

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

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<b>COMBINED APPLICATION FOR BENEFICIAL WATER USE PERMIT 41I 30068548 AND CHANGE APPLICATIONS 41I 30069327 AND 41I 30070581 BY MARKS RANCH ENTERPRISES CO</b>	) ) ) ) )	<b>PRELIMINARY DETERMINATION TO GRANT COMBINED APPLICATION</b>
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On April, 4, 2014, Marks Ranch Enterprises Co. (Applicant) submitted a Combined Application for Beneficial Water Use Permit No. 41I 30068548 and Change Application Nos. 41I 30069327 and 41I 30070581 to the Helena Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for the authorized use of two groundwater wells diverting 100 gallons per minute (GPM), up to 46.76 acre-feet (AF) per year. The Applicant proposes to use this flow rate and volume to supply water to the Red Cliff Estates subdivision and an adjacent 10-unit housing development, consisting of a total of 35 domestic households and 8.26 acres of lawn and garden irrigation. The groundwater appropriation will cause a net depletion to Clancy Creek and then Prickly Pear Creek, within the Upper Missouri Basin Closure, and the Applicant proposes to offset the depletions by changing the purpose, place of use and point of diversion of a portion of existing irrigation and stock Water Right Claims Nos. 41I 118281 00 and 41I 30069586 to mitigation. The Department published receipt of the Applications on its website. The Department sent the Applicant deficiency letters under § 85-2-302, Montana Code Annotated (MCA), dated October 1, 2014. The Applicant requested a 15-day extension to respond to the Departments deficiency letters on October 22, 2014. The Applicant responded with information dated November 14, 2014. The applications were determined to be correct and complete as of June 12, 2015, at which time the Applicant was provided with the Department’s technical reports. On November 14, 2014, the Applicant submitted a minor amendment to the permit application and on July 10, 2015, submitted minor amendments to both change applications. The Department met with the

Applicant's attorney, Rachel Kinkie from Bloomquist Law Firm, and consultant, Luke Osborne from HydroSolutions on May 1, November 12, December 29, 2014, and June 23, 2015. An Environmental Assessment for each of these Applications was completed on October 7, 2015.

### **INFORMATION**

The Department considered the following information submitted by the Applicant.

#### Applications as filed:

- Application for Beneficial Water Use Permit, Form 600 GW
- Aquifer Test Report Addendum, Form 600 ATA
- Basin Closure Addendum, Form 600 BCA
- Hydrogeologic Report Addendum, Form 600 HRA
- Application to Change, Form 606 Irrigation
- Historic Use Addendum, Form 606 HUA
- Purpose Addendum, Form 606 PA
- Application to Change, Form 606 Non-Irrigation
- Purpose Addendum, Form 606 PA
- Attachments
- Maps

#### Information Received after Applications Filed

- Applicant's request for extension to respond to the Department's deficiency letters, by Luke Osborne from HydroSolutions, Inc. received October 21, 2014.
- Applicant's response to the Department's deficiency letters, by Luke Osborne from HydroSolutions, Inc. received November 14, 2014.
- Documentation supplementation for deficiency response, by Rachel Kinkie from Bloomquist Law Firm, received December 9, 2014.
- Minor amendment to permit application, received November 14, 2014.
- Minor amendment to change applications, received July 10, 2015.

### Information within the Department's Possession/Knowledge

- Technical Reports completed by the Department June 12, 2015.
- Return Flow Report, by Russell Levens, DNRC Water Management Bureau Groundwater Hydrologist, dated May 14, 2015.
- Depletion Report, by Attila Fohnagy and Russell Levens, DNRC Water Management Bureau Groundwater Hydrologists, dated February 11, 2015.
- Aquifer Test Report, by Attila Fohnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015.
- Department water right records of existing rights.
- Department of Environmental Quality (DEQ) Plat approval.

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, parts 3 and 4, MCA).

### BASIN CLOSURE

#### FINDINGS OF FACT

1. Application 41I 30068548 is for multiple domestic use of groundwater, including 8.26 acres of lawn and garden irrigation. This application is located within the Upper Missouri River Basin legislative closure.
2. Applicant submitted a hydrogeologic assessment and mitigation plan determined to be correct and complete by Department staff.

#### CONCLUSIONS OF LAW

3. As provided in § 85-2-319, MCA the Department may not grant an application for a permit to appropriate water or for a state water reservation within the Upper Missouri River Basin until the final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin § 85-2-343(1), MCA. The

upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. § 85-2-342(4), MCA. This Application is within the Upper Missouri River Basin closure and is for a permit to appropriate groundwater, which falls under the exceptions for the basin closure. § 85-2-343 (2)(a), MCA.

4. Pursuant to § 85-2-363, MCA, a combined application for new appropriations of groundwater in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. § 85-2-363, MCA. ARM 36.12.120. *E.g., In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer* (DNRC Final Order 2010, Combined Application)(combined application under §85-2-363, MCA, reviewed as a single unit).

5. In reviewing an application for groundwater in a closed basin, the District Court in Sitz Ranch v. DNRC observed:

The basin from which applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors.

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7.

6. A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. *E.g., In The Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee*

(DNRC Final Order 2011); *In The Matter of Application for Beneficial Water Use Permit No. 41K-30045713* by Nicholas D. Konen, (DNRC Final Order 2011)

**§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

7. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

8. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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 use has 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 under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35.

9. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

10. E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if in further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use*

*Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin R. Mont. (ARM) 36.12.207.

11. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

12. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

13. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **PROPOSED APPROPRIATION**

#### **BENEFICIAL WATER USE PERMIT NO. 41I 30068548**

#### **FINDINGS OF FACT**

14. The Applicant proposes to divert groundwater, by means of two public water supply wells completed at depths of 140 and 150 feet and capable of diverting a cumulative flow rate of 100 GPM up to 46.76 AF. The proposed period of diversion and use is from January 1 through December 31 for multiple domestic purposes and from April 15 through October 15 for lawn and garden irrigation purposes. The Applicant proposes to use 20.44 AF of water for 8.26 acres of lawn and garden irrigation and 26.32 AF for multiple domestic purposes in 35 households. The place of use is 25 lots in Red Cliff Estates and 10 units in an adjacent development, generally located in the SWSE of Section 4, N2NENW and N2NWNE of Section 9, Township (T) 8 North (N), Range (R) 3 West (W), Town of Clancy, Jefferson County.

15. The Applicant's proposed groundwater diversions, wells #5 and #6, are located approximately 100 feet from Clancy Creek and 1,800 feet from Prickly Pear Creek in the NENENW of Section 9, T8N, R3W.

16. Consumptive use of the proposed 46.76 AF diverted volume is estimated to be 17.31 AF per year. Lawn and garden irrigation, based on the net irrigation requirement for pasture grass obtained from the NRCS Irrigation Water Requirement (IWR) program with modified inputs, is projected to consume 14.68 AF from April 15 to October 15. Year-round multiple domestic uses are estimated to consume 2.63 AF, which is approximately 10% of the 26.32 AF of domestic demands. The 23.69 AF of wastewater not consumed for domestic use returns to the system via DEQ-regulated wastewater treatment through individual and community drain fields.

17. In a minor amendment received November 14, 2014, the Applicant and the President of the Red Cliff Estates Home Owners Association have agreed to the following measurement condition:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY

**Physical Availability**

**FINDINGS OF FACT**

18. The Applicant submitted the Aquifer Testing Report Addendum with the Application. A 24-hour aquifer test was started on well #6 on March 28, 2011 at 12:30 PM and continued without interruption until 12:41 PM, March 29, 2011, at an average flow rate of 102 GPM. Well #6 experienced 6.34 feet of drawdown, leaving 33.66 feet of water above the pump and achieved 96% of pre-pumping water levels 72 hours after pumping ceased. Wells #5, #4 and piezometer (PZ-N) were monitored during the test. Table 1 below shows the depth, distance from pumping well and drawdowns for the monitoring wells. The monitoring wells achieve 99% recovery 24 hours after pumping ceased, well #5 was pumped during the recovery phase to provide water to homes already constructed. Department Groundwater Hydrologist Attila Felnagy reviewed the aquifer test and determined the test conforms to the procedures in ARM.36.12.121. (Aquifer Test Report, by Attila Felnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015)

**TABLE 1: MONITORING WELLS DURNING AQUIFER TEST**

Wells	Depth (feet)	Distance from pumping well (feet)	Drawdown (feet)
#5	140	25	2.24
#4	333	92	1.86

PZ-N	10.7	56	0.97
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19. The aquifer test data was used to model projected drawdown through the period of diversion by assigning half of the monthly pumping schedule to wells 5 and 6, respectively. Based on the requested volume for domestic and lawn and garden use, pumping the wells continuously will result in a maximum drawdown of 9.4 feet. This would leave 30.6 feet of available drawdown above the pumps of the proposed wells and it is more likely than not that water is physically available at the points of diversion. (Aquifer Test Report, by Attila Folnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015)

20. Department Hydrologist Folnagy calculated the groundwater volumetric flux through the zone of influence (ZOI), which is determined by the 0.01 foot drawdown contour, in the project area. The 0.01 foot drawdown contour was determined to occur at 9,000 feet from the proposed wells. The volumetric flux through the delineated area was calculated to be 2,177.3 AF/year, which exceeds the requested volume of 46.76 AF. (Aquifer Test Report, by Attila Folnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015)

21. The Department finds the Applicant’s aquifer test and analysis are adequate and show that groundwater is physically available at the points of diversion in the amount requested and sufficient water will remain above the pump intake after pumping 100 GPM in combination from the wells for a year.

CONCLUSIONS OF LAW

22. Pursuant to § 85-2-311(1)(a) (i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

23. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

24. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Findings of Fact Nos. 18-21)

**Legal Availability:**

**FINDINGS OF FACT**

25. As mentioned above, Department Hydrologist calculated the volumetric flux through the ZOI to be 2,177.3 AF/year. The groundwater legal demands within the ZOI are calculated to be 1,374.9 AF/year, leaving 802.4 AF/year remaining ( $2,177.3 - 1,374.9 = 802.4$ ). Therefore, the 46.76 AF requested volume of groundwater is legally available within the ZOI of the proposed wells. (Aquifer Test Report, by Attila Folnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015)

26. The proposed wells are located approximately 100 feet from Clancy Creek and 1,800 feet from Prickly Pear Creek. As stated in the Department's Depletion Report, "based on well log data, depth to groundwater, proximity to wells, vegetative riparian areas, and drawdown in overlying unconsolidated material, Clancy Creek is interpreted to be hydraulically connected to the source aquifer in the area of the application and potentially affected surface water in Section 9, T8N, R3W." Depletions to the hydraulically connected surface water, based on the proposed uses, are assumed to equal the net consumption. Annual consumption associated with the domestic use is estimated to be 2.63 AF, which is 10% of the requested domestic volume because unconsumed water is disposed via on site drainfields. The proposed lawn and garden irrigation on 8.26 acres is estimated to consume 14.68 AF annually, based on net irrigation requirement for pasture grass. The total predicted depletion to Clancy Creek is 17.31 AF annually; however the Applicant did not provide a complete analysis of surface water legal availability because they propose to mitigate the full volume of estimated depletions. The mitigation plan, which is discussed in more detail in the Adverse Effect section below, proposes to leave 17.31 AF of water instream under Water Right Claim Nos. 41I 118281 00 and 41I 30069586 in order to offset any potential adverse effects to surface water rights. (Depletion

Report, by Attila Fohnagy and Russell Levens, DNRC Water Management Bureau Groundwater Hydrologists, dated February 11, 2015)

### CONCLUSIONS OF LAW

27. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

28. It is the applicant's burden to present evidence to prove water can be reasonably considered legal available. E.g., Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility*

*Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

29. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and groundwater and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and groundwater appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the groundwater source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to groundwater. § 85-2-311(a)(ii), MCA.

Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed groundwater appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5; Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

30. Where a proposed groundwater appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on and availability of water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion of 3

gpm and 9 gpm respectively to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Westmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping).

31. Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

32. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (Findings of Fact No. 25-26)

### **Adverse Effect**

#### **FINDINGS OF FACT**

33. In order to determine if the proposed Beneficial Water Use Permit would adversely affect groundwater appropriations within the ZOI, Department groundwater hydrologists evaluated potential drawdown in other wells using the Theis (1935) solution. The estimated monthly pumping schedule for 5 years showed drawdown in excess of 1 foot would occur in wells located within 700 feet of the proposed wells. Review of groundwater rights on record with the Department showed 5 existing water rights located within the 700 feet radius that would experience the predicted drawdown in excess of 1 foot. However, the available water columns in the wells are greater than 20 feet and will not be adversely affected by the pumping of the Red Cliff wells. Table 2 below shows the groundwater rights affected by the pumping of the proposed wells. (Aquifer Test Report, by Attila Fohnagy, DNRC Water Management Bureau Groundwater Hydrologist, dated February 10, 2015)

**TABLE 2: GROUNDWATER RIGHTS AFFECTED BY PROPOSED WELLS**

<b>Water Right No.</b>	<b>Owner</b>	<b>Distance (ft)</b>	<b>Well Depth (ft)</b>	<b>Additional Drawdown (ft)</b>	<b>Static Water Level (ft) bgs</b>	<b>Available Water Column (ft)</b>
41I 84724 00	Kasowski	130	46	2	23	21
41I 2069 00	Jefferson Co. S.D.#1	366	38	1.4	8	28.6
41I 30015401	Elkhorn Search & Rescue	366	140	1.4	5	133.6
41I 87934 00	Parrothead LLC	366	180	1.4	18	160.6
41I 84679 00	Jefferson Co. S.D.#1	590	220	1.1	8	210.9

34. The Applicant’s plan to prevent adverse effects to water rights of prior appropriators under an existing water right claim, certificate, permit, or state water reservation is to mitigate the total consumptive volume associated with Red Cliff Estates and proposed adjacent 10-unit development. As such, the mitigation plan is to retire 11 acres from Water Right Claim 41I 118281 00 and 473 stock animal units (AU) from Water Right Claim 41I 30069586 in order to offset the surface water depletions caused by the consumptive use of the subdivision and adjacent development. The Irrigation Water Requirements (IWR) program was used to calculate the historic consumptive volume for the 19.2 acres historically irrigated by Water Right Claim 41I 118281 00. The historic consumptive volume is calculated to be 32.57 AF (crop consumption plus irrecoverable losses). The Applicant plans to only retire the amount of acreage needed to offset depletions during the irrigation season, which is approximately 11 acres. In order to mitigate the depletion during the non-irrigation season, the Applicant is retiring 473 of the 590 stock AU from Water Right Claim 41I 30069586. The volume of water historically consumed by the retired acres and stock watering will be left in Clancy Creek and Prickly Pear Creek for the purpose of mitigation, which will adequately offset the 17.31 AF of expected consumptive losses. (Return Flow Report, by Russell Levens, DNRC Water Management Bureau Groundwater Hydrologist, dated May 14, 2015)

35. As described in the Department Depletion Report, Clancy Creek is considered to be hydraulically connected to the source aquifer in the area of the proposed wells and potentially

affected surface water in Section 9, T8N, R3W. Pumping of the proposed wells will cause depletions through propagation of drawdown through the unconfined aquifer to Clancy Creek and cumulate in Prickly Pear Creek. Department hydrologists used the Well Pumping Depletion Model (WPDM) to calculate the monthly depletions to potentially affected surface water sources. Depletion was calculated, using a monthly pumping schedule, to occur in the nearby reach of Clancy Creek at rates listed in Table 3 below. The WPDM also predicted the depletions will experience some lag time, however, on a monthly basis depletions to Clancy Creek will occur essentially simultaneously with consumption. (Depletion Report, by Attila Fohnagy and Russell Levens, DNRC Water Management Bureau Groundwater Hydrologists, dated February 11, 2015)

**TABLE 3: NET DEPLETIONS TO CLANCY CREEK BY PROPOSED APPROPRIATION**

<b>Month</b>	<b>Domestic Consumption (AF)</b>	<b>Irrigation Consumption (AF)</b>	<b>Depletion (AF)</b>	<b>Depletion (GPM)</b>
January	0.22	0.00	0.27	1.95
February	0.22	0.00	0.28	2.26
March	0.22	0.00	0.25	1.86
April	0.22	0.37	0.59	4.48
May	0.22	1.84	1.89	13.78
June	0.22	2.90	3.01	22.69
July	0.22	3.98	3.96	28.87
August	0.22	3.43	3.55	25.88
September	0.22	1.80	2.16	16.27
October	0.22	0.36	0.74	5.42
November	0.22	0.00	0.33	2.49
December	0.22	0.00	0.28	2.06
<b>Total</b>	<b>2.63</b>	<b>14.68</b>	<b>17.31</b>	

36. The Applicant’s mitigation plan includes retiring 11 of the 19.2 acres historically irrigated with Water Right Claim 41I 118281 00, to offset depletions to Clancy Creek during the irrigation season. The mitigation plan also consists of reducing the number of stock watering from Prickly Pear Creek with Water Right Claim 41I 30069586, during the non-irrigation season, in order to offset depletions that will cumulate in Prickly Pear Creek and could potentially adversely affect Water Reservation 41I 30017547. Table 4 below reflects the estimated depletion and

consumption for 473 AU and consumptive and irrecoverable losses associated with the retired 11 acres.

**TABLE 4: MODELED DEPLETION FOR 41I 30068548 MINUS PROPOSED RETIRED CONSUMPTION FOR 41I 118281 00 AND 41I 30069586**

<b>Months</b>	<b>Depletions Permit 41I 30068548 (AF)</b>	<b>Consumption &amp; Irrecoverable losses 41I 118281 11 acres (AF)</b>	<b>Consumption for 41I 30069586 473 AU (AF)</b>	<b>Depletions minus Historic consumption</b>
January	0.27	0.0	1.35	-1.08
February	0.28	0.0	1.22	-0.94
March	0.25	0.0	1.35	-1.1
April	0.59	0.0	1.31	-0.72
May	1.89	3.68	0.65	-2.44
June	3.01	3.95	0.0	-0.94
July	3.96	5.55	0.0	-1.59
August	3.55	4.77	0.0	-1.22
September	2.16	2.21	0.0	-0.05
October	0.74	0.0	0.7	+0.04
November	0.33	0.0	1.31	-0.98
December	0.28	0.0	1.35	-1.07

37. Montana Department of Fish Wildlife and Parks’ (DFWP) Water Reservation (41I 30017547), provides for instream flow protection of 22 CFS during both the irrigation season and non-irrigation season on Prickly Pear Creek. The DFWP reservation is typically met every month except December, January and February as per USGS stream gage date (Site No. 06061500). Although the Applicant’s mitigation plan is 0.04 AF short in October, the excess mitigation waters in November will off-set any potential adverse effects. Also, since the Water Reservation is typically met in October, it is more likely than not that the Applicant’s mitigation plan effectively mitigates any potential adverse effects to users on Clancy and Prickly Pear Creeks. The attenuating nature of downstream Lake Helena and Hauser Lake will prevent adverse effect to downstream hydropower demands.

**CONCLUSIONS OF LAW**

38. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing

water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

39. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

40. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

41. It is the applicant's burden to produce the required evidence. E.g., Id. at Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

42. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a *de minimis* level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8; see also, *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied).

43. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant's burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be

adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source."); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company (DNRC Final Order 2006)*(adverse effect not required to be measureable but must be calculable); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994).

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

44. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

45. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. E.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), *affirmed*, *Montana River Action Network v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*,( DNRC Final Order 2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC*.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See *Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148 Mont. 355, 423 P.2d 587.

Augmentation/ mitigation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

# The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

E.g., *Combined Application for Beneficial Water Use Permit No. 76G-30050801 and Change Authorization 76G-30050805 by Missoula County* (DNRC Final Order 2012)(permit granted conditioned on mitigation of depletion ranging .8 to 7.4 gpm); *In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer* (DNRC Final Order 2010, Combined Application)(permit granted conditioned on mitigation).

46. If the applicant seeks to use a mitigation plan to prove lack of adverse effect, the applicant must have a defined mitigation proposal at the time of application. It is the Applicant's burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on this basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted based on plan for mitigation of depletion), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007) (permit granted on basis of plan for mitigation of depletion), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); §85-2-360 *et seq.*, MCA.

47. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

48. For a permit with mitigation: The Department will evaluate whether an applicant’s proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet § 85-2-311(1)(b), MCA, in the permit proceeding. The applicant’s authority to use the water as proposed is assumed for the purposes of the analysis. The authority of the applicant to use the offset water as proposed for the plan is not determined in the permit proceeding but is determined in any required application for change in appropriation. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department exactly what it proposes for a mitigation/aquifer recharge plan. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007) , *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); § 85-2-360 *et seq.*

49. Pursuant to § 85-2-363, MCA, an applicant whose hydrogeologic assessment conducted pursuant to § 85-2-361, MCA, predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

50. Pursuant to § 85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

51. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. *E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008).

52. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed appropriation as conditioned on Applicant's plan. § 85-2-311(d), MCA. (Findings of Fact Nos. 33-37)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

53. The proposed wells were drilled in 2002 (#5) and 2003 (#6) to depths of 140 and 150 feet, respectively. Well #5 is equipped with a 7.5 horsepower Big-Flo 85 GPM Series MB pump and Well #6 is equipped with a 5.0 horsepower Big-Flo 50 GPM Series FC pump, both are Red Jacket pumps. Each well has a 2.5 inch PVC supply line that conveys water independently to a 30,000 gallon storage tank located at the well house. Pressure transducers are used to automatically activate the pumps when the water level in the storage tank drops to 5,000 gallons.

54. The Applicant's public water supply system design and operation was approved by the Montana State Department of Environmental Quality in 2002.

### CONCLUSIONS OF LAW

55. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA..

56. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

57. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

58. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA. (Findings of Fact Nos. 53-54)

### Beneficial Use

### FINDINGS OF FACT

59. Applicant requests a diversionary flow rate of 100 GPM and an annual volume of 46.76 AF, for a multiple domestic purpose in the 25 lot Red Cliff Estates subdivision and adjacent 10-unit development, in addition to 8.26 acres of lawn and garden irrigation. The proposed public water supply system will benefit the Applicant, residents of the Red Cliff Estates subdivision and proposed adjacent 10-unit development by providing a reliable source of water.

60. Multiple domestic, including lawn and garden irrigation, are considered beneficial uses of water as described in § 85-2-102 (2), MCA.

#### CONCLUSIONS OF LAW

61. Under § 85-2-311(1)(d), MCA, an applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§ 85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, *supra*; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

62. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. BDV-2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (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).

63. Applicant proposes to use water for multiple domestic and lawn and garden irrigation which are recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that 46.26 AF of diverted volume and 100 GPM of water requested is the amount needed to sustain the beneficial use. (Finding of Fact Nos. 59-60)

## **Possessory Interest**

### **FINDINGS OF FACT**

64. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

### **CONCLUSIONS OF LAW**

65. Pursuant to § 85-2-311(1)(e), MCA, an applicant must prove by a preponderance of the evidence 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, or if the proposed use has 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 under the permit.

66. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

67. The Applicant has proven by a preponderance of the evidence 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. § 85-2-402(2)(d), MCA. (Finding of Fact No. 64)

**CHANGE NO. 41I 30069327**

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

68. The Applicant seeks to change a portion of a Water Right Claim 41I 118281 00 from its historical use of irrigation to a mitigation purpose. Water Right Claim 41I 118281 00 historically flood irrigated 19.2 acres with a flow rate of 445.66 GPM from Clancy Creek with a priority date of April 1, 1865. The historic place of use is located in the SE of Section 4, NENW and NWNE of Section 9 with the points of diversion in the SWNWNW and NENENW of Section 9, all in 8N, R3W, Jefferson County. The claimed period of use and diversion is April 15 thru October 31. The Applicant proposes to retire 11 acres of irrigation and change the historic consumptive use associated with these acres to instream mitigation.

**Table 5: WATER RIGHT PROPOSED FOR CHANGE**

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>	<b>Acres</b>
41I 118281	Irrigation	445.66 GPM	4/15 to 10/31	SWNWNW & NENENW Sec. 9, T8N, R3W	SE Sec.4, NENW & NWNE Sec. 9, T8N, R3W	4/1/1865	19.2

**CHANGE PROPOSAL 41I 30069327**

**FINDINGS OF FACT**

69. This change application proposes to change the purpose, point of diversion and place of use of a portion of existing irrigation Water Right Claim 41I 118281 00 to mitigation in order to offset the consumptive water use associated with Beneficial Water Use Application 41I 30068548. The Applicant proposes to cease irrigation on 11 acres in the SWSE of Section 4, NENW and NWNE of Section 9, T8N, R3W. The consumptive use and irrecoverable loss volumes associated with these acres will be left instream to mitigate the Clancy Creek depletions

caused by the pumping of the Red Cliff Estate public water supply wells. Therefore, the portion of the water right associated with the 11 acres (18.67 AF) is proposed to be changed to the purpose of mitigation and the place of use and points of diversion will be instream from the historic point of diversion to the downstream extent of the historic place of use and then to the confluence with Lump Gulch as described in Table 6.

**TABLE 6: PROPOSED PLACE OF USE AND POINTS OF DIVERSION FOR MITIGATION**

<b>Stream Reach</b>	<b>Quarter Section</b>	<b>Section</b>	<b>TWP (N)</b>	<b>RNG (W)</b>
POD on Clancy Creek to Confluence with Prickly Pear Creek	SWNWNW	9	8	3
	N2NWNE	9	8	3
	NWNW	9	8	3
Prickly Pear Creek, from confluence with Clancy Creek to Lump Gulch	W2SE	4	8	3
	NENESE	4	8	3

**CHANGE NO. 41I 30070581**

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

70. The Applicant seeks to change a portion of Water Right Claim 41I 30069586 from its historical use of stock watering direct from source to the purpose of mitigation. Under Water Right Claim 41I 30069586, 590 animal units (AU) historically watered directly from Prickly Pear Creek with a priority date of December 31, 1883. The historic place of use is located in the SE of Section 4, T8N, R3W, Jefferson County. The claimed period of diversion is October 15 to May 15 of each year. The Applicant proposes to change a portion of this right by retiring 473 AU and moving the consumptive use associated with these AU to instream mitigation.

**Table 7: WATER RIGHT PROPOSED FOR CHANGE**

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>	<b>AU</b>
41I 30069586	Stock	12.29 GPM	10/15 to 5/15	SE Sec. 4, T8N, R3W	SE Sec.4, T8N, R3W	12/31/1883	590

**CHANGE PROPOSAL 41I 30070581**

**FINDINGS OF FACT**

71. This change application proposes to change the purpose, point of diversion and place of use of a portion of existing stock Water Right Claim 41I 30069586. The purpose would change to mitigation in order to offset the consumptive water use associated with Beneficial Water Use Application 41I 30068548. The Applicant proposes to reduce the number of AU watering directly from Prickly Pear Creek in the SE of Section 4, T8N, R3W. The consumptive use associated with 473 AU proposed for retirement (i.e. change) will be left instream to mitigate the depletions that will cumulate in Prickly Pear Creek by the pumping of the Red Cliff Estate public water supply wells. Therefore, the portion of the water right associated with the 473 AU ( 9.28 AF) is proposed to be changed to the purpose of mitigation and the place of use and points of diversion will be instream in the SE of Section 4, T8N, R3W.

**TABLE 8: PROPOSED PLACE OF USE AND POINTS OF DIVERSION FOR MITIGATION**

<b>Stream Reach</b>	<b>Quarter Section</b>	<b>Section</b>	<b>TWP (N)</b>	<b>RNG (W)</b>
Prickly Pear Creek	SE	4	8	3

**§ 85-2-402, MCA, CHANGE CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

72. An applicant in a change proceeding must affirmatively prove all of the criteria in § 85-2-402, MCA. 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), and (16) 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) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana’s change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff’d on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81. The burden of proof in a change proceeding is by a preponderance of evidence, which is “more probably than not.” Hohenlohe ¶¶ 33, 35.

73. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; ); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also 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). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Water Use Act in § 85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana's change statute reads in part to this issue:

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

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

....

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

(italics added).

74. Montana's change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

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

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

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

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

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and

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Colorado follows a similar analysis under its requirement that a “change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

75. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., *In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer*, (DNRC Final Order 1991); *In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester*, (DNRC Final Order 1992); *In The Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H*, Proposal for Decision and Memorandum at Pgs. 8-22 (Adopted by Final Order January 9, 1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) 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, *citing McDonald*).

76. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. 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. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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 v. DNRC](#), 2010 MT 203, ¶¶ 43, 45; see also [Town of Manhattan v. DNRC](#), Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9.

77. The extent of the historic beneficial use must be determined in a change case. E.g., [McDonald](#); [Hohenlohe](#) ¶ 43; [Quigley](#); [Application for Water Rights in Rio Grande County](#), 53 P.3d 1165, 1170 (Colo. 2002); [Santa Fe Trail Ranches Property Owners Ass'n v. Simpson](#), 990 P.2d 46, 55 -57 (Colo.,1999); [City of Bozeman \(DNRC\)](#), *supra* (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors”). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” § 85-2-234, MCA. [Town of Manhattan v. DNRC](#), Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

78. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. [Hohenlohe](#) ¶¶ 30-31.

79. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision); see also Quigley. An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

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

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

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

....

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

....

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

80. Water and Water Rights at § 14.04(c)(1); see also, 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.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

81. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

82. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

### **Historic Use Change No. 41I 30069327:**

#### **FINDINGS OF FACT**

83. Water Right Claim 41I 118281 00 has a priority date of April 1, 1865, as established by District Court Case No. 668 on October 5, 1911. The appropriation was originally decreed to M.A. Haynes for 60 miner's inches of Clancy Creek. The appropriation was included in a Temporary Preliminary Montana Water Court Decree on March 8, 1995. On January 21, 2015, at the request of the Applicant, the Montana Water Court split the appropriation and created "child" Water Right Claim 41I 30069692 which is owned by multiple homeowners in Red Cliff Estates.

Points of Diversion, Flow Rate and Conveyance Facilities

84. Historically, Clancy Creek water was diverted from two locations to deliver water to the place of use. The diversions were located in the SWSWNW and NENENW of Section 9, T8N, R3W. The 1956 Jefferson County Water Resources Survey refers to both conveyance facilities as the Haynes Ditches. Table 9 below list the three water rights that historically diverted from both diversions. Water Right Claim 41I 30069692 is a child right of 41I 118281 00 and is owned by multiple homeowners within the Red Cliff Estates. Water Right Claim 41I 89634 00 is owned by the Applicant.

TABLE 9: WATER RIGHTS ON THE HAYNES DITCHES

<b>Water Rights</b>	<b>Priority Date</b>	<b>Flow Rate</b>	<b>Acres Irrigated</b>	<b>Period of Diversion</b>
41I 118281	4/1/1865	445.66 GPM	19.2	4/15 to 10/31
41I 30069692	4/1/1865	227.54 GPM	9.8	4/15 TO 10/31
41I 89634	10/02/1918	NA*	51	4/1 to 10/9

\*This water right is limited to high or flood waters of Clancy Creek and no flow rate decreed.

85. Although both diversions have since been decommissioned, the headgate and culvert of the upper diversion are still on site. The size of the culvert and Manning’s equation were used by the Applicant’s consultant to estimate the diversion capacity to be roughly 5.2 CFS. Capacity of the lower diversion was not obtained; however, measurements of portions of the ditch remnants indicate adequate capacity to convey the claimed flow rate. (File)

86. The Applicant’s consultant measured several cross sections of the Haynes Ditches and both are of sufficient size to convey the claimed flow rate. Affidavit from the Applicant states diversion and conveyance measurements done by his consultant are representative of historic conditions. Also, the 1956 Jefferson County Water Resource Survey supports the historic use of the Haynes Ditches. The Department finds the Applicant’s assertion to be reasonable and that, historically, the points of diversion and conveyance ditches were capable of diverting and conveying the claimed flow rate. (File and Applicant’s response to the Department’s Deficiency letters, by Luke Osborne from HydroSolutions, Inc. received November 14, 2014)

Period of Diversion/Use

87. The claimed period of diversion and period of use for Water Right Claim 41I 118281 00 is April 15 thru October 31 of each year. The Applicant’s two diversions on Clancy Creek are

the last diversions on the source before the confluence with Prickly Pear Creek. The Applicant submitted historic stream flow data for Clancy Creek from USGS gaging station #06060000, which was located near the mouth of Clancy Creek. The data indicates, historically, there was adequate flow in Clancy Creek for the Applicant to divert the claimed flow rate during the claimed period of diversion. (Applicant's response to the Department's Deficiency letters, by Luke Osborne from HydroSolutions, Inc. received November 14, 2014)

88. Based on the USGS records and affidavit from the Applicant, the Department finds the period of diversion and period of use to be April 15 thru October 31 of each year.

#### Place of Use

89. The historic place of use for Water Right Claim 41I 118281 00 was 19.2 acres located in the NWSE and SWSE of Section 4 and the NENW and NWNE of Section 9, T8N, R3W. Aerial photos from 1946 and 1947, as well as the 1956 Jefferson County Water Resource Survey (WRS), support active irrigation on the 19.2 acre place of use. The Department finds 19.2 acres were historically irrigated at the claimed place of use. (Technical Report completed by the Department June 12, 2015)

#### Diverted Volume and Consumptive Volume

90. As described in the Department's Return Flow Report, the historic crop consumption for Water Right Claim 41I 118281 00 was calculated using the IWR program with a management factor of 1.0, which is consistent with the consumptive use rules in ARM 36.12.1902. A management factor of 1.0 was used because the Applicant provided adequate information to support full service irrigation on the 19.2 acre place of use. The crop consumption and irrecoverable losses associated with 19.2 acre place of use were calculated to be 32.57 AF (30.06 + 2.51). The crop consumption and irrecoverable losses associated with 11 acres proposed to be changed to mitigation are 18.67 AF (17.23 + 1.44). (File, Minor Amendment to Change Applications, received July 10, 2015 and Return Flow Report, by Russell Levens, DNRC Water Management Bureau Groundwater Hydrologist, dated May 14, 2015)

91. The diverted volume was calculated using the Department's methodologies on determining historic diverted volumes. The conveyance losses were estimated, by the

Applicant’s consultant, to be 47.6 AF. Therefore the historic diverted volume for Water Right Claim 41I 118281 00 was determined to be 101.88 AF. (File and Technical Report completed by the Department June 12, 2015)

92. The Department finds the following historic use for Water Right Claim 41I 118281 00:

<b>Water Right #</b>	<b>Purpose Acres</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>	<b>Diverted Volume</b>	<b>Consp. Vol. + Irrec. Losses</b>
41I 118281	Irrigation 19.2	445.66 GPM	4/15 to 10/31	SWNWNW & NENENW Sec. 9, T8N, R3W	SE Sec.4, NENW & NWNE Sec. 9, T8N, R3W	4/1/1865	101.88 AF	32.57 AF

**Historic Use Change No. 41I 30070581:**

**FINDINGS OF FACT**

93. Water Right Claim 41I 30069586, with the purpose of stock, has a priority date of December 31, 1883, for which 590 AU historically watered directly from Prickly Pear Creek in the SE of Section 4, T8N, R3W. The Applicant provided extensive tax records to support the historic maximum number of animal units watering from Prickly Pear Creek of 590 AU. The place of use the stock historically watered from was irrigated during the irrigation season, so the period of use and diversion was from October 15 to May 15. The historic consumptive volume associated with the 590 AU is 11.57 AF (30GPD x 590 AU x 213days/325851gallon/AF). (File and Technical Report completed by the Department June 12, 2015)

94. The Department finds the following historic use for Water Right Claim 41I 30069586:

<b>Water Right #</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>	<b>Consumptive Volume</b>
41I 30069586	Stock	12.29 GPM	10/15 to 5/15	SE Sec. 4, T8N, R3W	SE Sec.4, T8N, R3W	12/31/1883	11.57 AF

## CONCLUSIONS OF LAW

95. 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 no changes could have been made to those rights after that date without the Department’s approval. § 85-2-402(1), MCA; Royston, *supra*; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; *cf.* General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. *E.g.*, Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120; 85-2-102(12)(“Existing right” or “existing water right” means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973). An applicant can change only that to which it has a perfected right. *E.g.*, McDonald, *supra*; Quigley, *supra*; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (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, *citing* Featherman v. Hennessy, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); *see also* In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

96. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, as reflecting basic water law principles).

97. The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. *Id.* at Pg. 14; *In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008)(applicant must provide evidence on actual historic use of water right regardless of decree; statement that “we will not be using any more water than was used before” is not sufficient).

98. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

99. 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. ARM 36.12.1902.

100. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902, 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.*, (DNRC Final Order 2005); 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”).

101. 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., supra. 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. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001).

102. Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos.*

*101960-41S and 101967-41S by Keith and Alice Royston, COL No. 8 (DNRC Final Order 1989), affirmed (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC., DNRC Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), supra; In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra.*

103. The Department has the authority to consider waste in determining a volume for change in a water right.

*The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868](#).*

Hohenlohe ¶ 71.

104. Applicant may proceed under ARM 36.12.1902, the Department's historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (Finding of Fact No.90)

105. The Department finds that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I 118281 00 to be 101.88 AF diverted volume and 445.66 GPM flow rate with a consumptive use of 32.57 AF. The Department finds that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim 41I 30069586 to be for 590 AU with a consumptive use of 12.57 AF. (Findings of Fact Nos. 83-94)

### **Adverse Effect Change Application 41I 30069327:**

#### **FINDINGS OF FACT**

106. The Applicant proposes to change a portion of Water Right Claim 41I 118281 00 from irrigation to instream mitigation from April 15 to October 31, offsetting the depletion to the source, Clancy Creek, caused by the groundwater appropriation described in Application for Beneficial Water Use Permit 41I 30068548. In order to provide mitigation water, the Applicant is ceasing irrigation of 11 acres with water historically diverted from Clancy Creek. The consumptive volume of water (18.67AF) and corresponding flow rate historically associated with the 11 acres will be left instream to mitigate the potential depletions to Clancy Creek, eventually Prickly Pear Creek, caused by the pumping of the Red Cliff Estates wells.

107. The place of use historically irrigated with Water Right Claim 41I 118281 00 is located adjacent to Clancy Creek in the NENW and NWNE of Section 9 and adjacent to Prickly Pear Creek in the W2SE of Section 4. Due to the close proximity to the receiving stream reach, Clancy Creek from the upstream extent of the historic place of use to its mouth and Prickly Pear Creek from Clancy Creek to the downstream extent of the historic place of use, return flows entered the receiving stream reach relatively quickly. Leaving the consumptive volume and flow rate associated with 11 acres instream will be comparable to the timing of the historic return flows, i.e. less than a month, and will not create an adverse effect to other surface water appropriations. (Return Flow Report, by Russell Levens, DNRC Water Management Bureau Groundwater Hydrologist, dated May 14, 2015)

108. As mentioned above, there are other water rights that historically diverted from the same points of diversion as the water right proposed to be changed under this Application. However, both diversions were decommissioned upon creation of the Red Cliff Estates subdivision and the other water rights on the diversion will not be adversely affected by ceasing the diversion of water associated with the 11 acres to be retired. (File)

109. Water Right Claim 41I 118281 00 was last used to its full extent, as listed on the abstract, in 2000-2001. Construction of the Red Cliff Estates subdivision began in 2001 on a portion of the historic place of use for Water Right Claim 41I 118281 00. Although Water Right Claim 41I 118281 00 has not been used for over ten years, the Department finds resumption of use for the purpose of mitigation will not adversely affect other users.

## **Adverse Effect Change Application 41I 30070581:**

### **FINDINGS OF FACT**

110. The Applicant proposes to change a portion of Water Right Claim 41I 30069586 from stock watering directly from Prickly Pear Creek to instream mitigation, offsetting the depletion to the source caused by the groundwater appropriation detailed in Application for Beneficial Water Use Permit 41I 30068548. In order to provide mitigation water in the non-irrigation season, the Applicant is proposing to reduce the number of stock watering directly from Prickly Pear Creek from 590 AU to 117 AU. The consumptive volume associated with 473 AU drinking from Prickly Pear Creek will be left instream from October 15 to May 15 of each year.

111. There are no wintertime legal demands on Clancy Creek in the depleted reach that could potentially be adversely affected by the pumping of the Red Cliff Estate wells. There is a Water Reservation on Prickly Pear Creek within the depleted reach that could potentially be adversely affected. However, leaving the 9.28 AF of consumptive use associated with 473 AU instream will offset the depletions and effectively mitigate any potential adverse effects to Water Reservation 41I 30017547. (File and Minor Amendment to Change Applications, received July 10, 2015)

### **CONCLUSIONS OF LAW**

112. The Applicant bears the affirmative burden of proving that 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. § 85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

113. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185 Mont. 409, 605 P.2d 1060, *following Lokowich v. Helena* (1913), 46 Mont. 575, 129 P. 1063;

Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (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 (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) Pg.13; City of Bozeman (DNRC), supra; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. 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. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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...

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 ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., [Application for Water Rights in Rio Grande County](#), 53 P.3d 1165, 1170 (Colo. 2002); [Santa Fe Trail Ranches Property Owners Ass'n v. Simpson](#), 990 P.2d 46, 55-57 (Colo.1999); [Orr v. Arapahoe Water and Sanitation Dist.](#), 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” (citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

... we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the

historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

114. Consumptive use of water may not increase when an existing water right is changed. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003).

Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (application subsequently withdrawn); *In the Matter of Application to Change A Water Right No. 43B 30002710 by USA (Dept. of Agriculture – Forest Service)* (DNRC Final Order 2005); *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

#It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981)

[hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of the water right of the appropriator changing their water right and an appropriator changing their water right is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. See also, Doney, p. 21.

The Montana Supreme Court also 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, ¶¶ 2 2, 31,43, *citing Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, *supra*.

115. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra; In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008) (applicant must show that significant

changes in timing and location of historic return flow will not be adverse effect.) The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

116. The Applicant has proven by a preponderance of the evidence that the proposed change in appropriations 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. (Finding Of Fact Nos. 106-111)

### **Adequate Diversion Application 41I 30069327 & Application 41I 30070581:**

#### **FINDINGS OF FACT**

117. The proposed changes leave a portion of existing irrigation and stock water rights instream in order to offset depletions to Clancy Creek and Prickly Pear Creek created by Beneficial Water Use Permit 41I 30068548. No diversion facilities are required to leave water instream as part of the mitigation plan.

#### **CONCLUSIONS OF LAW**

118. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)

(a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 GPM, and maximum usage allowed during non-high water periods, is 144-247 GPM, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), affirmed, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

119. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-402 (2)(b), MCA. (Finding of Fact No. 117).

### **Beneficial Use Application 41I 30069327 & Application 41I 30070581:**

#### **FINDINGS OF FACT**

120. These Change Applications seek to provide mitigation water for Beneficial Water Use Permit 41I 30068548, which will result in 17.31 AF of annual depletions to Clancy Creek and

Prickly Pear Creek. Proposed Change 41I 30069327 will discontinue irrigation on 11 acres leaving 21.32 GPM up to 14.39 AF of water in Clancy Creek and then Prickly Pear Creek to offset the potential depletions during the irrigation season. Proposed Change 41I 30070581 will reduce the number of stock watering directly from Prickly Pear Creek from 590 AU to 117 AU, leaving 3.12 GPM up to 2.92 AF in Prickly Pear Creek to offset potential depletions in the non-irrigation season. The proposed changes will provide mitigation water to Clancy Creek and Prickly Pear Creek so that the depletions resulting from the issuance of Beneficial Water Use Permit 41I 30068548 will not adversely affect existing surface water rights.

### CONCLUSIONS OF LAW

121. Under the change statute, § 85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and 311(1)(d), MCA.

122. 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. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Quigley; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (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); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, (DNRC Final Order 1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for

lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly*, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In the Matter of Application for Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, *Deaterly v. DNRC et al.*, Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); *In The Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008) (when adding new water rights to land already irrigated by other water rights, applicant must show that all of the proposed rights together are needed to irrigate those lands);

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. Waste is defined to include the “application of water to anything but a beneficial use.” § 85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

123. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., In the

*Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005).*

124. Applicant proposes to use water for mitigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by preponderance of the evidence mitigation is a beneficial use and that 21.32 GPM up to 14.39 AF from April 15 to October 31 and 3.12 GPM up to 2.92 AF from October 15 to May 15 of water requested is the amount needed to sustain the beneficial use. (Finding of Fact No. 120)

### **Possessory Interest**

#### **FINDINGS OF FACT**

125. These applications are for instream flow, sale, rental, distribution, or are a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. ARM 36.12.1802. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

#### **CONCLUSIONS OF LAW**

126. Pursuant to § 85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, MCA, the Applicant must prove by a preponderance of the evidence 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 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.

127. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

128. The Applicant has proven by a preponderance of the evidence 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. § 85-2-402(2)(d), MCA. (Finding of Fact No. 125)

### **Salvage Water**

129. This Application does not involve salvage water.

### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Order, the Department preliminarily determines that this Combined Application for Beneficial Water Use Permit No. 41I 30068548, Change 41I 30069327 and Change 41I 30070581 should be GRANTED.

The Department determines the Applicant may for the purposes of Beneficial Water Use Permit No. 41I 30068548 divert water from a groundwater source, by means of two wells, drilled to the depths of 140 and 150 feet, from January 1 to December at 100 GPM up to 46.76 AF, from points in the NENENW of Section 9, T8N, R3W, for multiple domestic use from January 1 to December 31, and lawn and garden use from April 15 to October 15 on 8.26 acres. The place of use is located in SWSE of Section 4, N2NENW and N2NWNE of Section 9, T8N, R3W,

Jefferson County. The Department determines the Applicant may change a portion of Water Right Claims 41I 118281 00 and 41I 30069586 from the purposes of irrigation and stock to the purpose of mitigation to offset 17.31 AF of depletion to the affected reaches of Clancy Creek and Prickly Pear Creek resulting from Application for Beneficial Water Use Permit 41I 30068548.

Change No. 41I 30069327 and will provide 21.32 GPM up to 14.39 AF from April 15 to October 31 of mitigation water by ceasing irrigation on 11 acres. The place of use and points of diversion for mitigation will be:

<b>Stream Reach</b>	<b>Quarter Section</b>	<b>Section</b>	<b>TWP (N)</b>	<b>RNG (W)</b>
POD on Clancy Creek to Confluence with Prickly Pear Creek	SWNWNW	9	8	3
	N2NWNE	9	8	3
	NWNW	9	8	3
Prickly Pear Creek, from confluence with Clancy Creek to Lump Gulch	W2SE	4	8	3
	NENESE	4	8	3

Change No. 41I 30070581 will provide 3.12 GPM up to 2.92 AF from October 15 to May 15 of mitigation water by reducing the number of stock watering by 473 AU. The place of use and point of diversion for mitigation will be in Prickly Pear Creek in the SE of Section 4, T8N, R3W, Jefferson County.

The Applicant will be subject to the following conditions, limitations or restrictions for Application for Beneficial Water Use Permit 41I 30068548:

**CONDITION**

1. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY

**NOTICE**

This Department will provide public notice of this Combined 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 Combined Application pursuant to §§ 85-2-307, and -308, MCA. If this Combined Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Combined Application as herein approved. If this Combined Application receives a valid objection, the Combined Application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to a combined application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the combined application, the department will grant the combined application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 7<sup>th</sup> day of October 2015.

/Original signed by Bryan Gartland/  
Bryan Gartland, Deputy Manager  
Helena Regional Office  
Department of Natural Resources and Conservation