



**Exhibit A-2:** a memorandum dated April 1, 2016 from Tim Davis, Administrator, Water Resources Division, to WRD Regional Managers, Water Rights Bureau, and Hydro Science Section, WMB, entitled “Policy Memo – Return Flows.”

**Exhibit A-3:** a memorandum from Dave Baldwin, Senior Hydrogeologist/Senior Water Rights Specialist, to Peter G. Scott [counsel for Applicant], entitled “Centennial Livestock Inc Change 41I-30110538 – Return Flow Review.”

Applicant offered at hearing, and the Hearing Examiner admitted, the following exhibits:

**Exhibit A-4:** the *curriculum vitae* of David O. Baldwin.

**Exhibit A-10:** the Department’s Change Authorization for the five old Schatz Ditch water rights at issue in this matter, dated 2005.

**Exhibit A-15:** one page titled “Table 1: Summary of Water Commissioner Records for water delivered to Schatz Ranch in the years 1964-1966, 1972-1977, 1984, 1986-1988 and 1993-2001.

**Exhibit A-19:** the Department’s Change Authorization for the five old Schatz Ditch water rights at issue in this matter, dated 2014.

**Exhibit A-21:** a Quit Claim Deed conveying water rights from the Schatz-McGehee Water Users Association to Centennial Livestock, dated 2006.

**Exhibit A-28:** USGS Water-Resources Investigations Report 01-4120 entitled “Streamflow and Water Quality of the Lower Tenmile Creek Watershed-Central Montana, 1997 and 1998.”

Objector offered, and the Hearing Examiner admitted, the following exhibits at hearing (for clarification, the Hearing Examiner retitled the exhibits as O-2 *a, b, and c*):

**Exhibit O-2(a):** pages 1 – 8 of the “Lewis and Clark County Water Quality Protection District 2018 Surface Water Sampling Plan.”

**Exhibit O-2(b):** pages 9 – 35 of the “Lewis and Clark County Water Quality Protection District 2018 Surface Water Sampling Plan.”

**Exhibit O-2(c):** three hydrographs, of unknown origin, of streamflow on Tenmile Creek during the irrigation season at various locations during 2012, 2015 and 2016.

## **INTRODUCTION**

1. On March 21, 2017, Centennial Livestock, Inc. submitted Application to Change an Existing Irrigation Water Right No. 41I-30110538 (“Application”) to the Helena Regional Office of the Department. The Application requests to change the purpose of use of irrigation water

rights No. 41I-132502, 41I-132503, 41I-132504, 41I-132505 and 41I-132506 (“Applicant’s Water Rights”) from irrigation to marketing for mitigation pursuant to § 85-2-420, MCA. (File “Application Materials”; Applicant’s Proposed FOF 1, 2). Water historically diverted from Tenmile Creek to flood irrigate 395 acres will be used to mitigate depletions to surface water caused by future water use, pursuant to § 85-2-420, MCA, and will no longer be used for the purpose of irrigation. The five water rights are currently under a temporary change for the purpose of fishery/instream flow with a place of use from the historic point of diversion (Schatz Ditch headgate) downstream to the Williams Street bridge. (Change Authorization 41I-30015779). (PDG ¶ 11)

### **Water Rights Proposed to be Changed**

2. In order to have a clear understanding of this the proposed change, the recent history of the five water right claims at issue is needed. The instant change application involves the five Statements of Claim as described in Table 1, below.

3. Water rights 41I-132502-00 and 41I-132506-00 were historically diverted from Tenmile Creek into the Schatz Ditch by a headgate located in the SESESW Section 22, T10N, R04W, Lewis and Clark County from April 15 to November 4 annually. The place of use for irrigation was 190 acres located in the SE of Section 15, NE quarter of Section 22 and NW quarter of Section 23, all in T10N, R04W, Lewis and Clark County. (PDG FOF 2)

4. Water rights 41I-132503-00, 41I-132504-00, 41I-132505-00 were historically diverted from Tenmile Creek using a headgate in the SWSESW of Section 7, T10N, R3W, from April 1 to September 15 annually, for irrigation of 120 acres in the SE of Section 8, T10N, R3W. In 1975, the department issued a change authorization for these rights to change the point of diversion to the Schatz ditch headgate in the SESESW Section 22, T10N, R04W. This change authorization also increased the place of use to the 395 acres located in the E2 of Section 15, NE Section 22 and NW of Section 23, T10N, R04W. (PDG FOF 3)

5. In 2005 the Department issued a change authorization for all five of these water rights to temporary instream flow for fisheries. In that change, the Department determined that the combined flow rate and volume of the five water rights was 11.15 cubic feet per second (cfs) and the historic diverted volume was 1,212.65 acre-feet (AF). That change is described as follows:

THE APPLICANT WILL DISCONTINUE USE OF THE HISTORIC HEADGATE AND DITCH SYSTEM AND WILL NO LONGER DIVERT THESE WATER RIGHTS FOR IRRIGATION OF THE 395 ACRE PLACE OF USE. BY TEMPORARILY RETIRING THESE WATER RIGHTS, THE APPLICANT WILL SAVE APPROXIMATELY 11.15 CFS UP TP 1212.65 ACRE-FEET OF WATER PER YEAR. THE APPLICANT WILL TEMPORARILY CHANGE THIS AMOUNT OF WATER TO FISHERIES USE AND LEAVE THE WATER INSTREAM TO AUGMENT FLOW IN TENMILE CREEK. THE TEMPOARARY CHANGE TO FISHERIES USE WILL LAST 10 YEARS. THE PLACE OF USE AND POINT OF DIVERSION FOR THE FISHERY INSTREAM FLOW USE WILL BE TENMILE CREEK, TRIBUTARY TO PRICKLEY PEAR CREEK AS IT TRAVERSES THROUGH THE S1/2 OF SECTION 22, TWP 10N, RGE 04W, LEWIS AND CLARK COUNTY, FROM THE HISTORIC HEADGATE TO THE WILLIAMS STREET BRIDGE.

(Exhibit A-10)

6. In 2006 all five water rights were severed from the 395-acre place of use when they were conveyed by quitclaim deed from the Schatz-McGehee Water Users Association, LLC to Centennial Livestock. (Exhibit A-21; PDG FOF 5).

7. In 2014 the temporary instream flow change, as described in paragraph 4, above, was reauthorized for another ten-year period until 2024. (Exhibit A-19)

**Table 1** Water Rights Proposed be Changed

Statement of Claim No.	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41I-132502	Flood Irrigation	3.00 CFS	4/15 -11/4	SESESW Section 22, T10N, R04W	severed	03/29/1865	190
41I-132503	Flood Irrigation	2.63 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W	severed	05/31/1896	395
41I-132504	Flood Irrigation	1.42 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W	severed	05/01/1865	395
41I-132505	Flood Irrigation	2.10 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W	severed	04/30/1867	395

Statement of Claim No.	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
411-132506	Flood Irrigation	2.00 CFS	4/15 –11/4	SESESW Section 22, T10N, R04W	severed	05/31/1867	190

8. The five water rights proposed to be changed are located in the Upper Missouri River basin closure. The basin closure closes the basin to new permits to appropriate water with limited exceptions. An exception for new groundwater appropriations requires an application to “be accompanied by a hydrogeologic report conducted pursuant to 85-2-361, MCA, an aquifer recharge or mitigation plan if required, and an application for a change in appropriation right or rights if necessary.” (§§ 85-2-242, - 243, -360, MCA)

9. The Applicant does not own the 395-acre place of use that was historically irrigated by the water rights and will no longer divert the full flow rate and diverted volume associated with those acres. The historic flow rate of 11.15 CFS and historic diverted volume of 1,212.65 AF for 395-acres of historic irrigated acreage were determined for the subject claims in temporary instream flow change 411-30015779, authorized by DNRC in 2005. During processing of change application 411-30015779 the department made a finding of fact regarding the historic flow rate diverted and volume diverted but did not make finding of facts regarding the individual flow rates and volume diverted for each individual claim and made no finding regarding historic consumptive use for any of the subject water rights. For the purposes of processing [the instant] application the department will utilize a maximum historic flow rate of 11.15 CFS and a diverted volume of 1,212.65 AF that will be broken down per individual water right. The Applicant proposes to allocate up to 1,212.65 AF of diverted volume and 556.02 AF of consumed volume to marketing for mitigation throughout the May to September irrigation growing period annually. Although diversion of the 11.15 CFS flow rate will cease throughout the entire period of diversion; April 1 through November 4, the consumptive use volume of 556.02 AF available for marketing for mitigation will be restricted to growing season months, May through September, as identified in the NRCS Irrigation Water Requirement program for Lewis and Clark County. (PDG ¶12)

10. After thorough analysis, the PDG specifically found the following monthly flow rates and volumes for each of the five water rights at issue:

Water Right No.	Mitigation Flow Rate and Volume Provided by Month										Total per WR
	May		June		July		August		September		
	GPM	AF	GPM	AF	GPM	AF	GPM	AF	GPM	AF	
41I-132502-00	61.66	8.43	310.54	41.10	408.88	55.92	341.23	46.67	102.07	13.51	165.63
41I-132503-00	44.57	6.10	224.48	29.71	295.57	40.42	246.67	33.73	73.78	9.77	119.73
41I-132504-00	24.06	3.29	121.19	16.04	159.57	21.82	133.17	18.21	39.83	5.27	64.64
41I-132505-00	35.59	4.87	179.24	23.72	236.00	32.28	196.96	26.94	58.91	7.80	95.60
41I-132506-00	41.11	5.62	207.03	27.40	272.58	37.28	227.49	31.11	68.05	9.01	110.42
Total CU		28.31		137.97		187.72		156.66		45.35	556.02

(PDG ¶¶ 31 – 39, Table 2)

### **Procedural History**

11. On September 11, 2017, the Department sent Applicant a deficiency letter under § 85-2-302, MCA. The Applicant responded with information dated October 18, 2017. (File – “Deficiency Letter & Response”; Applicant’s Proposed FOF 3)

12. Pursuant to the April 1, 2016, Policy Memo – Return Flows, a Return Flow and Mitigation Report completed by Russell Levens on January 19, 2018 (“Levens Report”), analyzed the rate and timing of return flow for claims 41I 132503-00, 41I 132504-00, and 41I 132505-00. Applicant’s water right claims 41I 132502-00 and 41I 132506-00 were excluded from this analysis, consistent with the Policy Memo – Return Flows, because return flow for those claims was determined to go only to Tenmile Creek. (File – Levens’ “Return Flow and Mitigation Report”; Applicant’s Proposed FOF 4)

13. On May 9, 2018, the Department determined the Application to be correct and complete. An Environmental Assessment was completed on August 23, 2018. (File – “General Correspondence”, “Processing Forms/Public Notice”; Applicant’s Proposed FOF 5)

14. On August 27, 2018, the Department issued a Preliminary Determination (“PDG”) that the Application should be granted, subject to terms and analysis presented in the PDG. (File – “PDG”; Applicant’s Proposed FOF 6)

15. On September 18, 2018, the Department mailed public notice of the Application to interested individuals and on September 19, 2018 public notice of the Application was published in the Independent Record, a newspaper of general circulation in the area of the proposed Application. (File - “Processing Forms/Public Notice”)

16. On November 2, 2018, an objection was filed by Andy Skinner and Steve Skinner (“Skinner” or “Objectors”). Skinners’ objection alleged that the proposed change would adversely affect Skinners’ water right or interest. Specifically, Skinner alleged (summarized):

- a. The proposed change failed to consider gaining stream inputs and return flows.
- b. The proposed change will require more water to bypass Skinners’ POD.
- c. The lack of measuring requirements makes it difficult to determine where and when water may be available for Applicant’s proposed use and will interfere with water commissioner’s ability to administer the parties’ rights in priority.
- d. The current temporary use of Applicant’s water rights for instream fisheries creates confusion regarding the allowable use of Applicant’s water if the temporary change expires in 2024.

(File – Objection to Application under “Objections/Correspondence”; Applicant’s Proposed FOF 7)

17. On November 5, 2018, Skinners’ Objection was reviewed by the Department and found to be valid. (File – “Objections/Correspondence”; Applicant’s Proposed FOF 9)

18. On February 12, 2019, following a telephonic prehearing conference, the Hearing Examiner ordered the Department to conduct an additional return flow analysis for this Application pursuant to Policy Memo – Return Flows (April 1, 2016). (File – “Minute Order; Appointment of Staff Expert”; Applicant’s Proposed FOF 10)

19. On February 19, 2019, Department staff expert, Attila Felnagy filed a Return Flow and Mitigation Report (“Felnagy Report”) for Centennial claims 41I 132502 and 41I 132506; the two claims for which the rate and timing of return flow was not evaluated in the Levens Report. (File – “Return Flow and Mitigation Report; Applicant’s Proposed FOF 11)

20. On March 21, 2019, DNRC Water Resource Specialist Troy Lechman, filed his Report and Recommendation (“Lechman Report”). (File – untitled; Applicant’s Proposed FOF 12)

21. On September 10, 2019, a hearing was conducted on in Helena, Montana.

a. Applicant appeared by and through counsel, Peter G. Scott. The following witnesses testified on behalf of the Applicant:

- i. William Staudenmeyer as corporate representative for Applicant;
- ii. Troy Lechman for the State of Montana by subpoena; and

- iii. Dave Baldwin with HydroSolutions, Inc., Applicant's consultant.
- b. Andy R. Skinner and Steve Skinner (collectively, "Objectors") were not represented by counsel and appeared *pro se*. Objectors testified on their own behalf.  
(File – Objection to Application under "Objections/Correspondence")

At the close of the hearing the Hearing Examiner requested proposed findings of fact and conclusions of law from the parties. The Hearing Examiner's request was not mandatory, but at the option of the parties.

22. On November 1, 2019, Applicant filed their "Proposed Findings of Fact, Conclusions of Law, and Final Order" and Objectors filed their "Proposed Findings of Fact." (File)

23. Objectors contend, in their "Proposed Findings of Fact", that "[t]hree primary errors occurred in the processing and hearing [in this matter]." The Hearing Examiner summarizes Objectors' contentions as follows: the DNRC's PDG and contested case proceeding impermissibly shifted the burden of proof to the objectors; the interpretation of § 85-2-420, MCA, which allows marketing for purposes of mitigation is flawed; and the application of DNRC's return flow policy which allowed the issuance of the PDG without documenting the impact of changes in the amount and timing of return flows. ("Proposed Findings of Fact" pp. 1-5)

## **ANALYSIS**

### **A. The PDG and hearing process did not impermissibly shift the burden of proof to objectors**

24. Objectors contend that the Hearing Examiner committed error in ruling that issuance of the PDG by the Department created a rebuttable presumption of no adverse effect. Objectors argue that application of *MEIC v. DEQ*, 2005 MT 96, 326 Mont 502, 112 P.3d 964, is inapplicable to the instant matter because that ruling was based on "an application of the common law and statutory rules of evidence" which, under § 85-2-121, MCA, are not applicable to this proceeding. (Objectors "Proposed Findings of Fact" p. 3)

25. *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, involved a contested case proceeding regarding the issuance of an air quality permit by DEQ. MEIC challenged the issuance of the permit and a hearing was held before the Montana Board of Environmental Review (the Board) wherein the Board concluded that MEIC had the burden of proof in the

contested case proceeding. MEIC challenged that conclusion and the District Court upheld that conclusion. MEIC appealed. In *MEIC* the Supreme Court stated:

The claim MEIC asserted before the Board was that the Department's decision to issue the air quality permit violated Montana law. If no challenge had been made or, as in this case, no evidence were presented at the contested case hearing establishing that issuance of the permit violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid. Thus, as the party asserting the claim at issue, MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law.

26. Objectors state "the burden of proof in a change proceeding is always on the applicant under MCA 85-2-402. The burden does not shift to the objector simply because a preliminary determination to grant has been issued." (*id.*)

27. The Department PDG evaluated the Applicant's evidence regarding lack of adverse effect against the applicable statutes, rules and Department policies. In doing so, it determined that a preponderance of the evidence establishes that the proposed change will not result in adverse effect. This hearing examiner is not free to simply reevaluate the evidence. Indeed, if valid objections are not filed, the permit must be granted. Likewise, if objections are filed and subsequently withdrawn, the hearing examiner must grant the permit as set forth in the PDG. §§ 85-2-307(1) and - 310(3) and (4), MCA.

28. Once an objection is filed the burden remains with the applicant to prove the criteria by a preponderance of evidence. However, if an objector presented no evidence, the applicant's burden would remain satisfied as set forth in the PDG. Any evidence presented by an objector is weighed against the evidence already presented by the applicant and considered by the Department in the PDG along with any additional evidence the applicant elects to submit in response to that submitted by the objector to determine whether the subject criterion is satisfied by a preponderance.

29. Requiring an objector to present its evidence first in a contested case does not shift burden of proof. Rather, it reflects that the applicant already presented a preponderance of evidence and ensures that the scope of the hearing addresses that evidence and criterion contested by the objector. Requiring the applicant to submit that evidence again at the beginning of the contested case hearing would be needlessly redundant and duplicative of the process and analysis already conducted at the regional office level.

30. The Hearing Examiner in a contested case is vested with the authority to identify the sequence for presenting evidence and argument and identifying the burden of proof for each party. (ARM 36.12.223(1)(a)(ii) and (iv)) The sequence of presenting evidence was provided to the parties in the Notice of First Pre-Hearing Conference, dated November 14, 2018, wherein the Objectors were to present evidence first. The Hearing Examiner explained, at the hearing, the same sequence would be followed and that the Objectors had the burden of production to rebut the Department's finding in the PDG of no adverse effect. (File – "Notice of First Pre-Hearing Conference; Audio Tk. 2 @ 2:20)

31. Objectors maintain that *MEIC* does not apply in this matter because pursuant to § 85-2-121, MCA, because "[t]he common law and statutory rules of evidence do not apply to DNRC contested case hearings except on stipulation of all parties." (Objectors Proposed Findings of Fact p. 3) This argument is based upon a misread of § 85-2-121, MCA which states in its entirety "[t]he Montana Administrative Procedure Act governs administrative proceedings conducted under parts 1 through 4 of this chapter, except that *the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding.*" (emphasis provided) The Hearing Examiner notes that the Montana Administrative Procedure Act states "[e]xcept as otherwise provided by statute relating directly to an agency, agencies shall be *bound by common law and statutory rules of evidence.*" (emphasis provided) § 2-4-612(2), MCA. The Hearing Examiner's understanding of § 85-2-121, MCA is that by placing the "the" in front of "common law and statutory rules of evidence" the Legislature intended the effect of § 85-2-121, MCA to be "the common law rules of evidence and the statutory rules of evidence" do not apply unless stipulated to. This interpretation is the long-standing interpretation by the Department and is borne out by the Department's rules which allow otherwise inadmissible evidence such as hearsay. (ARM 36.12.221) Objectors reading of § 85-2-121, MCA is so broad as to say that common law does not apply to contested cases and would mean the Department could not rely on previous Department precedents and judicial case law. Such an interpretation would hamstring the Departments contested case proceedings and is not tenable.

### **Conclusions of Law**

32. While not controlling precedent, the explanation of the parties' respective burdens in *MEIC* is consistent with requiring the Objectors to produce some evidence against which the Applicant's evidence, as reflected in the PDG, could be weighed to determine whether Applicant

met its burden of proof in light of the objection. This does not shift the burden of proof, rather it reflects the procedural posture of the application and evidence at the time a contested case proceeding is triggered.

33. Given the statutory procedures set forth in §§ 85-2-307 through 310, MCA, it is appropriate to consider all the evidence presented regarding the application at the contested case, along with that evidence already analyzed in the PDG, to determine whether the applicant satisfied its burden of proof regarding criterion subject to an objection. Accordingly, this Hearing Examiner concludes that statute and administrative rule support the requirement that Objectors present their case first where the PDG determined that the applicant satisfied its burden of proof.

**B. As conditioned, the Applicant satisfies the requirements of §§ 85-2-310, 402, and 420, MCA**

34. The Objection is generally concerned with whether it is even feasible to “move” the 556.02 AF of historically consumed water downstream due to losing stream reaches on Tenmile Creek and, if moved, how it can be done and measured without causing adverse effect to Objectors. Objectors are also concerned that the PDG treats the 556.02 AF as a single block when in fact it consists of five separate water rights with different priority dates interspersed with Objectors water rights and priority dates.

(File – Objection to Application under “Objections/Correspondence”; Applicant’s Proposed FOF 7)

35. Objectors state:

Centennial argued [85-2-420, MCA] does not require an analysis of the potential adverse effects from using the water rights as mitigation water within the proposed place of use which includes the entire 10.7 mile reach of Tenmile Creek below the historic diversion point down to Lake Helena. According to Centennial, this analysis will occur when a future developer proposes to use the water for mitigation purposes. Centennial suggests that future groundwater permits requiring a mitigation plan will be accompanied by a change application which will address adverse effects to other water users at that time. In other words, Centennial argues Skinner cannot prove adverse effect until they know exactly where the mitigation water will be used.

(Objectors “Proposed Findings of Fact” p.3)

36. Objectors assert that the instant change “will allow the use of Centennial’s water rights for mitigation throughout the new place of use. There will be no future determination of [adverse

effect] if the new purchaser will be using the mitigation water within the approved place of use. Centennial has failed to address the adverse effects resulting from *moving* the use of its water rights along the entire 10.7 mile reach of Tenmile Creek from the historic diversion point down to Lake Helena.” (emphasis provided) (Objectors “Findings of Fact” p. 5)

37. Objectors attempt to make their case by arguing at hearing that Tenmile Creek is a losing stream between the historic point of diversion and their point of diversion and thus any future attempt to “move” mitigation water downstream is doomed to failure (i.e. “futile”). Objectors also complain that there are no measurement records for the instream flow. (Audio Tk. 3 @ 2:00)

38. Throughout the hearing Applicant maintained that any potential adverse effect of a future *use* of the mitigation water cannot be determined at this time as there is no pending plan for the use of the mitigation water. Applicant also points out that there is nothing to measure at this time. The only critical factor under the use as it exists today is that no water be diverted into the old Schatz Ditch. Testimony at the hearing confirms that no water is being diverted into the Schatz Ditch and this Hearing Examiner finds that the evidence supports a finding that no water is being diverted into the Schatz Ditch. (Audio Tk. 2 @ 17:13)

39. Objectors overlook the fact that any *future* new groundwater appropriator on Tenmile Creek (a closed basin) will be required, as part of their application, to submit a hydrogeologic report and an aquifer recharge or mitigation plan. As the hydrogeologic report and mitigation plan are part of the *application*, the requirements of no adverse effect will still apply and will be evaluated by the Department. (§§ 85-2-311, -360 – 362, MCA)

40. Objectors assertion that “there will be no future determination” of adverse effect is also belied by their own attachment to their “Findings of Fact.” Former DNRC Director Mary Sexton clearly states in her testimony on House Bill 24 that:

An applicant [a future groundwater appropriator] who intends to *use* mitigation or aquifer recharge water must still provide the scientific analysis necessary to demonstrate that purchased water will offset the depletions caused by the proposed new appropriation. *This includes the analysis of timing, amount and location of potential depletions and how the proposed mitigation/aquifer recharge will offset those depletions to protect existing water rights.* (emphasis provided)

Such scientific analysis would be part of their mitigation plan, be it a change or not, and would necessarily require an analysis of how the mitigation plan would not result in adverse effect to existing water rights. (Objectors “Findings of Fact” – Attachment)

41. Moreover, while it is true that the Centennial intends to market 556.02 AF of its water rights for use as mitigation throughout the 10.7 mile reach of Tenmile Creek identified as the “place of use”, the reality of the situation is that the “place of use” identified in the PDG is more properly described as Centennial’s “service area.” Comparison of § 85-2-310(9) and (10), MCA, reflects that marketing for mitigation pursuant to §85-2-420, MCA, allows for greater flexibility in identification of the ultimate place of use for mitigation water. Montana water law recognizes the validity of the concept of a service area under certain circumstances where water is marketed for sale to end users. See *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440; *Dodson Irr. Dist. v. U.S.*, Order Vacating Master’s Order and Approving Stipulation, 2018 WL 7574161 (Nov. 16, 2018)(Mont. Water Ct.) . While the PDG identifies the 10.7 mile reach of Tenmile Creek below the historic point of diversion as the “place of use” of the mitigation water, under Applicant’s proposal, the Applicant’s place of use for the change to marketing for mitigation is the point of sale which is at the historic point of diversion, and the 10.7 mile reach is the service area. (PDG ¶ 13)

42. In other words, a future potential new appropriator may make use of Centennial’s mitigation water within the 10.7 mile stretch of Tenmile Creek *if* their new appropriation requires mitigation of Tenmile Creek *and if* their mitigation plan can effectively offset depletions to Tenmile Creek without causing adverse effect. But, *Centennials* use ends at the point of sale.

43. The instant change application does not authorize the actual end use of the water at a specific place of use within the service area, i.e. a “move” of the water in Tenmile Creek - it only authorizes the Applicant to market the water for *future* mitigation which will be sold and delivered to the buyer at the historic point of diversion. Until that time, the water will remain as instream flow for fisheries until at least 2024. The current status quo will be retained on Tenmile Creek until an as yet unknown entity approaches the Applicant and requests some mitigation water, or the temporary change to instream flow for fisheries expires or is not renewed. (¶ 7, 8, *supra*; PDG ¶ 11; Audio Tk. 2 @ 4:00)

44. The Hearing Examiner finds that PDG FOF 13 mischaracterizes the instant change when it reads:

The proposed place of use for mitigation is a 10.7-mile reach of Tenmile Creek from the historic Schatz ditch point of diversion in Tenmile Creek located in the SESESW Section 22, T10 N, R04 W past the confluence of Tenmile and Prickly Pear Creeks to the inlet at Lake Helena, located in the SWSW of Section 23, T11N, R03W, Lewis and Clark County.

And should properly read:

The proposed place of use for marketing for mitigation is the historic point of diversion located in the SESESW Sec. 22, T10N, R04W. The service area for potential future mitigation is a 10.7 mile reach of Tenmile Creek extending from the SESESW Sec. 22, T10N, R04W downstream past the confluence of Tenmile and Prickly Pear Creeks to the inlet at Lake Helena, located in the SWSW Section 23, T11N, R03W, Lewis and Clark County.

45. In addition, paragraph 37 of the PDG which states:

Applicant seeks to change the purpose and place of use of statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00. Upon authorization of the change, the Applicant will no longer divert 11.15 CFS up to 1,212.63 AF from the historic point of diversion. Water will be left instream for the purpose of marketing for mitigation. The mitigation plan effectively provides mitigation water to offset depletions to Tenmile and Prickly Pear creeks that occur within the reach extending from the historic headgate to the confluence of Tenmile and Prickly Pear creeks, and on Prickly Pear Creek from the confluence with Tenmile Creek to Lake Helena. The proposed change will provide effective mitigation water throughout the 10.7-mile stream reach during the months of May through September in the amounts identified in Table 2 in F.O.F No. 36.

also mischaracterizes the instant change application and should read:

Applicant seeks to change the purpose and place of use of statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00. Upon authorization of the change, the Applicant will no longer divert 11.15 CFS up to 1,212.63 AF from the historic point of diversion. Water will be left instream for the purpose of marketing for mitigation. The water made available through marketing can be used to provide mitigation water to offset depletions to Tenmile and Prickly Pear creeks that occur within the reach extending from the historic headgate to the confluence of Tenmile and Prickly Pear creeks, and on Prickly Pear Creek from the confluence with Tenmile Creek to Lake Helena during the months of May through September in the amounts identified in Table 2 in F.O.F No. 36.

(¶ 41 – 43, *supra*)

46. Similarly, paragraph 38 of the PDG which reads:

Following the conversion of water from instream flow for fisheries to marketing for mitigation, the historically diverted volume of 1,212.63 AF and historically consumed volume of 556.02 AF will be left instream. The effective mitigation is limited to the monthly historically consumed volumes. The proposed change will also result in leaving 656.61 AF of historically diverted but unconsumed water remaining in Tenmile Creek to flow downstream to Lake Helena. The department finds reducing the diverted flow rate

and volume at the headgate for the purpose of marketing for mitigation ensures that no adverse effect will result from expansion of the water right due to the fact that the Applicant does not own the place of use for irrigation and the historic place of use will no longer be irrigated.

should be clarified to read:

Following the conversion of water from instream flow for fisheries to marketing for mitigation (i.e. the future sale of water to a purchaser), the historically diverted volume of 1,212.63 AF and historically consumed volume of 556.02 AF will be left instream. The water subsequently sold is limited to the monthly consumed volumes described in Table 2. The proposed change will also result in leaving 656.61 AF of historically diverted but unconsumed water remaining in Tenmile Creek to flow downstream to Lake Helena. The department finds reducing the diverted flow rate and volume at the headgate for the purpose of marketing for mitigation ensures that no adverse effect will result from expansion of the water right due to the fact that the Applicant does not own the place of use for irrigation and the historic place of use will no longer be irrigated.

47. Objectors raise valid concerns regarding the absence of a measurement plan and potential for adverse effect caused by moving a block of water down the 10.7 reach of Tenmile Creek. Objector Proposed Findings of Fact 7, 8. While those aspects of the proposed change could have been established on the front end, it is not required for the applicant's proposal or change as authorized. Essentially, the applicant proposes to sell water for third parties to use for mitigation on the 10.7 mile reach. However, the applicant will not be delivering water to the end user. Applicant's dominion over the water will terminate at the point of sale located at the historic point of diversion.

48. Under the applicant's proposal, a future buyer will be responsible for establishing that the amount of water purchased at the historic point of diversion is sufficient for any proposed mitigation where it is ultimately needed. For example, if 100 acre-feet of water is needed for mitigation 10 miles downstream, a future permittee will have to submit a measurement plan and account for any losses in the 10 mile reach of Ten Mile Creek used as a natural conveyance between the point of sale and the place of use to establish the amount of water purchased at the point of sale is sufficient for mitigation at the ultimate point of use. Depending upon that future analysis, it may be that 300 acre-feet of water must be purchased at the point of sale to deliver 100 acre-feet at ultimate point of use. Alternatively, a future permittee could pipe water

directly from the point of sale into an infiltration gallery resulting in no conveyance losses or potential for adverse effect to downstream water users.

49. These scenarios illustrate why it would be premature to require a detailed measurement and delivery plan for this change as proposed by the Objectors. While this approach to marketing for mitigation places a significant burden on the future buyer, as conditioned below, it satisfies the minimum requirements of §§ 85-2-310(10), - 402, and - 420, MCA. The Hearing Examiner determines that the change must be conditioned in a manner to ensure that any future use for mitigation includes an adequate measurement and delivery plan that accounts for conveyance of mitigation water from the historic point of diversion to the ultimate place of use including potential impacts on water rights throughout any reach of Tenmile Creek used as a natural carrier. This condition likewise addressed Objectors concerns related to adverse effect. See Objector Proposal 7, 11, 15

### **Conclusions of Law**

50. This Hearing Examiner concludes that any *future* applicant for a groundwater appropriation on Tenmile Creek that depletes surface water will still need to submit a mitigation plan which must include how the proposed project will be operated. Should such future applicant wish to utilize water made available by Centennial under the instant application they would need to show, in their mitigation plan (which is a component of their application), how actually *using* the water made available would not result in adverse effect under § 85-2-311, MCA. (§§ 85-2-311, -360 - 362 MCA)

51. In addition to the conditions set forth in the PDG, the Hearing Examiner further places the following condition on the change authorization:

APPLIANT OR PURCHASER MUST PROVIDE A DNRC APPROVED MEASUREMENT PLAN FOR THE DELIVERY OF MITIGATION WATER FROM THE POINT OF SALE TO THE PLACE OF USE FOR THE MITIGATION WATER PURSUANT TO ANY FUTURE PERMIT OR CHANGE APPLICATION. THE MEASUREMENT PLAN MUST ADDRESS CONVEYANCE OF THE MITIGATION WATER INCLUDING POTENTIAL CONVEYANCE LOSSES ON THE REACH OF TENMILE CREEK USED AS A NATURAL CARRIER.

52. This Hearing Examiner concludes that, as conditioned, the Applicant's marketing for mitigation change application satisfies the requirements of § 85-2-420, MCA. (FOF 38 – 49)

**C. The proposed change will not result in adverse effect**

53. Objectors rely on § 85-2-402(2)(a), MCA, and Admin. R. Mont. 36.12.1903(2)(d) for the proposition that the Department’s Policy Memo – Return Flows (Exhibit A-2) violates Montana law in that it allows an application to be granted without considering “the amount and timing of return flows as required by law.” (Objectors “Proposed Findings of Fact” p. 2)

54. While “return flow” is not specifically addressed in statute, ARM 36.12.1903 does touch on the subject. ARM 36.12.1903 requires an applicant to have a “plan showing the diversion and use of water . . . will not exceed historic use and can be implemented and properly regulated.” Specifically ARM 36.12.1903(2) requires a plan that must document the effects to other water rights including, *inter alia*, “the effect to water rights dependent on the return flow”; and “the effects of changing the *historic diversion pattern* including the rate and timing of *depletions*” (emphasis provided). The rule does not address the rate and timing of *return flows*. (ARM 36.12.1903(2)(d), (e))

55. The amount of analysis that the Department must undertake in analyzing return flows is dependent on the situation. As the Supreme Court has stated “[t]he Department undoubtedly possesses the discretion to require a more or less comprehensive return flow analysis depending on circumstances. This discretion does not exist in a vacuum, however, and the degree of analysis required in a given situation will vary according to the underlying facts.” *Hohenlohe v. DNRC*, 2010 MT 203, 357 Mont. 428, 240 P.3d 628 ¶ 55.

56. The Policy Memo – Return Flows at issue relates to the level of analysis that the Department will undertake when considering return flows. As stated in the policy:

- 3) The department will analyze the change to determine if:
  - a. return flows will enter back into the source where they have historically returned upstream of or at the location of the next downstream appropriator; or,
  - b. water is left instream so historically diverted flows are available during the historic period of diversion either below the point of diversion or where return flows historically returned to the source.

This will help ensure that the next appropriator and others will have a similar or greater opportunity for appropriations than were historically available.

If those conditions (in addition to historic use findings) are met “then the department will not develop a *monthly return flow analysis* for change authorizations without an objection.” (emphasis provided)  
(Exhibit A-2)

57. The Department did, in fact, consider return flows in its analysis leading up to the PDG when it made the initial determination in the “Levens Report” that *all* of the former return flows attributable to Statement of Claims 41I-13502-00 and 41I-13506-00 returned to Tenmile Creek and half of the former return flow attributable to Statement of Claims 41I-13503-00, 41I-13504-00 and 41I-13505-00 returned to Tenmile Creek. (File – “Levens Report”)

58. Throughout these proceedings the issue of return flows has been mischaracterized as a “loss of return flows” when in fact the former return flows are not “lost” at all. In fact, those former return flows (in addition to the formerly consumed volumes) are now simply un-diverted water which flow freely downstream and which are now protected from the former point of diversion down to the Williams Street bridge for use as instream flow for fisheries. Under current conditions, beyond the Williams Street bridge, they are waters available for appropriation in priority.

59. Objectors contend at hearing that the Department erred when it used the historic irrigation use in determining the historic use of the water rights. Objectors rely on the Department’s Policy Manual regarding “Changes on an existing change application” in arguing that the historic use should be determined as of the 2005 change to instream flow. (Audio Tk. 3 @ 7:50)

60. The 2005 change to instream flow was processed pursuant to §§ 85-2-402, -407, -408, MCA and is a temporary change. As such, at the end of that authorization (and any subsequent renewals) the water rights at issue automatically revert to their permanent purpose, place of use, point of diversion, or place of storage. (§ 85-2-407(6), MCA) The Department’s Policy Manual does not contemplate temporary changes, only permanent changes that are either perfected or unperfected. (Department Permit & Change Manual, pp. 120 – 121) As such, the Department properly utilized the recognized permanent water use authorization (irrigation) in its analysis of historic use.

61. The Levens Report specifically determined that Tenmile Creek [was] the receiving stream for return flows from the formerly irrigated acres under statement of claims 41I-132502-00 and 41I-132506-00 therefore, the *rate and timing* of historic return flows was not evaluated for those claims. While the *rate and timing* of those return flows was not evaluated, implicit in that finding is that *all of the water* represented by those return flows is now being left instream (not diverted) because those statements of claim have been severed from the place of use and/or are now being left instream for fisheries purposes from the Schatz Ditch headgate down to the Williams Street bridge. (Levens Report; Para. 4, 5, 8 *supra*)

62. The Levens Report does evaluate the rate and timing of return flows from statements of claim 41I-132503-00, 41I-132504 and 41I-132505. Levens finds that return flows from the formerly irrigated acres were split approximately evenly between Tenmile Creek and Sevenmile Creek. Levens found that Tenmile Creek would lose 93.32 acre-feet (AF) of return flows spread throughout the year but there would be 186.65 AF of non-consumed water left instream in Tenmile Creek on an annual basis as a result of the severance of those three water rights from the historic place of use and/or changing the use to instream flow for fisheries. The 186.65 AF left instream represents the 93.32 AF of former return flows to Tenmile Creek plus the former return flows to Sevenmile Creek of 93.32 AF. (Levens Report; Para. 4, 5, 8 *supra*)

63. Subsequent to the Levens Report and the Objection, and pursuant to the Policy Memo – Return Flows, a second analysis was conducted to evaluate the rate and timing of return flows from water rights 41I-132502-00 and 41I-132506-00 (“Folnagy Report”). An evaluation of the combined Levens Report and Folnagy Report was then prepared to determine the “... cumulative effects from both reports relating to the retirement of irrigated acres . . . to Tenmile Creek . . .” (“Lechman Report”)

64. The Lechman Report concludes “. . . under the proposed change conditions of Application to Change an Existing Water Right 41I 30110538, the change in rate and timing of return flows could adversely affect downstream users on Tenmile Creek.” (Lechman Report)

65. Applicant’s expert report and testimony offered a different analysis of the potential adverse effect of any alteration of return flow. (Exhibit A-3; Audio Tk. 7 *passim*) Baldwin explained that the amount of water available to Objectors increased as a result of this change.

66. Objectors have relied on the former return flows now being left instream for the last fifteen years further indicating that there have been no adverse effects due to the severance of

the irrigation rights from the land and/or the change to instream flow for fisheries. (Audio Tk. 3 @ 9:20) This aspect of conditions on the source will not be altered under the terms of the proposed change.

67. The bulk of Objectors' argument regarding adverse effect relates to the absence of a measurement plan that insures their water rights will not be impaired by future use of water for mitigation. These concerns are addressed by the measurement condition imposed in paragraph 51 of this order.

68. Finally, Objectors claim that the PDG improperly authorized 556.02 AF of water to be used for mitigation as a single block without regard for priority dates of the individual underlying water rights being changed. In fact, the PDG specifically identifies each of the five water rights at issue and parses out the 556.02 AF of water associated with each right. (§ 10, *supra*) Those findings and COL 61 – 65 of the PDG demonstrate that each water right, with its individual priority date, have been assigned a specific amount of water available on a monthly basis for mitigation. The change authorization for each of the five water rights to be changed must reflect the limitations found in the table in paragraph 10, *supra*.

### **Conclusions of Law**

69. This Hearing Examiner concludes that the Department applied an appropriate level of return flow analysis for the instant Application as required by *Hohenlohe*. (FOF 59, 63 - 65, 68) The level of return flow analysis conducted is sufficient for purposes of this change considering that Objectors own evidence and testimony supports the above finding that their water rights will not be impaired by any alteration of conditions on the source from the proposed change. (*Hohenlohe* § 53)

70. This Hearing Examiner concludes that the instant proceeding does not make any physical change in the occurrence of water in Tenmile Creek, therefore there can be no adverse effect. (FOF 38 - 43)

71. This Hearing Examiner concludes that the Department's use of the historic irrigation as the basis for its analysis of historic use was proper. (FOF 59 - 60)

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## CONCLUSION

For the foregoing reasons, to the extent not specifically cited above, the filed findings of fact and conclusions of law provided by the Applicant and Objectors have been addressed and/or are deemed unnecessary for a decision in this matter and are not incorporated in this decision.

This Final Order modifies paragraphs 13, 37, and 38 of the PDG as described above in paragraphs 44 – 46.

This Final Order also makes a minor modification to the WATER MARKET REPORT condition by requiring identification by Water Right Number sold under this authorization.

This Hearing Examiner concludes that Application to Change an Existing Irrigation Water Right No. 411-30110538 by Centennial Livestock Inc. should be and is hereby **GRANTED** as proposed in the Preliminary Determination to Grant dated August 27, 2018 and as modified by this FINAL ORDER, with the addition of the following conditions:

THE CHANGE AUTHORIZATION ASSOCIATED WITH THE MARKETING FOR MITIGATION PURPOSE IS CONDITIONED UPON THE ANNUAL DELIVERY OF 556.02 ACRE-FEET OF MITIGATION WATER TO TENMILE CREEK THROUGH A REDUCTION IN DIVERSIONS AT THE TENMILE CREEK / SCHATZ DITCH HEADGATE AS WATER IS SOLD/LEASED. CONVEYANCE OF THE MITIGATION WATER SHALL BE VIA TENMILE CREEK BELOW THE HEADGATE TO LAKE HELENA. THE APPLICANT, OR THE SUCCESSORS IN INTEREST, IS RESPONSIBLE FOR MAINTAINING DOCUMENTATION SHOWING PROOF OF MITIGATION PLAN IMPLEMENTATION, CONSISTING OF TENMILE CREEK WATER COMMISSIONER RECORDS FOR THE SCHATZ DITCH. THE WATER COMMISSIONER RECORDS MUST CLEARLY SHOW THAT THE 11.15 CFS ASSOCIATED WITH THIS MARKETING FOR MITIGATION CHANGE IS NO LONGER BEING DIVERTED FOR IRRIGATION PURPOSES AND THAT MITIGATION WATER IS BEING LEFT INSTREAM. THESE RECORDS SHALL BE SUBMITTED TO THE HELENA WATER RESOURCES REGIONAL OFFICE BY DECEMBER 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE AUTHORIZATION.

THE CHANGE AUTHORIZATION WILL CONTAIN THE FOLLOWING CONDITIONS TO ENSURE COMPLIANCE PURSUANT TO §85-2-420, MCA.

- a. WATER MARKET REPORT: THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE

ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF EACH PORTION OF THE WATER RIGHT, IDENTIFIED BY INDIVIDUAL WATER RIGHT NUMBER, SOLD FOR MITIGATION/AQUIFER RECHARGE PURPOSE.

b. PROGRESS REPORT ON MARKETING: THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

PRIOR TO USE OF ANY WATER SOLD UNDER THIS AUTHORIZATION, APPLICANT OR PURCHASER MUST PROVIDE A DNRC APPROVED MEASUREMENT PLAN FOR THE DELIVERY OF MITIGATION WATER FROM THE POINT OF SALE TO THE PLACE OF USE FOR THE MITIGATION WATER PURSUANT TO ANY FUTURE PERMIT OR CHANGE APPLICATION. THE MEASUREMENT PLAN MUST ADDRESS CONVEYANCE OF THE MITIGATION WATER INCLUDING ANY CONVEYANCE LOSSES ON THE REACH OF TENMILE CREEK USED AS A NATURAL CARRIER.

**NOTE:** The change authorization for each of the five water rights to be changed must reflect the limitations found in the table in paragraph 10, *supra*.

**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 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 reviewing court.

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Dated this 30<sup>th</sup> day of January 2020.

/Original signed by David A. Vogler/  
David A. Vogler, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-6835

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 30<sup>th</sup> day of January 2020 by first class United States mail.

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/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615

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

\*\*\*\*\*

<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 41I – 30110538 BY CENTENNIAL ) LIVESTOCK INC. )</b>	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On March 21, 2017, Centennial Livestock Inc. (Applicant) submitted application to Change Water Right No. 41I-30110538 to change Water Right Claim Nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (department or DNRC). The department published receipt of the application on its website. The department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), September 11, 2017. The Applicant responded with information dated October 18, 2017. The application was determined to be correct and complete as of May 9, 2018. An Environmental Assessment for this application was completed on August 23, 2018.

**INFORMATION**

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

Application as filed:

- Application to Change Water Right, Form 606
- Attachments
- Maps:
  - Aerial photos dated 1947, 1954 and 1979 outlining the historical irrigation place of use.
  - USGS Quad map showing the proposed place of use for marketing for mitigation from the historical point of diversion to Lake Helena.
  - USGS Quad map showing historical place of use, point of diversion and ditch location.
  - Statement of Opinion for Change Authorization 41I-30015779

### Information received after application filed

- Response to deficiency letter dated and received by the department on October 18, 2017

### Information within the department's possession/knowledge

- Change Authorization No. 41I-132504-00 issued March 24, 1975
- Change Authorization No. 41I-30015779 issued December 7, 2005
- Change Authorization No. 41-30028246 issued February 26, 2009
- Lewis & Clark Water Quality Protection District Sevenmile Creek streamflow measurements
- The department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.
  - Return Flow Memo
  - Consumptive Use Methodology Memo

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

## **WATER RIGHTS TO BE CHANGED**

### FINDINGS OF FACT

1. Applicant seeks to change the point of diversion, place of use and purpose from irrigation of 395 acres to marketing for mitigation for statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00.
2. Water rights 41I-132502-00 and 41I-132506-00 were historically diverted from Tenmile Creek into the Schatz Ditch by a headgate located in the SESESW Section 22, T10N, R04W, Lewis and Clark County from April 15 to November 4 annually. The place

of use for irrigation is 190 acres located in the SE of Section 15, NE quarter of Section 22 and NW quarter of Section 23, all in T10N, R04W, Lewis and Clark County.

3. Water rights 41I-132503-00, 41I-132504-00, 41I-132505-00 were historically diverted from Tenmile Creek using a headgate in the SWSESW of Section 7, T10N, R3W, from April 1 to September 15 annually, for irrigation of 120 acres in the SE of Section 8, T10N, R3W. In 1975, the department issued a change authorization for these rights to change the point of diversion to the Schatz ditch headgate in the SESESW Section 22, T10N, R04W. This change authorization also increased the place of use to the 395 acres located in the E2 of Section 15, NE Section 22 and NW of Section 23, T10N, R04W.

4. The place of use is located approximately 3.5 miles west of the city of Helena, MT, Lewis, and Clark County.

5. The five water rights proposed for change were severed from the 395-acre place of use when they were transferred in a filed quitclaim deed on December 12, 2006 from the Schatz-McGehee Water Users Association, LLC to the Applicant. The five water rights are currently operating under a temporary change authorization for the purpose of fishery/instream flow (Change Authorization 41I-30015779) in Tenmile Creek. The existing temporary place of use is from the historic Schatz ditch point of diversion located in the SESESW Section 22, T10N, R04W, to the Williams Street Bridge located in the SWNESE of Section 22, T10N, R04W.

6. Elements of the water rights proposed to be changed are presented in the following table.

Statement of Claim No.	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41I-132502	Flood Irrigation	3.00 CFS	4/15 -11/4	SESESW Section 22, T10N, R04W		03/29/1865	190
41I-132503	Flood Irrigation	2.63 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W		05/31/1896	395
41I-132504	Flood Irrigation	1.42 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W		05/01/1865	395

41I-132505	Flood Irrigation	2.10 CFS	4/1 – 9/15	SESESW Section 22, T10N, R04W		04/30/1867	395
41I-132506	Flood Irrigation	2.00 CFS	4/15 –11/4	SESESW Section 22, T10N, R04W		05/31/1867	190

7. Pursuant change authorization 41I-30015779, the department found a combined historic flow rate of 11.15 CFS and up to 1212.65 AF of historic diverted volume per year. The maximum historic irrigated acres were determined to be a total of 395 acres. In processing this change authorization the department did not make findings regarding historic consumed volume or historic diverted volume for each individual water right.

8. There are four statement of claims supplemental to the water rights subject of this change application. These claims include 41I-132497-00, 41I-132498-00, 41I-132499-00 and 41I-132501-00, which are all irrigation rights appurtenant to portions of the 395-acre place of use that claim water diverted from groundwater wells. The Applicant states these water rights are no longer used, have been severed from the property and will be withdrawn. Based on the Applicant’s statements the department finds that Statement of claim numbers 41I-132497-00, 41I-132498-00 and 41I-132499-00 provided zero historic diverted volume and historic consumptive use.

9. Pursuant to Change Authorization number 41-30028246 issued on February 26, 2009, the purpose of supplemental statement of claim number 41I-132501-00 was changed from irrigation using a groundwater well to mitigation. This statement of claim was severed from its 12.3-acre place of use and the water right was sold to Robert H. Bryant. The 12.3-acre place of use retired for mitigation is located entirely within the 395-acre place of use currently being retired for marketing for mitigation in this application. Although statement of 41I-132501-00 is supplemental to the subject water rights, the supplemental relationship was not described in the 2009 change and the entire historic consumptive use on 12.3 acres was allowed to be changed to the new purpose of mitigation. Since the entire historic consumptive use on the 12.3 acres was previously

changed to mitigation the remaining acres that can be retired and changed to marketing for mitigation is reduced from 395 acres to 382.7 acres (395 – 12.3 = 382.7 acres).

10. Elements of the supplemental water rights are presented in the following table:

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date	Acres
411-132497	Irrigation	110 GPM	0*	4/1 - 10/19	SWNWNE SEC 22, T10N, R04W	NE SEC 15 SE SEC 15 N2NE SEC 22 SENE SEC 22, T10N, R04W	5/3/1958	349
411-132498	Irrigation	150 GPM	0*	05/01 - 10/09	SWSENE SEC 22, T10N,R04W	NE SEC 22 W2NW SEC 23, T10N, R04W	02/28/61	76
411-132499	Irrigation	561 GPM	0*	04/01 - 11/04	SESWSE SEC 15, T10N,R04W	NE SEC 15 SE SEC 15 N2NE SEC 22 SENE SEC 22, T10N, R04W	03/10/61	349
411-132501	Mitigation	150 GPM	24.60 AF	04/15 – 10/31	N2SE SEC 7, T10N, R3W	N2SE SEC 7, T10N, R3W	05/23/59	12.3

\*No volume associated with this claim due to late season use and lack of substantial evidence of historic use

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

11. The Applicant proposes to change the purpose and place of use from irrigation to marketing for mitigation on statement of claim nos. 411-132502-00, 411-132503-00, 411-132504-00, 411-132505-00, and 411-132506-00. Water historically diverted from Tenmile Creek to flood irrigate 395 acres will be used to mitigate depletions to surface water caused by future water use, pursuant to §85-2-420, MCA, and will no longer be

used for the purpose of irrigation. The five water rights are currently under temporary change to the purpose of fishery/instream flow (Change Authorization 41I-30015779).

12. The Applicant does not own the 395-acre place of use that was historically irrigated by the water rights and will no longer divert the full flow rate and diverted volume associated with those acres. The historic flow rate of 11.15 CFS and historic diverted volume of 1,212.65 AF for 395-acres of historic irrigated acreage were determined for the subject claims in temporary instream flow change 41I-30015779, authorized by DNRC in 2005. During processing of change application 41I-30015779 the department made a finding of fact regarding the historic flow rate diverted and volume diverted but did not make finding of facts regarding the individual flow rates and volume diverted for each individual claim and made no finding regarding historic consumptive use for any of the subject water rights. For the purposes of processing this application the department will utilize a maximum historic flow rate of 11.15 CFS and a diverted volume of 1,212.65 AF that will be broken down per individual water right. The Applicant proposes to allocate up to 1,212.65 AF of diverted volume and 556.02 AF of consumed volume to marketing for mitigation throughout the May to September irrigation growing period annually. Although diversion of the 11.15 CFS flow rate will cease throughout the entire period of diversion; April 1 through November 4, the consumptive use volume of 556.02 AF available for marketing for mitigation will be restricted to growing season months, May through September, as identified in the NRCS Irrigation Water Requirement program for Lewis and Clark County.

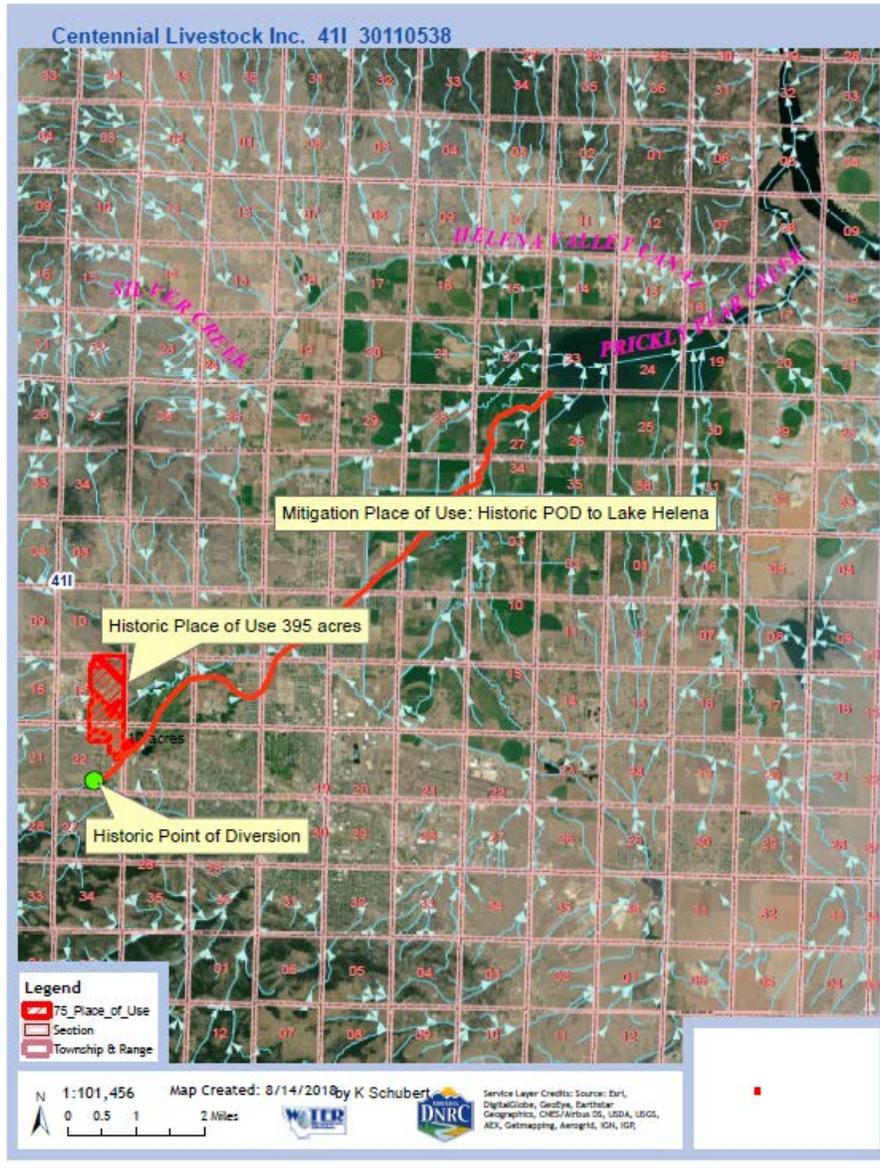
13. The proposed place of use for mitigation is a 10.7-mile reach of Tenmile Creek from the historic Schatz ditch point of diversion in Tenmile Creek located in the SESESW Section 22, T10 N, R04 W past the confluence of Tenmile and Prickly Pear Creeks to the inlet at Lake Helena, located in the SWSW of Section 23, T11N, R03W, Lewis and Clark County.

14. The Applicant agrees to the following water measurement reporting condition:

“The change authorization associated with the marketing for mitigation purpose is conditioned upon the annual delivery of 556.02 acre-feet of mitigation water to Tenmile Creek through a reduction in diversions at the Tenmile Creek / Schatz Ditch headgate as water is sold/leased. Conveyance of the mitigation water shall be via Tenmile Creek below the headgate to Lake Helena. The Applicant, or the successors in interest, is responsible for maintaining documentation showing proof of mitigation plan implementation, consisting of Tenmile Creek water commissioner records for the Schatz Ditch. The water commissioner records must clearly show that the 11.15 CFS associated with this marketing for mitigation change is no longer being diverted for irrigation purposes and that mitigation water is being left instream. These records shall be submitted to the Helena Water Resources Regional Office by December 31 of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of the change authorization.”

15. The Change Authorization will contain the following conditions to ensure compliance pursuant to §85-2-420, MCA.

- a. Water Market Report: The appropriator shall submit to the department Form WM09 within 30 days of leasing or selling any portion of water under this authorization. The Form shall be accompanied by a copy of the water lease agreement or deed evidencing the sale of a portion of the water right for mitigation/aquifer recharge purpose.
- b. Progress Report on Marketing: The appropriator shall submit a progress report every 5 years from the date of issuance of this authorization of the activities to date towards diligence in marketing the water. The reports must be sent to the Water Resources Regional Office.



## **CHANGE CRITERIA**

16. The department is authorized to approve a change if the Applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an Applicant’s burden to prove change criteria by a preponderance of evidence is “more probably than not.”); Town of Manhattan v. DNRC, 2012

MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

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

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

(d) 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 or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

17. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of application to change appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

18. The water rights proposed for change to marketing for mitigation are subject to previous change authorizations; 41I-13250400 and 41I-30015779, that included findings related to historic use. Change authorization 41I-13250400 authorized in 1975, changed

the point of diversion and place of use of water rights 41I-132503-00, 41I-132504-00, 41I-132505-00 resulting in their becoming supplemental to the existing water rights used to irrigate the 395-acre place of use. Since the 1975 change in point of diversion and place of use was authorized all five water rights have been used over the 395-acre place of use.

19. Change authorization number 41I-30015779 issued in 2005, authorized all five water rights to be temporarily changed to instream flow with an authorized flow rate of 11.15 CFS, a diverted volume of 1212.65 acre-feet and maximum historical irrigated acres of 395. The department will recognize these historical use findings.

#### Flow Rate

20. Through analysis provided in change authorization number 41I-30015779, the department finds the combined total historical flow rate for statement of claim numbers 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00 to be 11.15 CFS.

#### Place of Use

21. Through analysis provided in change authorization number 41I-30015779, the department finds the historical place of use for irrigation is 395 acres located in the E2 of Section 15, NE of Section 22, and NW of Section 23, T10N, R04W, based on 1950's and 1970's aerial photographs. Pursuant change authorization 41I-13250400 issued in 1975, the place of use for statement of claim nos. 41I-132503-00, 41I-132504-00, 41I-132505-00 was changed to the 395-acre place of use. The change authorized the three statements of claims to be used on the 395-acre place of use.

22. The place of use is located approximately 3.5 miles west of the city of Helena, MT, Lewis, and Clark County

23. The five water rights proposed for change were severed from the property when they were transferred in a filed quitclaim deed on December 12, 2006 from the Schatz-McGehee Water Users Association, LLC to the Applicant. The five water rights are currently under temporary change to the purpose of fishery/instream flow (Change Authorization 41I-30015779). The existing temporary place of use is Tenmile Creek from

the historic point of diversion located in the SESESW Section 22, T10N, R04W, to the Williams Street Bridge located in the SWNESE of Section 22, T10N, R04W.

#### Period of Diversion/Diverted Volume

24. Through analysis provided in change authorization no. 41I-30015779, the department finds that the period of diversion for statement of claim nos. 41I-132503, 41I-132504 and 41I-132505 to be April 1<sup>st</sup> through September 15<sup>th</sup> annually. Statement of claim nos. 41I-132502 and 41I-132506 were found to be April 15<sup>th</sup> through November 4<sup>th</sup> annually and the total maximum diverted volume is 1,212.65 AF.

25. The diverted volume figure found in the 2005 change authorization was based on the Montana Irrigation Guide for the entire 395-acre place of use. This volume includes inefficiencies for conveyance and represents the diverted volume required for crop growth but does not identify the volume of water consumed by the crop. Additionally, the 2005 change authorization did not identify what portion of the 1,212.65 acre-feet of diverted volume was provided by each individual right. The department must calculate both the diverted and consumed volume for each water right to assess the amount of water available for mitigation.

26. To calculate historic diverted volume per water right the department applied a percentage, based on the maximum potential volume of water that could be diverted for each water right, to the 1,212.65 AF diverted volume found in the 2005 change authorization. The maximum potential volume for each water right was calculated by multiplying the flow rate times the number of days in the claimed period of diversion. These volume figures were then summed to calculate a maximum potential volume that could be diverted for the five water rights combined. Each individual maximum potential volume was divided by the summed total to arrive at the percentage supplied by that water right. This figure was then multiplied by 1,212.65 AF to calculate the percentage of historic diverted volume supplied by each water right.

27. The department finds the following historic diverted volume for each water right proposed to be changed to marketing for mitigation.

Water Right No.	Period of Diversion and Use (days diverted)	Flow Rate (CFS)	Acres	Max Potential Diverted Volume	% of Max Potential Diverted	Diverted Volume per Water Right (AF)
41I-132502-00	4/15 - 11/4 (204)	3.00	190	1,213.8	29.8%	361.46
41I-132503-00	4/1 - 9/15 (168)	2.63	382.7	876.3	21.5%	260.95
41I-132504-00	4/1 - 9/15 (168)	1.42	382.7	473.1	11.6%	140.88
41I-132505-00	4/1 - 9/15 (168)	2.10	382.7	699.7	17.2%	208.36
41I-132506-00	4/15 - 11/4 (204)	2.00	190	809.2	19.9%	240.97
		11.15	382.7	4,072.1	100.0%	1212.63

### Points of Diversion and Conveyance Facilities

28. Statement of Claims Nos. 41I-132502-00 and 41I-132506-00 were historically diverted into the Schatz Ditch by a headgate located in the SESESW Section 22, T10N, R04W, Lewis and Clark County from April 15 to November 4 annually.

29. Water rights 41I-132503-00, 41I-132504-00, 41I-132505-00 were historically diverted from a point in the SWSESW of Section 7, T10N, R3W, from April 1 to September 15 annually, until 1975, when a change authorization was issued to change the point of diversion to the Schatz ditch in the SESESW Section 22 and place of use to the 395 acres located in the E2 of Section 15, NE Section 22 and NW of Section 23, T10N, R04W.

30. Following authorization of change application No. 41I-30015779, all five statements of claim have a temporary purpose of instream flow for fisheries, and water is no longer diverted from Tenmile Creek.

### Consumptive Use

31. The department calculated historic consumptive use using data from the nearest weather station and monthly Irrigation Water Requirement (IWR) values for flood irrigation, derived from data inputs used in the development of seasonal irrigation values provided in ARM 36.12.1902(16). Consumptive use figures are based on the Applicant's claimed 395 acres of historic irrigation, the Helena weather station IWR value of 20.23 inches, Lewis, and Clark County management factor of 79.0%, and irrecoverable losses attributed to the irrigation method: 5% of total diverted volume for flood. Of the 395 acres, 12.3 acres were previously severed from the place of use and changed from irrigation

using a groundwater well to mitigation (change authorization 41I 30028246); the 12.3 acres and historic consumptive use on that acreage is not considered available to change to marketing for mitigation in this change application. The Applicant's portion of the historically irrigated acreage available to change to marketing for mitigation is determined to be 382.7 acres (395 acres – 12.3 acres = 382.7).

32. The department calculates the historic consumptive use for the remaining 382.7 acres to be 556.0 AF, or 1.45 AF/acre.

33. Per ARM 36.12.1904(16), the volume of water that is consumptively used by plant growth on the 382.7-acre place of use is 509.7 AF (20.23 in/ac × 1 ft/12 in × 0.79 × 382.7 acres = 509.7AF). Irrecoverable losses for flood irrigation are assessed at 5% of the applied volume which was calculated using a 55% efficiency value for flood irrigation. The applied volume at the 382.7-acre place of use was calculated to be 926.7 AF (509.7 AF / 0.55 = 926.7 AF); irrecoverable losses account for 5% of the applied volume, or 46.3 AF (926.7 AF × 0.05 = 46.3 AF). Total consumptive use of **556.0 AF** for the 382.7 historically irrigated acres is calculated by adding crop consumptive use to irrecoverable losses (509.7 AF + 46.3 AF = 556.0 AF).

34. To calculate the total historical consumptive volume for each water right, the same percentages calculated to determine historical diverted volume were applied to consumptive use totals. The department calculates the following historical consumptive use totals for each of the five water rights:

**Table 1:**

Water Right No.	Period of Diversion and Use (days diverted)	Flow Rate (CFS)	Acres	Max Potential Diverted Volume	% of Max Potential Diverted	Diverted Volume per Water Right (AF)	CU on 192.7 Acres	CU on 190 Acres	<b>TOTAL CU per WR</b>
41I-132502-00	4/15 - 11/4 (204)	3.00	190	1,213.8	29.8%	361.46	0.00	165.63	165.63
41I-132503-00	4/1 - 9/15 (168)	2.63	382.7	876.3	21.5%	260.95	119.73	0.00*	119.73
41I-132504-00	4/1 - 9/15 (168)	1.42	382.7	473.1	11.6%	140.88	64.64	0.00*	64.64
41I-132505-00	4/1 - 9/15 (168)	2.10	382.7	699.7	17.2%	208.36	95.60	0.00*	95.60
41I-132506-00	4/15 - 11/4 (204)	2.00	190	809.2	19.9%	240.97	0.00	110.42	110.42
		11.15	382.7	4,072.1	100.0%	1212.63	279.97	276.05	556.02

\* consumptive use was not calculated for this water right on the 190 acres due to the distribution and availability of water.

35. During processing this application to change a Water Right it was determined that monthly distributions of diverted and consumed volumes were required to be calculated to ensure that the Applicant did not exceed the historic consumptive use per water right in any given month. For the purpose of this marketing for mitigation change application the Applicant's portion of the historic diverted and consumed volumes were also assessed using the same method. A monthly assessment is required to determine mitigation flow rates and volumes provided to Tenmile Creek, which is in the legislatively closed Upper Missouri River basin.

36. The department finds the following historical diverted and consumed monthly volumes for statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00

**Table 2:**

Water Right No.	Mitigation Flow Rate and Volume Provided by Month										Total CU per WR
	May		June		July		August		September		
	GPM	AF	GPM	AF	GPM	AF	GPM	AF	GPM	AF	
41I-132502-00	61.66	8.43	310.54	41.10	408.88	55.92	341.23	46.67	102.07	13.51	165.63
41I-132503-00	44.57	6.10	224.48	29.71	295.57	40.42	246.67	33.73	73.78	9.77	119.73
41I-132504-00	24.06	3.29	121.19	16.04	159.57	21.82	133.17	18.21	39.83	5.27	64.64
41I-132505-00	35.59	4.87	179.24	23.72	236.00	32.28	196.96	26.94	58.91	7.80	95.60
41I-132506-00	41.11	5.62	207.03	27.40	272.58	37.28	227.49	31.11	68.05	9.01	110.42
Total CU		28.31		137.97		187.72		156.66		45.35	556.02

***FINDINGS OF FACT – Adverse Effect***

37. Applicant seeks to change the purpose and place of use of statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00. Upon authorization of the change, the Applicant will no longer divert 11.15 CFS up to 1,212.63 AF from the historic point of diversion. Water will be left instream for the purpose of marketing for mitigation. The mitigation plan effectively provides mitigation water to offset depletions to Tenmile and Prickly Pear creeks that occur within the reach extending from the historic headgate to the confluence of Tenmile and Prickly Pear creeks, and on

Prickly Pear Creek from the confluence with Tenmile Creek to Lake Helena. The proposed change will provide effective mitigation water throughout the 10.7-mile stream reach during the months of May through September in the amounts identified in Table 2 in F.O.F No. 36.

38. Following the conversion of water from instream flow for fisheries to marketing for mitigation, the historically diverted volume of 1,212.63 AF and historically consumed volume of 556.02 AF will be left instream. The effective mitigation is limited to the monthly historically consumed volumes. The proposed change will also result in leaving 656.61 AF of historically diverted but unconsumed water remaining in Tenmile Creek to flow downstream to Lake Helena. The department finds reducing the diverted flow rate and volume at the headgate for the purpose of marketing for mitigation ensures that no adverse effect will result from expansion of the water right due to the fact that the Applicant does not own the place of use for irrigation and the historic place of use will no longer be irrigated.

39. The department finds historic consumptive use for the 1,212.63 AF historic diverted volume to be 556.02 AF. The proposed consumptive use for marketing for mitigation will be 556.02 AF. The proposed change to marketing for mitigation does not result in an increase in historic consumptive use.

40. According to department policy, under the changed conditions return flows will only be reviewed under a limited adverse effect analysis absent a valid objection. For purposes of the Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that is left instream is available during the period of diversion either below the point of diversion or where return flows returned to the source. Department Policy Memorandum on Return Flows, April 1, 2016. In this instance, historically diverted but not consumed water will be left instream below the historic point of diversion during the irrigation season, ensuring downstream water users have similar or greater opportunity to appropriate water than they historically did. The policy directs no further detailed analysis will be undertaken by the department prior to

objections, provided there will be no enlargement of the amounts of water historically diverted or consumed.

41. Tenmile Creek is determined to be the receiving stream for return flows from the 190 acres irrigated under statement of claims 41I-132502-00 and 41I-132506-00 according to the Return Flow and Mitigation Report prepared by Russell Levens, department Groundwater Hydrologist, dated January 19, 2018. This report also found that approximately half of the return flow, flow rate and volume from 41I-132503-00, 41I-132504-00 and 41I-132505 also returned to Tenmile Creek. Due to the fact that the receiving stream for return flows is the same as the source of supply for these claims a monthly analysis of return flow volumes and flow rates was not conducted per the department's April 1, 2016 return flow policy memo because historically diverted but not consumed water will be left in Tenmile Creek, resulting in no adverse effect to Tenmile Creek water users from any loss of return flows.

42. Return flow volume and flow rate from the additional 192.7 acres irrigated by statement of claims 41I-132503-00, 41I-132504-00, and 41I-132505-00 are split approximately evenly between Tenmile and Sevenmile creeks based on the inverse squared distances from the historically irrigated acres (see Return Flow and Mitigation Report). A monthly analysis of return flow volumes and flow rates was calculated for Sevenmile Creek and is presented in the table below. The analysis for Sevenmile Creek is required because the proposal does not leave any historically diverted but not consumed water in Sevenmile Creek and the April 1, 2016 return flow policy does not apply to Sevenmile Creek.

**Table 3. Monthly Return Flow Volume and Flow Rate – Sevenmile Creek**

	#41I-132503-00.		#41I-132504-00		#41I-132505-00		Total	
	Return Flows – Sevenmile Creek (AF)	Return Flows – Sevenmile Creek (gpm)	Return Flows – Sevenmile Creek (AF)	Return Flows – Sevenmile Creek (gpm)	Return Flows – Sevenmile Creek (AF)	Return Flows – Sevenmile Creek (gpm)	AF	GPM
<b>January</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>February</b>	3.06	22.35	1.65	12.06	2.44	17.84	7.15	52.25
<b>March</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>April</b>	3.28	23.94	1.77	12.93	2.62	19.12	7.67	55.99
<b>May</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>June</b>	3.28	23.94	1.77	12.93	2.62	19.12	7.67	55.99
<b>July</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>August</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>September</b>	3.28	23.94	1.77	12.93	2.62	19.12	7.67	55.99
<b>October</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
<b>November</b>	3.28	23.94	1.77	12.93	2.62	19.12	7.67	55.99
<b>December</b>	3.39	24.74	1.83	13.36	2.71	19.75	7.93	57.85
	<b>39.91</b>		<b>21.55</b>		<b>31.87</b>		<b>93.34</b>	

43. The retirement of 192.7 acres from irrigation results in a decrease of return flows to Sevenmile Creek ranging from a low of 52.25 GPM and 7.15 AF in February to a high of 57.85 GPM and 7.93 acre in the months of January, March, May, July, August, October, and December. These return flows would most likely have shown up in Sevenmile Creek in the S1/2 of Section 11, T10N, R04W. The return flows originating from the irrigation of the 192.7 acres would not have been present in Sevenmile Creek prior to the 1975 change in place of use, therefore water rights with priority dates earlier than 1975 did not rely on these return flows. There is one diversion located in the NWNWSW of Section 11, T10N, R04W with a priority date of June 11, 1865 (claim nos. 41I 22 and 41I 120990) and there are no other diversions from this location to the confluence of Sevenmile and Tenmile creeks.

44. Within the affected reach of Sevenmile Creek, which includes the S1/2 of Section 11, the NENENE of Section 14, and the N1/2 of Section 13, all in T10N, R04W, there is

a water reservation for instream flow owned by the Montana Department of Fish, Wildlife and Parks (411 30017561). This reservation lists a priority date of July 1, 1985, a flow rate of 1 CFS and a place of use approximately 7 miles long. To determine if a loss of return flows in Sevenmile Creek would adversely affect this reservation the department obtained flow data on Sevenmile Creek from the Lewis and Clark Water Quality Protection District, who operated a tru-track on Sevenmile Creek for the years spanning 2007 through 2016. The Lewis and Clark Water Quality Protection District measured flows in Sevenmile Creek at two locations, where the creek passed under Birdseye Road and Hand Road. The Hand Bridge site is in the S1/2 of Section 11, T10N, R04W where return flows would have historically showed up in Sevenmile Creek. The period of record for flow measurements is also during the time when the historic place of use was not irrigated, and the subject statement of claims were left in Tenmile Creek per the temporary instream flow change authorization. DNRC took the daily readings and averaged them for each month available to determine the average monthly flow for the period of record. Through 10 years of measurements taken during the irrigation season at the Hand Road Bridge site there were 5 out of 53 months of recorded flows where less than 1 CFS was present in this stream reach. During 3 of the 5 months flows recorded upstream at the Birdseye Road crossing showed substantially more water in Sevenmile Creek. There were no measurements at the Birdseye Road crossing taken during the other two months when flows dropped below 1 CFS at Hand Bridge. The Hand Road Bridge site is downstream of the irrigation diversion on Sevenmile Creek in Section 11, indicating that irrigation diversion was the most probable cause of the low flow conditions in the lower reach of Sevenmile Creek, as the instream flow reservation was fully met upstream of the irrigation diversion even in drought conditions. These low flows were recorded during extremely dry years when Sevenmile Creek would go entirely dry. The loss of approximately 60 GPM of return flows would not have resulted in a re-wetting of the stream channel in these extreme dry conditions. It is the department's finding that the loss of return flows will not prevent Fish, Wildlife and Parks from reasonably exercising their instream flow reservation.

**Table 4. Sevenmile Creek Flows at Birdseye Road**

	2012	2013	2014	2015	2016
April					6.4
May					7.63
June	9.55	6.43		6.98	6.19
July	4.1	3.95		5.08	2.55
August	2.17	2.42	5.18	4.26	1.53
September	1.42	2.83	5.58	4.02	1.96
October	1.22	3.3	4.79		2.56
November		3.54			

**Table 5. Sevenmile Creek flows at Hand Road**

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
April		2.97	8.22							4.56
May		6	11.1			6.2				4.02
June	1.91	8.12			69.68	5.97	5.99		3.41	3.3
July	2.09	4.46			18.84	1.8	3.32	6.45	2.05	1.56
August	0.13	3.67		1	11	0.42	1.02	3.8	0.5	1.23
September	0.17	3.96		2.85	4.93	0.33	2.64	4.12	1	1.6
October	2.44	4.99		4.33	7.6	1.36	2.7	4.04	3.22	2.28
November		5.53		4.68			3.36		3.97	

45. All the subject water rights were changed to instream flow in Tenmile Creek in 2005. The department authorized this temporary change which resulted in the retirement of irrigation over the entire historic place of use. This temporary change lasted for a period of 10 years and was then renewed in 2014 for another 10-year period. During processing of the renewal notice the application was published for 90 days with individual notices going out to public notice standards including Fish, Wildlife and Parks. During public notice of a temporary change renewal water users may object if they feel their water rights were adversely affected during the temporary change. The application to renew a temporary change authorization did not receive any comment or objection from any water user on Tenmile or Sevenmile creeks, indicating that there was no adverse effect from the loss of return flows during the first 10 years of discontinued irrigation.

The Applicant's proposal is to permanently discontinue the use of the historic Schatz ditch headgate and ditch system. There are no other water users on the Schatz ditch that may be adversely affected from the proposed change to marketing for mitigation.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

46. Applicant proposes to change the place of use and purpose of statement of claim nos. 41I-132502-00, 41I-132503-00, 41I-132504-00, 41I-132505-00, and 41I-132506-00 to marketing for mitigation. The maximum proposed flow rate and volume to be changed is 11.15 CFS up to 1,212.63 AF, of which a maximum of 556.02 AF will be available to mitigate future consumptive use(s) from the historic point of diversion on Tenmile Creek located in the SESESW Section 22, T10N, R04 W past the confluence of Tenmile and Prickly Pear Creeks to the mouth of Lake Helena. The need for mitigation water in Tenmile Creek is supported by the Upper Missouri River Basin Legislative Closure that requires mitigation to replace surface water depletions caused by groundwater pumping that result in adverse effect. The department recognizes mitigation as a beneficial use and is aware of the need for marketing water for sale or lease where basin closures limit new consumptive uses of water.

47. Mitigation water made available through the retirement of historically irrigated acres only provides mitigation through the place of use seasonally, during the months of May, June, July, August, and September. Following is a table listing the monthly mitigation amounts per water right and monthly totals.

**Table 5. Monthly mitigation water flow rates and volumes per water right**

Water Right No.	Mitigation Flow Rate and Volume Provided by Month										Total per WR
	May		June		July		August		September		
	GPM	AF	GPM	AF	GPM	AF	GPM	AF	GPM	AF	
41I-132502-00	61.66	8.43	310.54	41.10	408.88	55.92	341.23	46.67	102.07	13.51	165.63
41I-132503-00	44.57	6.10	224.48	29.71	295.57	40.42	246.67	33.73	73.78	9.77	119.73
41I-132504-00	24.06	3.29	121.19	16.04	159.57	21.82	133.17	18.21	39.83	5.27	64.64
41I-132505-00	35.59	4.87	179.24	23.72	236.00	32.28	196.96	26.94	58.91	7.80	95.60
41I-132506-00	41.11	5.62	207.03	27.40	272.58	37.28	227.49	31.11	68.05	9.01	110.42
Total CU		28.31		137.97		187.72		156.66		45.35	556.02

**ADEQUATE DIVERSION**

*FINDINGS OF FACT*

48. The Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation are adequate for a change in appropriation right pursuant to §85-2-420, MCA, for marketing for mitigation. See §85-2-402(2)(b)(iii), MCA.

**POSSESSORY INTEREST**

*FINDINGS OF FACT*

49. The Applicant is not required to prove it has a possessory interest in the place of use for a change in appropriation right pursuant to §85-2-420, MCA, for marketing for mitigation. See §85-2-402(2)(d)(iii), MCA.

**CONCLUSIONS OF LAW**

*HISTORIC USE AND ADVERSE EFFECT*

50. Montana’s change statute codifies the fundamental principles of the Prior

Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of application to change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

51. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles

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<sup>1</sup> DNRC decisions are available at:  
[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

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

52. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it

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<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); 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); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

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

is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶144-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

53. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

54. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained

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<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

55. In Royston, the Montana Supreme Court confirmed that an Applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the department’s determinations in numerous prior change proceedings. The department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

56. The department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an Applicant

to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

57. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

58. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service

irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

59. The department has adopted a rule providing for the calculation of historic consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF No.31-36).

60. If an Applicant seeks more than the historic consumptive use as calculated by Admin.R.M .36.12.1902 (16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

61. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I-132502-00 of 361.46 AF diverted volume and 3.0 CFS flow rate with a consumptive use of 165.63 acre-feet. (FOF Nos. 27 and 34)

62. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I-132503-

00 of 260.95 AF diverted volume and 2.63CFS flow rate with a consumptive use of 119.73 acre-feet. (FOF Nos. 27 and 34)

63. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I-132504-00 of 140.88 AF diverted volume and 1.42 CFS flow rate with a consumptive use of 64.64 acre-feet. (FOF Nos. 27 and 34)

64. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I-132505-00 of 208.36 AF diverted volume and 2.10 CFS flow rate with a consumptive use of 95.60 acre-feet. (FOF Nos. 27 and 34)

65. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I-132506-00 of 240.97 AF diverted volume and 2.0 CFS flow rate with a consumptive use of 110.42 acre-feet. (FOF Nos. 27 and 34)

66. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that 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. §85-2-402(2)(b), MCA. (FOF Nos. 37-45)

### BENEFICIAL USE

67. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402,

MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

68. The department may issue a change authorization for less than the amount of water requested but may not issue a change authorization for more water than is requested or more water than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

69. Applicant proposes to use water for marketing for mitigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence marketing for mitigation is a beneficial use and that 1,212.63 acre-feet of diverted volume, 556.02 acre-feet of consumed volume, and 11.15 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 46-47)

### ADEQUATE MEANS OF DIVERSION

70. Pursuant to §85-2-402 (2)(b), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

### POSSESSORY INTEREST

71. Pursuant to §85-2-402(2)(d)(iii), MCA, the Applicant is not required to prove that it 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 because this application involves a change in appropriation right pursuant to §85-2-420 MCA for mitigation or marketing for mitigation.

## **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the department preliminarily determines that this application to change Water Right No. 41I-30110538 should be Granted subject to the following: The Applicant will no longer irrigate the 382.7- acre place of use historically associated with the 11.15 CFS flow rate and 1,212.65 acre feet of diverted volume of the five water rights being changed to the new purpose of marketing for mitigation. A maximum of 556.02 AF will be available to mitigate future consumptive use(s) from the historic point of diversion on Tenmile Creek located in the SESESW Section 22, T10N, R04 W past the confluence of Tenmile and Prickly Pear Creeks to the inlet at Lake Helena located in the SWSW of Section 23, T11N, R03W, Lewis and Clark County. Mitigation water made available through the retirement of historically irrigated acres only provides mitigation through the place of use seasonally, during the months of May, June, July, August and September. See Table 5 in FOF 47 for a listing of the monthly mitigation amounts per water right and monthly totals.

The application will be subject to the following conditions, limitations, or restrictions.

### **CONDITIONS**

THE CHANGE AUTHORIZATION ASSOCIATED WITH THE MARKETING FOR MITIGATION PURPOSE IS CONDITIONED UPON THE ANNUAL DELIVERY OF 556.02 ACRE-FEET OF MITIGATION WATER TO TENMILE CREEK THROUGH A REDUCTION IN DIVERSIONS AT THE TENMILE CREEK / SCHATZ DITCH HEADGATE AS WATER IS SOLD/LEASED. CONVEYANCE OF THE MITIGATION WATER SHALL BE VIA TENMILE CREEK BELOW THE HEADGATE TO LAKE HELENA. THE APPLICANT, OR THE SUCCESSORS IN INTEREST, IS RESPONSIBLE FOR MAINTAINING DOCUMENTATION SHOWING PROOF OF MITIGATION PLAN IMPLEMENTATION, CONSISTING OF TENMILE CREEK WATER COMMISSIONER RECORDS FOR THE SCHATZ DITCH. THE WATER COMMISSIONER RECORDS MUST CLEARLY SHOW THAT THE 11.15 CFS ASSOCIATED WITH THIS MARKETING FOR MITIGATION CHANGE IS NO LONGER

BEING DIVERTED FOR IRRIGATION PURPOSES AND THAT MITIGATION WATER IS BEING LEFT INSTREAM. THESE RECORDS SHALL BE SUBMITTED TO THE HELENA WATER RESOURCES REGIONAL OFFICE BY DECEMBER 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE AUTHORIZATION.

THE CHANGE AUTHORIZATION WILL CONTAIN THE FOLLOWING CONDITIONS TO ENSURE COMPLIANCE PURSUANT TO §85-2-420, MCA.

- a. WATER MARKET REPORT: THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF A PORTION OF THE WATER RIGHT FOR MITIGATION/AQUIFER RECHARGE PURPOSE.
- b. PROGRESS REPORT ON MARKETING: THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

**NOTICE**

This department will provide public notice of this application and the department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The department will set a deadline for objections to this application pursuant to §§85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the department will consider the proposed condition(s) and grant the application with such conditions as the department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 27<sup>TH</sup> day of AUGUST 2018.

/Original signed by Jim Nave/  
Jim Nave, Regional Manager  
Missoula Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 27<sup>TH</sup> day of AUGUST 2018, by first class United States mail.

CENTENNIAL LIVESTOCK INC.  
900 MANSFIELD LANE  
DILLON, MT 59725

HYDRO SOLUTIONS INC  
303 CLARKE STREET  
HELENA, MT 59601  
ATTN: DAVE BALDWIN

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Regional Office, (406) 721-4284