrepancy.

The applicant calculated the flow rate of water diverted historically was adjusted according to water availability in Little Prickly Pear Creek. The Department cannot find anything in the file that supports the Applicant's determination of water availability. The only evidence presented on historic diversion was documentation previously discussed supporting the headgate capacity and the affidavit from J.C. Kantorowicz who was on the ranch from 1948 to 1999. Mr. Kantorowicz stated that the headgate would support 36 to 40 CFS and was, subject to water availability often filled to capacity. The Applicant provided the following as representative of the period of use and diversion rate during a typical irrigation season. There does not appear to be any information in the file that supports the information below.

Mid-April to Mid-June: 32.5 cfs
 Mid-June to Early August: 15.0 cfs
 Early August to Mid-Sept: 10.0 cfs

The applicant calculated the acre-feet of water diverted annually; an average daily volume was estimated for each diversion rate from March 15 to October 15. The number of days and pro-rated flow rate is as follows:

Mid-April to Mid-June: 42 days
 Mid-June to Early August 40 days
 Early August to Mid-Sept: 40 days
 Total 122 days

It was not discussed whether the headgate operated 24/7. An affidavit in the file from Mr. Kantorowicz states only that the structure was, subject to water availability filled to capacity when the land was irrigated.

There is no information in the file that supports the prorated days or is actual evidence of the historic pattern of use. The above is estimation by the Applicant's consultant.

The applicant further states the estimate is conservative because of water availability and in reality, the irrigation diversions may have occurred for 150 days or more in some years. There was no evidence in the file that supported the historic pattern of operation. Using the estimates previously discussed the following table summarizes the Applicant consultant's estimates of flow rate and acre-feet (AF) historically diverted under both water right claims.

Flow Rate	AF Per Day	Days	Total Volume
32.5	64.35	42	2702.7
15	29.7	40	1188.0
10	19.8	40	792
		Total Volume	4682.7

An estimate of historic consumptive volume was calculated by Jim Beck, HRO Engineer and based on the Montana Irrigation Guide and information in the change application. The calculations are on a sheet attached to the memorandum dated June 15, 2007 and are based on full service irrigation. This calculation is not supported by any historical evidence to support the acres or the full flow rate or even the pattern of use.

WR Number	Priority Date	Historic Flow Rate	Historic Consumptive Volume	Historic Acres
17073-41QJ	08/22/1892	12.5	143.00	193
17074-41QJ	05/17/1890	20.0	229.00	193

A field investigation was performed on August 22, 2005. Present at the investigation were Jim Beck, Kathy Arndt, Ken Cook, ranch manager and George Liknes, fisheries biologist from the Great Falls office of the Montana Department of Fish, Wildlife & Parks (DFWP). There is a Future Fisheries Project Agreement between Christian and Nora Hohenlohe and Montana Fish, Wildlife & Parks dated April, 2004 contained in the application.

Ken Cook, current ranch manager (it is not known if he was manager prior to 1973) stated a large head of water was needed to move the flood irrigation water across the field because of the uneven topography and the gravelly soils. Jim Beck wrote in his memorandum, dated August 25, 2005, driving across the field some gentle undulations were noticeable, but the field was of a more uniform grade than many flood-irrigated fields. The ranch manager stated that some grading had recently taken place in the fields. There were no obvious signs of leveling. While on site, the ranch manager was asked to take us to one of the gravelly locations in the field. The site he showed us had a few more 1 – 4 inch rocks than the surrounding area, but they were within a matrix of sandy loam or sandy silt soil. These soils would not have very high infiltration rates that would interfere with the efficient application of water with flood irrigation.

In a letter dated October 4, 2005, the Applicant's consultant responded to the questions of return flow, timing and measurements with the following comments. The Hohenlohes are conservationists and they are concerned that an application process that can result in an unfair reduction in water rights, that is overly burdensome in terms of data requirements, and that leaves participants with unnecessary ongoing measurement obligations which could have a chilling affect on irrigators who might otherwise become involved in these types of programs. In this context, the Hohenlohes have the following comments regarding Jim Beck's Memorandum dated, August 25, 2005. As described above, the official length of the protected reach will not affect the fisheries value of this project. In addition to being unnecessary, defining the protected reach as extending a significant distance downstream below the point of diversion would require the Hohenlohes to address questions about the consumptive use of the water rights—including the timing, location, and rate of historic return flow to the stream, relative to the downstream user. These questions would be very expensive and difficult to fully answer. If it is truly necessary to define a length of stream, the Hohenlohes would prefer to simply assert a length of 200 feet, beginning at the point of diversion and continuing downstream.

The Applicant has not provided information needed to support the historic use of water. There is no information on water availability, the pattern of historic system operation or whether full service irrigation was received. The Applicant did not provide information regarding the actual historic consumptive volume which is available to change.

CONCLUSIONS OF LAW:

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 reads in part:

85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An appropriator may not make a change in an appropriation right except, as

permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3...*

(italics added).¹

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). Water rights are limited to the amount of water actually put to a beneficial use, despite the amount of water diverted or claimed under a notice of appropriation. 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 666 P.2d 215, citing, Conrow v. Huffine (1914), 48 Mont. 437, 138 P. 1094; Peck v. Simon (1935), 101 Mont. 12, 52 P.2d 164; Galiger v. McNulty (1927), 80 Mont. 339, 260 P. 401

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added). See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5.17[5] (1988)(*a water holder can only transfer the amount that he has historically put to beneficial use and consumed* – the increment diverted but not consumed must be left in the stream to protect junior appropriators); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271("The issues of waste and historic use, as well as misuse, nonuse, and abandonment, may be

¹ A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

² Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104.

properly be considered by the administrative official or water court when acting on a reallocation application," citing Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation, it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in: In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(Applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the Applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate). The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order; In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starke/Koester, April 1, 1992, Final Order.

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation are estimated. Such estimates are usually made by civil engineers. With respect to a reallocation, the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation. This investigation involves an examination of historic use over a period that may range from ten years to several decades, depending on the value of the water right being reallocated...

Expected consumptive use may not exceed historic consumptive use if, as would typically be the case, junior appropriators would be harmed. If an increase in consumptive use is expected, the quantity or flow of reallocated water is decreased so that consumptive use is not increased. 2 Water and Water Rights at § 16.02(b) at 279-80.

In addition to the requirements of §85-2-402 MCA, §85-2-408 MCA requires:

The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the Department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion.

The Department finds that the historic flow rate and consumptive volume are not proven by a preponderance of the evidence. There is no actual evidence of diversions, just estimations based on current use and estimated available flow. No actual records of available flow were provided. The applicant has not provided information that supports the amounts claimed, and the amounts claimed are clearly much higher than the amount needed for crop consumption. Moreover, the actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. Application for Water Rights in Rio Grande County __Colo. __, 53 P.3d 1165, (2002). It is the applicant's burden to produce this evidence of historical use, and not doing so constitutes a failure of proof. In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., Proposal for Decision (2005) adopted by Final Order. Without evidence of the amount of actual historical use, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a); In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC., Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002), *supra*; In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., *supra*.

Adverse Affect: The applicant must prove 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.

FINDINGS OF FACT:

The Applicant stated there is only one diversion between the Hohenlohe headgate and the confluence of Little Prickly Pear Creek and the Missouri River. During the field investigation, the ranch manager stated that there were not any significant diversions downstream from the Applicant's headgate. Department records show Josephine Lahti has claimed an irrigation water right (41QJ 97439) for 25 CFS, with a priority date of 6/18/1890 and period of diversion of May 10 to November 10 at a location on Little Prickly Pear Creek approximately 1 mile downstream from the Hohenlohe diversion. There is also a corresponding stock right (41QJ 97435), with a priority date of 6/18/1890. The irrigation right has since been reduced through adjudication to 4.47 CFS. Ms. Lahti filed an objection to this application which was later withdrawn.

Approximately 37 acres are proposed to remain under flood irrigation under this change. The applicant has stated the total flow rate and volume to be used for the continued irrigation is 3.5 CFS up to 515.2 acre-feet per year in the same area. That is the amount asserted to run the 5 pivots covering 155.3 acres and provide water for the 37 acres that remain under flood irrigation, for a total of 192.3 acres irrigated. The figure includes .47 CFS to compensate for ditch loss. No calculations or analysis of change in return flows or timing of change of return flows were provided. There are no pivot specifications included in the file. The Applicant did not address how this change may affect the above listed water user, instead only stating that the change will not decrease flows available to downstream users. The Applicant did not provide any calculation on consumptive use for the changed project. They did not submit plans to control the headgate to reduce flows or to monitor diversions to ensure they don't adversely affect other water users. In addition, because Applicant did not present sufficient evidence to support the claimed historical consumptive use is it impossible to determine whether the proposed change to instream flow and continued irrigation will adversely affect other appropriators.

CONCLUSIONS OF LAW:

The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. Mont. Code Ann. § 85-2-402(2)(a) Applicant has not proven the historic pattern of use or the historic consumptive volume for each water right proposed for change. The Applicant has not analyzed return flows or the potential effect of this change in use on other water users. Without this information, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a); Proposed Decision, *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change number 41H 30000806 by Montana Golf Enterprises, LLC (November 19, 2003)* (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165. It is the applicant's burden to produce this evidence of historical use, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC.*, Proposal for Decision (2005) adopted by Final Order; *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H108772 and 76H-108773* (Final Order January 2008), by North Corporation).

Adequacy Of Appropriation Works: The applicant must prove, except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

FINDINGS OF FACT:

The information provided during discussions in the field on August 22, 2005 and from the size of the diversion and conveyance structures, it was clear that it was possible for the water right holder to divert the amount of water claimed on the historic rights. The headgate delivers water to a conveyance ditch through a 3.5 foot wide by 2.3 foot high squashed culvert. Historically the creek had been dammed below the diversion, now the ditch is cut deeply into the natural contour to make it possible for diversion of the water without a check dam in the creek. The active ditch is 15 feet wide with a high water mark at 2.3 feet from the bottom of the ditch. When we were on site the ditch was choked with grass and only a 6-foot wide channel in the middle was free from growth. Approximately ¼ -mile down the ditch a fish separation screen has been installed. The screen keeps fish from entering the pipeline going to the sprinklers and provides the fish with a water route via the overflow to return to the creek. Pipelines go to each of the center pivot laterals where a pump pressurizes the water for that lateral.

CONCLUSIONS OF LAW: Applicant has proven that the proposed means of diversion, construction and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).

Beneficial Use: The applicant must prove the proposed use of water is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use.

FINDINGS OF FACT:

There are irrigation requirement worksheets in the file prepared by the consultant. The consultant calculated water use based ASCS data included in the file. The calculations provided are the flow rate and volume necessary to irrigate grass and alfalfa in climactic area 3 and appear reasonable.

The water consumed by the crop remains the same. The method of irrigation changed but the number of acres and type of crop (alfalfa and grass) did not although there is no historical basis for the full claimed acres. It was calculated by the consultant that 3.5 CFS up to 515.2 acre-feet per year was needed to irrigate the Hohenlohe fields, which included .47 CFS to compensate for ditch loss.

The Department does not believe there is any water left for instream flow. The number of acres irrigated remains the same as does the water consumed by the crop. The applicant has not included in the applications the requirements of Mont. Code Ann. § 85-2-408. Applicant provided no basis for the amount of water required for the fishery purpose.

CONCLUSIONS OF LAW: Applicant has not proven that the proposed use of water is a beneficial use of that the flow rate and volume are the amount needed to sustain proposed beneficial use. Mont. Code Ann. § 85-2-402(2)(c). Mont. Ann. §85-2-408(3)(b) also specifically requires for instream flow changes in use that Applicant "shall prove by a preponderance of evidence that . . . the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource." While irrigation and fishery are recognized beneficial uses, Mont. Code Ann. §85-2-102 (4), Applicant failed to provide justification for the amount of water needed to sustain the fishery use.

Possessory Interest: 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.

FINDINGS OF FACT:

The applicant signed and had the affidavit on the application form notarized affirming the applicant has 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.

CONCLUSIONS OF LAW: 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. Mont. Code Ann. § 85-2-402(2)(d).

Salvage Water: 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.

FINDINGS OF FACT:

It is difficult to determine if there is any salvage water because the Applicant has not proven the historical flow rate diverted, a volume diverted based on the historic operation, not the historically consumed volume. The Applicant stated that in changing from flood to sprinkler irrigation a great deal of water was salvaged. The Applicant's table below indicates the claimed amounts.

Historic Rate(CFS)	Current Rate (CFS)	Salvage (CFS)	Acre-feet per day	Days diverted	Total Salvage (Acre-feet)
32.5	3.5	29	57.42	42	2411.64
15	3.5	11.5	22.77	40	910.8
10	3.5	6.5	12.87	40	514.8
				Total	3837.24

The Department finds that changing from sprinkler irrigation to flood irrigation does not change the amount of water consumed by the crop and in this case the historic crop consumption is unknown. The large amounts asserted to be historically diverted were not utilized by the crop and likely returned to the system. The applicant did not provide an analysis of return flow.

CONCLUSIONS OF LAW: The applicant has not proven by a preponderance of the evidence that the proposed water-saving methods will salvage at least the amount of water asserted by the

Applicant, under Mont. Code Ann. 85-2-402(2)(e). Applicant has not proven that changing from flood to sprinkler irrigation results in any salvage water.

Water Quality Issues: The applicant must prove that the water quality criteria have been met only if a valid objection is filed. The water quality of a prior appropriator will not be adversely affected or the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

No objections relative to water quality or the ability of a discharge permit holder to satisfy effluent limitations of the permit holder were filed against this Application.

Public Notice: The Application was properly noticed pursuant to Mont. Code Ann. §85-2-307.

Environmental Assessment: The Environmental Assessment prepared by the Department for this Application was reviewed and is included in the application file.

MONT. CODE ANN. §85-2-408 REQUIREMENTS:

Mont. Code Ann. §85-2-408 requires in relevant part, in addition to the requirements under Mont. Code Ann. §85-2-402, the following:

- (1) . . . a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and
 - (b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.
- (2) (a) A temporary change authorization under the provisions of this section is allowable only if the owner of the water right voluntarily agrees to:
 - (i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource. . . .
- (3) an applicant for a change authorization under this section shall prove by a preponderance of evidence that:
 - (a) the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and
 - (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource....
- (7) The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion.

FINDINGS OF FACT:

Under Mont. Code Ann. 85-2-408(1)(a), the Applicant asserts a length of 200 feet, beginning at the point of diversion and continuing downstream as the "length and location of the stream reach in which the streamflow is to be maintained or enhanced."

Under Mont. Code Ann. 85-2-408(1)(b), Applicant failed to provide, "a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured."

Under Mont. Code Ann. 85-2-408(2)(a), Applicant met the requirements by proposing to "change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource."

Under Mont. Code Ann. 85-2-408(3)(a), Applicant failed to prove that "the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons." See discussion under Historical Use and Adverse Effect, above.

Under Mont. Code Ann. 85-2-408(3)(b), Applicant failed to prove "the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource." See discussion under Beneficial Use.

Under Mont. Code Ann. 85-2-408(7), and to reiterate the above, Applicant has failed to prove the historic diversion rates, volumes, and consumptive use. The applicant did not analyze return flows.

In addition, there is no evidence that there will be any water salvaged because the Applicant proposes to continue all of the irrigation.

CONCLUSIONS OF LAW:

Applicant failed to meet all of the requirements of Mont. Code Ann. 85-2-408.