

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

APPLICATION TO CHANGE WATER)	
RIGHT NO. 76H-30068632 BY KAY E.)	PRELIMINARY DETERMINATION TO
AND RANDOLPH S. CREECH)	GRANT CHANGE

On April 16, 2014, Kay E. and Randolph S. Creech Co-Trustees (Applicant) submitted Application to Change Water Right No. 76H-30068632 to change Water Right Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated June 10, 2014. The Applicant responded with information dated July 25, 2014. The Application was determined to be correct and complete as of November 7, 2014.

The Department met with the Applicant (Randy Creech), Applicant’s representative (Karl Uhlig), and Ranch Manager (Mike Bradt) on December 16, 2014. The Applicant requested additional time to provide information and submitted a waiver of the timelines in §85-2-307, MCA on December 16, 2014. An Environmental Assessment for this Application was completed on May 12, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application to Change a Water Right, Form 606
- Attachments
- Maps
 - Aerial photos depicting points of diversion and irrigated acres for the water rights proposed for change as well as the proposed reduction in irrigated acres, new point of diversion, and proposed new place of use under the proposed change
 - US Farm Service Agency (FSA) map showing historic irrigated acres

- Historic use description of all water rights proposed for change and supplemental water right Statement of Claim No. 76H-215671-00

Information Received after Application Filed:

- Affidavit from Andrew Longley dated April 7, 1982 regarding the diversion of water from Sawmill Creek starting in 1922
- Affidavit of Water Use from Andrew Longley dated February 5, 1997 supporting location of an irrigation ditch on Sawmill Creek
- Velocity Discharge Measurement Sheet for Claremont Creek below the culvert, dated May 12, 2014

Information within the Department's Possession/Knowledge

- 1958 Ravalli County Water Resources Survey (WRS)
- Change Application File No. 76H-1974599
- Water Right Claim File Nos. 76H-19742-00, 76H-19745-00, and 76H -215672-00
- Amendment for Statement of Claim No. 76H-19742-00 dated March 11, 2015
- Environmental Assessment dated May 12, 2015

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change a portion of Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00. Statement of Claim No. 76H-19742-00 is for 1.80 cubic feet per second (CFS) from Burnt Fork Creek for the purpose of flood irrigation from March 15 to October 15, with a priority date of June 1, 1871. Statement of Claim No. 76H-19745-00 is for 5.88 CFS from Burnt Fork Creek for the purpose of flood irrigation from March 15 to October 15, with a priority date of April 1, 1864. Statement of Claim No. 76H-215672-00 is for 5.00 CFS from Claremont Creek for the purpose of sprinkler/flood irrigation from April 15 to October 15, with a priority date of December 31, 1863 and an enforceable priority date of June 30, 1973.

Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 share the same 196 acre place of use while Statement of Claim No. 76H-215672-00 irrigates 141 acres that overlap the 196-acre place of use for the other two water rights. The points of diversion and places of use for these water rights are all located within Sections 10, 11, 13, and 14, T8N. R19W, Ravalli County. The place of use is located approximately 7.5 miles southeast of the town of Stevensville, MT. The elements of the water rights proposed to be changed are presented in the following table:

STATEMENT OF CLAIM NO.	FLOW RATE	PURPOSE	PERIOD OF USE	PLACE OF USE	POINTS OF DIVERSION	SOURCE	PRIORITY DATE
* 76H-19742-00	1.80 CFS	Flood Irrigation	03/15 – 10/15	196 acres in Sections 10, 11, 13, and 14, T8N, R19W	1. SENWNE Section 14, T8N, R19W 2. NWNWSW Section 11, T8N, R19W 3. SENWSW Section 13, T8N, R19W 4. SWNWNE Section 14, T8N, R19W	Burnt Fork Creek	06/01/1871
76H-19745-00	5.88 CFS	Flood Irrigation	03/15 – 10/15	196 acres in Sections 10, 11, 13, and 14, T8N, R19W	1. SWNESW Section 11, T8N, R19W 2. SENWSW Section 13, T8N, R19W 3. SWNWNE Section 14, T8N, R19W 4. NWSENE Section 14, T8N, R19W 5. SESESW Section 11, T8N, R19W	Burnt Fork Creek	04/01/1864
76H-215672-00	5.00 CFS	Sprinkle/Flood Irrigation	04/15 – 10/15	141 acres in Sections 3, 10, and 11, T8N, R19W	1. NESWNE Section 11, T8N, R19W • Off-Stream Reservoir: SWNESW Section 11, T8N, R19W	Claremont Creek	12/31/1863 Enforceable: 6/30/1973

* The flow rate for Statement of Claim No. 76H-19742-00 was amended from 1.88 CFS down to 1.80 CFS on March 11, 2015.

2. Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00 have two supplemental water rights that serve portions of the same place of use. Statement of Claim No. 76H-19743-00 diverts water from Haacke Creek for flood irrigation of 39 acres. Per information provided by the Applicant, this water right is not used to irrigate land west of the ranch access road and is therefore not considered supplemental to the water rights proposed for change. This

information provided by the Applicant is not consistent with the elements of the water right as presented in the summary report provided to the Montana Water Court for subbasin 76HA. Although Haacke Creek water is not used on the 10 acres in Section 14, the Applicant has chosen not to amend the place of use to match the historic use description provided in the change application materials submitted. The Department will limit any future changes to Statement of Claim No. 76H-19743-00 to the 29 acres east of the ranch access road as described by the Applicant. Haacke Creek water is not commingled with Burnt Fork water. Statement of Claim No. 76H-215671-00 is a groundwater well that provides sprinkler irrigation on 30 acres and is considered in the historic use analysis. Elements of Statement of Claim No. 76H-215671-00 are as follows:

W.R. NO.	FLOW RATE	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT OF DIVERSION	SOURCE	PRIORITY DATE
76H-215671-00	260 GPM	Irrigation	3/15 – 10/15	30 acres	SESESW Section 11, T8N, R19W	Groundwater	4/15/1959 Enforceable: 6/30/1973

3. Statement of Claim No. 76H-19745-00 has a prior Change Authorization (No. 76H-1974599), approving a change in point of diversion from the NWNWNE of Section 14, T8N, R19W to the SESESW of Section 11, T8N, R19W. The change was completed on August 2, 1978. This water right has additional points of diversion that were not included in the change authorization.

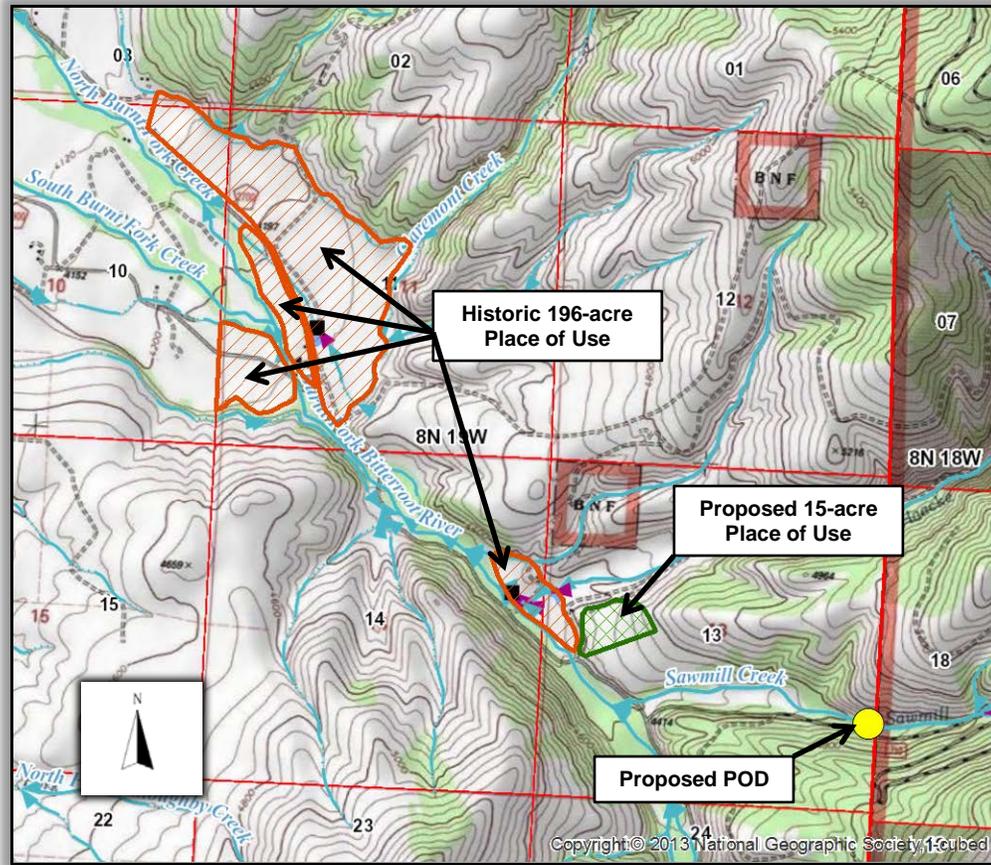
4. On March 11, 2015, the Applicant amended the flow rate for Statement of Claim No. 76H-19742-00 to resolve a decree exceedance issue. The flow rate was amended down from 1.88 CFS to 1.80 CFS in order to reflect the historic flow rate for their claimed place of use. This amendment was taken into account when calculating water availability for this change.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to add an additional point of diversion, add a source, and change a portion of the place of use for Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00, changing 224.4 gallons per minute (GPM) up to 16.2 acre-feet (AF) for the purpose of late season irrigation on 15 acres southeast of the current place of use. The Applicant will discontinue irrigation of 5.2 acres in the SWNW and NWSW and 9.8 acres in the SWNE, SENW, and NESW, all in Section 11, T8N, R19W in order to provide irrigation to 15 acres in the NESW, SENW, NWSW, and SWNW of Section 13, T8N, R19W. The Applicant proposes to divert water from Sawmill Creek, a tributary to Burnt Fork Creek, and apply water to the 15-acre field from an existing point of diversion in the SENESE of Section 13, T8N, R19W from July 15th until September 15th, annually. Statement of Claim No. 76H-19744-00 will continue to be used at the proposed 15-acre place of use until it is out of priority, after which the water rights proposed for change will be used to irrigate the Sawmill Creek field one to three additional times.

6. Sawmill Creek is a tributary of Burnt Fork Creek; it flows into the Burnt Fork approximately 2 miles upstream from the current place of use and is managed by the commissioner as part of the Burnt Fork Creek system. Sawmill Creek water will not be comingled with any other water and the purpose will remain irrigation of alfalfa hay. Water from the Statements of Claim proposed for change will only be diverted from Sawmill Creek to irrigate the proposed 15-acre place of use when 76H-19744-00 is out of priority.



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

7. 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.

8. The burden of proof in a change proceeding by a preponderance of evidence is "more probably than not." Hohenlohe ¶¶ 33, 35.

9. 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); Hohenlohe ¶ 43; 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 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).

10. Montana’s change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

¹ 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) (italics added).

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 Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has

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).

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.

11. 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*).

12. 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.

13. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Hohenlohe ¶ 43; 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).

14. 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.

15. 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 adopted by 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) . 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.

2 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.

16. 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).

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

Historic Use:

FINDINGS OF FACT

18. The Applicant proposes to add an additional point of diversion and change a portion of the place of use to Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00 in order to provide late season irrigation to a 15-acre field approximately 1.5 miles southeast of the current place of use. The Applicant proposes to reduce the combined flow rate and diverted volume of these three water rights by 224.4 GPM and 16.2 AF, respectively, no longer irrigating 15 acres under the historic use practice and instead providing water to the proposed 15-acre field from July 15th through September 15th.

Place of Use

19. The claimed place of use for Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 includes 196 acres, generally located in the NENE of Section 10, the W2 and SWSWNE of Section 11, the NWSW and SWNW of Section 13, and the SENE of Section 14, all in T8N, R19W, Ravalli County. The Applicant provided a Farm Service Agency (FSA) map from the mid-1990's to document historic irrigated acres; however, the black and white map does not

clearly reveal the extent of the claimed acreage and the date of the map does not support use prior to 1973. The USDA Aerial Photo dated August 16, 1979 displays a maximum of 196 acres irrigated and DNRC examination reports show a maximum of 197.1 acres irrigated from the 1979 aerial photo. WRS maps show 204 acres as irrigated. The Department finds 196 acres of irrigation for Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 per aerial photo evidence, Water Resources Survey information, and examination report findings.

20. The claimed place of use for Statement of Claim No. 76H-215671-00 is 141 acres, generally located in the SWSESE of Section 3, the NENE of Section 10, and the W2 and SWSWNE of Section 11 all in T8N, R19W, Ravalli County. The USDA Aerial Photo dated August 16, 1979 displays a maximum of 141 acres irrigated and examination reports show a maximum of 145.3 acres irrigated from the 1979 aerial photo. WRS maps show 151.8 acres as irrigated. The 141-acre field is located entirely within the 196 acre place of use for Statement of Claim Nos. 76H-19742-00 and 76H-19745-00. The Department finds 141 acres of irrigation for Statement of Claim No. 215671-00 per aerial photo evidence, Water Resources Survey information, and examination report findings.

21. Within the 196-acre place of use, the Department finds 94 acres of wheel line sprinkler irrigation and 102 acres of flood irrigation per the 1979 aerial photo.

Point of Diversion and Conveyance Facilities

22. The Applicant provided maps showing the various points of diversion for Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 identified in Finding of Fact (FOF) No. 1, of which the headgate to Sunset Highline ditch located in the NWNE of Section 14, T8N, R20W is the primary point of diversion for both water rights. Water is diverted into the Sunset Highline ditch through a flat steel headgate with an opening measuring 5' 10" wide by 4.0' tall and attached to a 4-foot squashed corrugated metal pipe. The ditch is trapezoidal with an 8-foot wide bottom, 10-foot wide top and a depth of 2.5 feet. Below the headgate but above the siphon there is a 4-foot Parshall flume; water marks on the flume indicate a high water line near the 1.4'-1.5' level and calculations show that a 4-foot Parshall flume with a water depth of 1.5 feet is carrying 30.34 CFS. Approximately ½-mile down from the headgate, irrigation water for the Burnt Fork Ranch is diverted into a 12-inch steel pipe. The pipe conveys water to a pump house where three

pumps are located; one, two, or all three pumps may be used to deliver water to the adjacent fields for sprinkler irrigation in any given year. The sprinkler irrigation system was installed prior to 1973. Ditches originating from additional points of diversion identified on the water rights are also utilized to convey water to the place of use, including the 17-acre field located in Sections 13 and 14, which is unable to receive water from the Sunset Highline ditch system.

23. The point of diversion for Statement of Claim No. 76H-215672-00 is located on Claremont Creek, a tributary to Burnt Fork Creek, immediately above the place of use for irrigation. Claremont Creek water was historically delivered to the fields via gravity fed sprinklers and direct flow ditches. Water was also historically re-routed around the east side of the field to keep irrigated grounds from becoming too wet and unworkable; water diverted around the field was then delivered to a small reservoir to the southwest of the irrigated fields where it was stored and used for irrigation.

Flow Rate

24. The claimed flow rate for Statement of Claim No. 76H-19742-00 is 1.88 CFS. On March 11, 2015, the Applicant amended this flow rate down to 1.80 CFS to accurately reflect the historic flow rate for their claimed place of use and resolve a decree exceedance issue. The Applicant is able to divert 1.80 CFS through the four points of diversion claimed, one of which includes the Sunset Highline ditch.

25. The claimed flow rate for Statement of Claim No. 76H-19745-00 is 5.88 CFS which the Applicant is able to divert through the five points of diversion claimed. The flow rate for this Burnt Fork Creek water right is primarily diverted into the Sunset Highline ditch system along with the 1.80 CFS flow rate from Statement of Claim No. 76H-19742-00; the Sunset Highline ditch can easily accommodate the full flow rate of both water rights.

26. The claimed flow rate for Statement of Claim No. 76H-215672-00 is 5.00 CFS which was diverted from a single headgate located in the NESWNE of Section 11, T8N, R19W and delivered to fields via gravity fed sprinklers, direct flow ditches, and from the reservoir southwest of the irrigated field. This water right is the only one to claim a flow rate from

Claremont Creek and is managed by the Burnt Fork water commissioner as part of the Burnt Fork system. The system has the capacity to utilize the entire 5.00 CFS flow rate.

27. The combined flow rate for Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 is 7.68 CFS. The Sunset Highline ditch capacity is estimated at 45 CFS. Although the Sunset Bench irrigation district has multiple water users that utilize the Sunset Highline ditch for delivery purposes, the high water marks on the canal flume are the best indication of typical operation flows and not the maximum capacity. Due to the location of the high water line mark below the maximum carrying capacity of the Sunset Highline delivery systems and additional points of diversion claimed, the Department finds that historic delivery of the combined 7.68 CFS is reasonable and believable.

28. The Department finds that the historic flow rates for Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00 are 1.80 CFS, 5.88 CFS, and 5.00 CFS, respectively.

Period of Diversion/Diverted Volume

29. The claimed period of diversion and period of use for Statement of Claim Nos. 76H-19742-00 and 76H-215672-00 is April 15th to October 15th; the period of diversion and period of use for Statement of Claim No. 76H-19745-00 is March 1st to November 30th. On March 12, 2015, the DNRC adjudication staff changed the period of diversion for Statement of Claim No. 76H-215672-00 to year-round and added reservoir information. The year-round period of diversion is required per Montana Supreme Court claim examination rules for irrigation rights that incorporate an on-stream reservoir. Applicant did not provide any information regarding a year-round period of diversion or the use of a reservoir in the change application materials. Review of the 1979 USDA aerial photo and the reservoir record in the claim file corroborate the existence of the reservoir on Claremont Creek. Due to the fact that the reservoir is located on-stream, the Department finds that the year-round period of diversion is reasonable; however, water is only diverted from the source for the purpose of irrigation during April 15th to October 15th. The reservoir consists of a 10-foot high earthen dam that creates a pond that is 1.5 surface acres, 7-feet deep, and has a holding capacity of 4.2 AF. Although the periods of diversion and use do not fall within the standard growing season of April 15th to October 15th for Climatic Area

III where the place of use is located (ARM 36.12.112), the Applicant indicates in their narrative that the sprinkler system is generally not turned on until mid-April and on some years water is delivered into mid-September. The sprinkler system is turned off around July 1st each year for harvest which takes 5-7 days, after which it is turned back on until the water rights are out of priority. Alfalfa is stored in silage bags and does not require complete drying which allows for a shorter period of non-diversion.

30. The Applicant supplied records from the water commissioner showing water use in various years between 1962 and 2003; however, the records primarily show water distribution in the months of July through mid-September as the commissioner generally discontinued regulating the Burnt Fork system by September 1st of each year. The Applicant states that although their Burnt Fork rights generally get shut off between mid- to late-August and early September, there are years where water is delivered into mid-September.

31. The Applicant calculated a total diverted volume of 1,573.2 AF for the four water rights used to irrigate the 196-acre place of use; this includes the three water rights proposed for change in addition to Statement of Claim No. 76H-215671-00 which historically flood irrigated up to 30 acres within the 196-acre place of use. The Applicant based their findings upon what they describe as a “typical water year” and utilized water commissioner records, flow rates, and water right periods of use to arrive at total diverted volume for each water right. The Department utilized the Applicant’s findings and applied the percentages of water per water right historically used to the total diverted volume arrived at through consideration of consumptive use totals and system efficiencies for flood and sprinkler irrigation. The efficiency of the sprinkler system used to irrigate 94 acres within the 196-acre place of use and utilized prior to 1973 is 70%. Efficiency of the flood irrigation system used to irrigate 102 acres within the 196-acre place of use and utilized prior to 1973 is based off of the Montana Irrigation Guide and soil type found in the area and is 50%. Utilizing the consumptive use total for each water right as determined in FOF No. 35 and system efficiencies for flood and sprinkler irrigation, the Department finds the total diverted volume for the four water rights used to irrigate the 196-acre place of use to be 430.1 AF (170.7 AF + 259.4 AF = 430.1 AF).

- Sprinkler irrigation: $119.5 \text{ AF} \div 0.7 = 170.7 \text{ AF}$
- Flood irrigation: $129.7 \text{ AF} \div 0.50 = 259.4 \text{ AF}$

32. Using the percentage of diverted water calculated for each water right while taking into consideration the irrigation methods utilized within the 196-acre place of use (flood and sprinkler), the Department calculated the diverted volume attributed to each water right; adjustments were made to the figures following the March 11, 2015 amendment to the flow rate for Statement of Claim No. 76H-19742-00. The Department calculates the following diverted volume totals for each of the four water rights:

- Statement of Claim No. 76H-19742-00: **66.6 AF** for 94 acres of sprinkler irrigation and 102 acre of flood irrigation
- Statement of Claim No. 76H-19745-00: **293.4 AF** for 94 acres of sprinkler irrigation and 102 acre of flood irrigation
- Statement of Claim No. 76H-215672: **68.7 AF** for 94 acres of sprinkler irrigation and 47 acres of flood irrigation
- Statement of Claim No. 76H-215671-00 (calculated to determine extent of supplemental relationship): 1.1 AF for 30 acre of sprinkler irrigation

33. Per acre historic diverted volume for flood irrigation is 2.54 AF. Historic diverted volume at the 15 flood irrigated acres is 38.1 AF ($2.54 \text{ AF/ac} \times 15 \text{ acres} = 38.1 \text{ AF}$). Applying the percentages provided by each water right, the Department calculates the following diverted volume totals for each of the four water rights that irrigate the 15-acre place of use that will be taken out of production:

- Statement of Claim No. 76H-19742-00: **5.9 AF** for 15 acres of flood irrigation
- Statement of Claim No. 76H-19745-00: **26.0 AF** for 15 acres of flood irrigation
- Statement of Claim No. 76H-215672: **5.8 AF** for 9.8 acres of flood irrigation
- Statement of Claim No. 76H-215671-00 (calculated to determine extent of supplemental relationship): 0.4 AF for 9.8 acre of flood irrigation

Consumptive Use

34. The Department calculated historic consumptive use using data from the nearest weather station and monthly Irrigation Water Requirement (IWR) values for flood irrigation and wheeline, derived from data inputs used in the development of seasonal irrigation values provided in ARM 36.12.1902(16). Consumptive use figures are based on the Applicant's

claimed 196 acres of historic irrigation, the Stevensville weather station IWR value of 19.19 inches, Ravalli County management factor of 79.5%, and irrecoverable losses attributed to the irrigation method: 5% of total diverted volume for flood irrigation and 10% of total diverted volume for sprinkler.

35. Per ARM 36.12.1904(16), the volume of water that is consumptively used at the 196-acre place of use is 249.2 AF ($19.19 \text{ in} \times 1 \text{ ft}/12 \text{ in} \times 196 \text{ ac} \times 0.795 = 249.2 \text{ AF}$). Irrecoverable losses, which are calculated as a percentage of the diverted volume, are 17.1 AF for the 94 acres of sprinkler irrigation ($170.7 \text{ AF} \times 0.10 = 17.1 \text{ AF}$) and 13.0 AF for the 102 acres of flood irrigation ($259.4 \text{ AF} \times 0.05 = 13.0 \text{ AF}$). Total consumptive use at the 196-acre place of use for the three water rights proposed for change and one supplemental water right is 279.3 AF ($249.2 \text{ AF} + 17.1 \text{ AF} + 13.0 \text{ AF} = 279.3 \text{ AF}$).

36. To calculate the total consumptive volume associated with each water right, the same percentages arrived at for the purpose of assessing total diverted volume per water right were applied to consumptive use totals. The Department calculates the following consumptive use totals for each of the four water rights:

- Statement of Claim No. 76H-19742-00: **42.7 AF** for 94 acres of sprinkler irrigation and 102 acre of flood irrigation
- Statement of Claim No. 76H-19745-00: **188.1 AF** for 94 acres of sprinkler irrigation and 102 acre of flood irrigation
- Statement of Claim No. 76H-215672: **48.0 AF** for 94 acres of sprinkler irrigation and 47 acres of flood irrigation
- Statement of Claim No. 76H-215671-00 (calculated to determine extent of supplemental relationship): 0.6 AF for 30 acre of flood irrigation

37. Per acre historic consumptive use for flood irrigation is 1.40 AF. Historic consumptive use at the 15 flood irrigated acres is 21.0 AF (1.40 AF/ac × 15 acres = 21.0 AF). Applying the percentages provided by each water right, the Department calculates the following consumptive use totals for each of the four water rights that irrigate the 15-acre place of use that will be taken out of production:

- Statement of Claim No. 76H-19742-00: **3.2 AF** for 15 acres of flood irrigation
- Statement of Claim No. 76H-19745-00: **14.3 AF** for 15 acres of flood irrigation
- Statement of Claim No. 76H-215672: **3.2 AF** for 9.8 acres of flood irrigation
- Statement of Claim No. 76H-215671-00 (calculated to determine extent of supplemental relationship): 0.2 AF for 9.8 acre of flood irrigation

38. For purposes of this Change Application, the Department finds the following historic use for Statement of Claim Nos. 76H-19742-00, 76H-19745-00, 76H-215672-00, and supplemental water right no. 76H-215671-00:

<u>STATEMENT OF CLAIM NO.</u>	<u>SOURCE</u>	<u>PRIORITY DATE</u>	<u>DIVERTED VOLUME</u>	<u>FLOW RATE</u>	<u>TOTAL ACRES</u>	<u>CONSUMPTIVE USE</u>
76H-19742-00	Burnt Fork Creek	06/01/1871	66.6 AF	1.80 CFS	196 Acres	42.7 AF
76H-19745-00	Burnt Fork Creek	04/01/1864	293.4 AF	5.88 CFS	196 Acres	188.1 AF
76H-215672-00	Claremont Creek	12/31/1863 Enforceable: 6/30/1973	68.7 AF	5.00 CFS	141 Acres	48.0 AF
<u>STATEMENT OF CLAIM NO.</u>	<u>SOURCE</u>	<u>PRIORITY DATE</u>	<u>DIVERTED VOLUME</u>	<u>FLOW RATE</u>	<u>TOTAL ACRES</u>	<u>CONSUMPTIVE USE</u>
<u>Supplemental WR</u> 76H-215671-00	Groundwater	4/15/1959 Enforceable: 6/30/1973	1.1 AF	260 GPM	30 Acres	0.6 AF

CONCLUSIONS OF LAW

39. 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. An applicant can change only that to which it has a perfected right. E.g., McDonald, 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. 139988-40A, 139989-40A, 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).

40. 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, reflecting basic water law principles).

41. 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.

42. 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).

43. 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 (16)

44. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., *Application for Water Rights in Rio Grande County* 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision

adopted by 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”).

45. 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)).

46. “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 (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 (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.

47. 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.

48. 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. File

49. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H-19742-00 of 66.6 AF diverted volume and 1.80 CFS flow rate with a consumptive use of 42.7 acre-feet. (FOF No. 24, 27, 28, 31-37)

50. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H-19745-00 of 293.4 AF diverted volume and 5.88 CFS flow rate with a consumptive use of 188.7 acre-feet. (FOF No. 25, 27, 28, 31-37)

51. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H-215672-00 of 68.7 AF diverted volume and 5.00 CFS flow rate with a consumptive use of 48.0 acre-feet. (FOF No. 26-28, 31-37)

Adverse Effect:

FINDINGS OF FACT

52. The Applicant proposes to add a point of diversion and change a portion of their place of use for Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00. This point of diversion will be located on Sawmill Creek, a tributary to Burnt Fork Creek, in the SENESE of Section 13, T8N, R19W, Ravalli County; the existing points of diversion for the water rights proposed for change will continue to be used as needed. The number of historically irrigated acres serviced by each of the water rights proposed for change will remain the same; however, 15 acres of flood irrigation will be removed from the current place of use and mid- to late-season sprinkler irrigation will be provided to 15 acres currently irrigated with water from Statement of Claim No. 76H-19744-00 from Sawmill Creek. The proposed change is for 224.4 GPM up to 16.2 AF.

Point of Diversion

53. Water from Sawmill Creek is tributary to the Burnt Fork Creek system and is managed by the water commissioner as part of the same system; senior water right holders can make call on junior water right holders of waters tributary to the Burnt Fork Creek system and upstream from their points of diversion. There is one water right on Sawmill Creek that is not owned or co-owned by the Applicant: Statement of Claim No. 76H-99248-00. This water right has a priority date of December 31, 1922 which is junior to the water rights proposed for change. As the Applicant can make call on this tributary source to service the 15-acre parcel that is being taken out of production, the proposed point of diversion change, diverting water from Sawmill Creek instead of Burnt Fork Creek, will not adversely affect the junior water right user on Sawmill Creek.

54. Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 have priority dates of June 1, 1871 and April 1, 1864, respectively. Statement of Claim No. 76H-215672-00 has a claimed priority date of December 31, 1863; however, the enforceable priority date for this Statement of Claim is June 30, 1973 due to a late claim filing. Due to the enforceable priority date of Statement of Claim No. 76H-215672-00 being junior to the other user on Sawmill Creek, this water right is not available to irrigate the new 15-acre place of use. Non-use of this water at both the historic 15-acre place of use and the proposed 15-acre place of use will ensure that there is no adverse effect from expansion of the water right at its historic place of use and no adverse effect to the more senior rights on Sawmill Creek.

Diverted Volume

55. The proposed period of diversion for the new 15-acre place of use is July 15th through September 15th, annually. Based on the NRCS irrigation water requirements of 9.43 inches per acre for the requested period of diversion, a 96.1% management factor for proposed new uses, and 70% sprinkler efficiency, the Applicant is requesting a total diverted volume of 16.2 AF ($9.43 \text{ in/ac} \times 1 \text{ ft/12 in} \times 15 \text{ ac} \times 0.961 = 11.33 \text{ AF}$; $11.33 \text{ AF} \div 0.70 = 16.2 \text{ AF}$). Discontinuing flood irrigation at the historic 15-acre place of use will reduce the diverted volume requirement by 38.1 AF ($2.54 \text{ AF/ac} \times 15 \text{ ac} = 38.1 \text{ AF}$), of which Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 account for 31.9 AF. The Department finds that there will be an overall

reduction of 22.0 AF in diverted volume ($38.1 \text{ AF} - 16.1 \text{ AF} = 22.0 \text{ AF}$) and that the volume being requested is available for the proposed change.

56. Diversion of the requested 16.2 AF of water from Sawmill Creek will not adversely affect other water users as this water is managed as part of the Burnt Fork Creek water system and is operated based on order of priority. This water will continue to be managed by the water commissioner at the new place of use and will remain subject to call in the event that it is out of priority.

Consumptive Use

57. Due to the reduced period of use requested as part of the proposed change, new consumptive use is calculated based on the irrigation water requirement of 9.43 inches per acre for the requested period of diversion, a 96.1% management factor for the proposed new use, and a 10% irrecoverable loss calculated as a percentage of the diverted volume ($16.2 \text{ AF} \times 0.10 = 1.62 \text{ AF}$). The new consumptive use is calculated to be 13.0 AF ($9.43 \text{ in/ac} \times 12 \text{ in/ac} \times 15 \text{ ac} \times 0.961 = 11.33 \text{ AF}$; $11.33 \text{ AF} + 1.62 \text{ AF} = 13.0 \text{ AF}$). Discontinuing flood irrigation at the historic 15-acre place of use will reduce the total consumed volume by 21.0 AF ($1.40 \text{ AF/ac} \times 15 \text{ ac} = 21.0 \text{ AF}$). Based on the percentage of consumptive use calculated for each of the water rights that historically serviced the 15-acre place of use, Statement of Claim Nos. 76H-19742-00 and 76H-19745-00 account for 17.5 AF. The Department finds that consumptive use will decrease by 8.0 AF ($21.0 \text{ AF} - 13.0 \text{ AF} = 8.0 \text{ AF}$) and that the 13.0 AF of consumptive use being requested is available for the proposed change.

Flow Rate

58. The flow rate per acre at the historically irrigated 196-acre place of use comes from a combination of four water rights: Statement of Claim Nos. 76H-19742-00, 76H-19745-00, 76H-215672-00, and 76H-215671-00. The combined flow rate for these water rights is 13.26 CFS (5,950 GPM). This amounts to a flow rate of 30.4 GPM per acre; higher flow rates would have been utilized for flood irrigated acres and lower flow rates for sprinkler irrigated acres. Although all of the water rights may not have been available throughout the entire irrigation season due to priority, the Department recognizes through aerial photos that adequate water was supplied to the 196-acre place of use for irrigation. The proposed flow rate of 224.4 GPM amounts to 15 GPM

per acre. The Department finds that a reduction in the flow rate required for irrigation from July 15th through September 15th annually will not adversely affect other irrigators on the system or prohibit the Applicant from continuing to irrigate the remaining 181 acres.

Measurements

59. The water commissioner will continue to measure and record water delivery for the water rights proposed for change. The water rights will continue to be managed based on priority dates and availability within the Burnt Fork Creek system; the commissioner keeps track of water deliveries on a daily basis.

CONCLUSIONS OF LAW

60. 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).

61. 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, where 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 deprived the plaintiff of his subsequent right).

62. 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.

63. 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 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); *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).

64. 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 a water right and an appropriator 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, ¶¶ 22, 31,43, *citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, supra.

65. 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., Hohenlohe, supra; *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. The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

66. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA.(FOF Nos. 52-59)

Beneficial Use

FINDINGS OF FACT

67. Applicant proposes to permanently remove 15 acres of flood irrigation and add a point of diversion and new 15-acre place of use to Statement of Claim Nos. 76H-19742-00, 76H-19745-00 and 76H-215672-00. The flow rate and maximum diverted volume for sprinkler irrigation is within the Irrigation Water Requirements for the stated purpose of alfalfa irrigation during the reduced period of use, July 15th through September 15th. The Department found historic consumptive use at the 15 acres to be 20.7 AF and finds that Applicant's proposed consumptive use of 13.0 AF is available for the stated purpose. This amount is supported by FOF No. 57.

68. The Department finds irrigation to be a beneficial use under § 85.2.102(4)(a), MCA. The requested flow rate of 224.4 GPM and diverted volume of 16.2 AF are reasonable for the intended beneficial use.

CONCLUSIONS OF LAW

69. 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.

70. 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; 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); see also §85-2-312(1) (a), MCA.

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. The Department can also consider waste in a change proceeding. Hohenlohe ¶ 71. 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.

71. 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).

72. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 16.2 AF of diverted volume and 224.4 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 67, 68)

Adequate Diversion

FINDINGS OF FACT

73. Applicant seeks to add a point of diversion and change the location of 15 acres of irrigation for Statement of Claim Nos. 76H-19742-00, 76H-19745-00 and 76H-215672-00. This change seeks to remove 15 acres of flood irrigation from the historic place of use in order to provide partial season sprinkler irrigation to a 15-acre field that receives water from a junior water right on Sawmill Creek in the Burnt Fork Creek system. The diversion from Sawmill Creek is currently in use and delivers Statement of Claim No. 76H-19744-00 water to the 15-acre place of use for irrigation until it is out of priority.

74. The diversion on Sawmill Creek was updated in 2013. The old system utilized a headgate, open ditch, and gravity feed hand-line to deliver water to the place of use. During the update in 2013, the headgate was replaced and the open ditch delivery system was replaced with sections of 6- and 8-inch PVC that deliver water from the headgate via gravity to the irrigated field. The existing hand-line sprinkler system is still in use and will continue to be used following this change.

75. The water commissioner on the Burnt Fork Creek system requires the Applicant to install a measuring device at the Sawmill headgate. The measuring device will allow the water commissioner to regulate the flow rate and manage the water rights as part of the overall Burnt Fork Creek system, delivering water in order of priority and during the appropriate periods of diversion. Statement of Claim No. 76H-91744-00 has a flow rate of 442 GPM that is diverted to the field through the same headgate and delivery system that will be utilized as part of this change. The headgate will be adjusted to allow a flow rate of 224.4 GPM to be delivered from July 15th through September 15th, annually. When the water rights proposed for change are out of priority in the Burnt Fork Creek system, the water commissioner can eliminate diversions on Sawmill Creek by closing the headgate.

CONCLUSIONS OF LAW

76. 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.

77. 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).

78. 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. (FOF Nos. 73-75).

Possessory Interest

FINDINGS OF FACT

79. The applicant signed and had the affidavit on the application form notarized affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

80. 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.

81. 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.

82. 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. (FOF No. 79)

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00 should be **GRANTED** subject to the following:

Applicant may permanently add a point of diversion and change 15 acres of their place of use for Statement of Claim Nos. 76H-19742-00, 76H-19745-00, and 76H-215672-00. The Applicant will permanently change the place of use from 5.2 acres in the SWNW and NWSW and 9.8 acres in the SWNE, SENW, and NWSW, all in Section 11, T8N, R19W to provide irrigation to 15 acres in the NESW, SENW, NWSW, and SWNW of Section 13, T8N, R19W. The additional point of diversion is located in the SENESE of Section 13, T8N, R19W. Applicant can divert 224.4 GPM up to 16.2 AF diverted volume from Sawmill Creek from July 15th through September 15th, annually.

NOTICE

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

DATED this 24th day of June, 2015.

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