

acres and proposed new place of use for marketing for mitigation under the proposed change

Information Received after Application Filed:

- Deficiency response dated and received by the department on May 6, 2015
- Waiver of Statutory Timeline for Preliminary Determination dated December 2, 2015. 2014

Information within the Department’s Possession/Knowledge

- 1958 Ravalli County Water Resources Survey (WRS)
- Change Application File No. 76H-30063540
- Water Right Claim File Nos. 76H76H-105162-00, 76H-105163-00, 76H-105164-00, 76H-105165-00 and 76H-214431-00
- Return Flow Policy Memo dated April 1, 2016
- Environmental Assessment dated June 20, 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. The underlying water rights proposed to be changed are Statements of Claim filed in Montana’s general stream adjudication. The following Table 1 displays elements of the water rights as *claimed*.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

W.R. NO. 76H	SOURCE	FLOW	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
105162 Maloney	Miller Cr	4.19C	Irrigation 413 ac	4/1 to 10/31	See Map D1 Below	See Map D1 Below	June 1, 1877
105163 Maloney	Miller Cr	5.19C	Irrigation 413 ac	4/1 to 10/31	See Map D1 Below	See Map D1 Below	June 7, 1878

105164 Maloney	Miller Cr	6.25C	Irrigation 413 ac	4/1 to 10/31	See Map D1 Below	See Map D1 Below	Sept. 1, 1878
105165 Maloney	Miller Cr	1.25C	Irrigation 413 ac	4/1 to 10/31	See Map D1 Below	See Map D1 Below	May 1, 1889
214431 Maloney	Miller Cr	13.20C	Irrigation 373 ac	4/15 to 7/19	See Map D1 Below	See Map D1 Below	June 30, 1973

CHANGE PROPOSAL

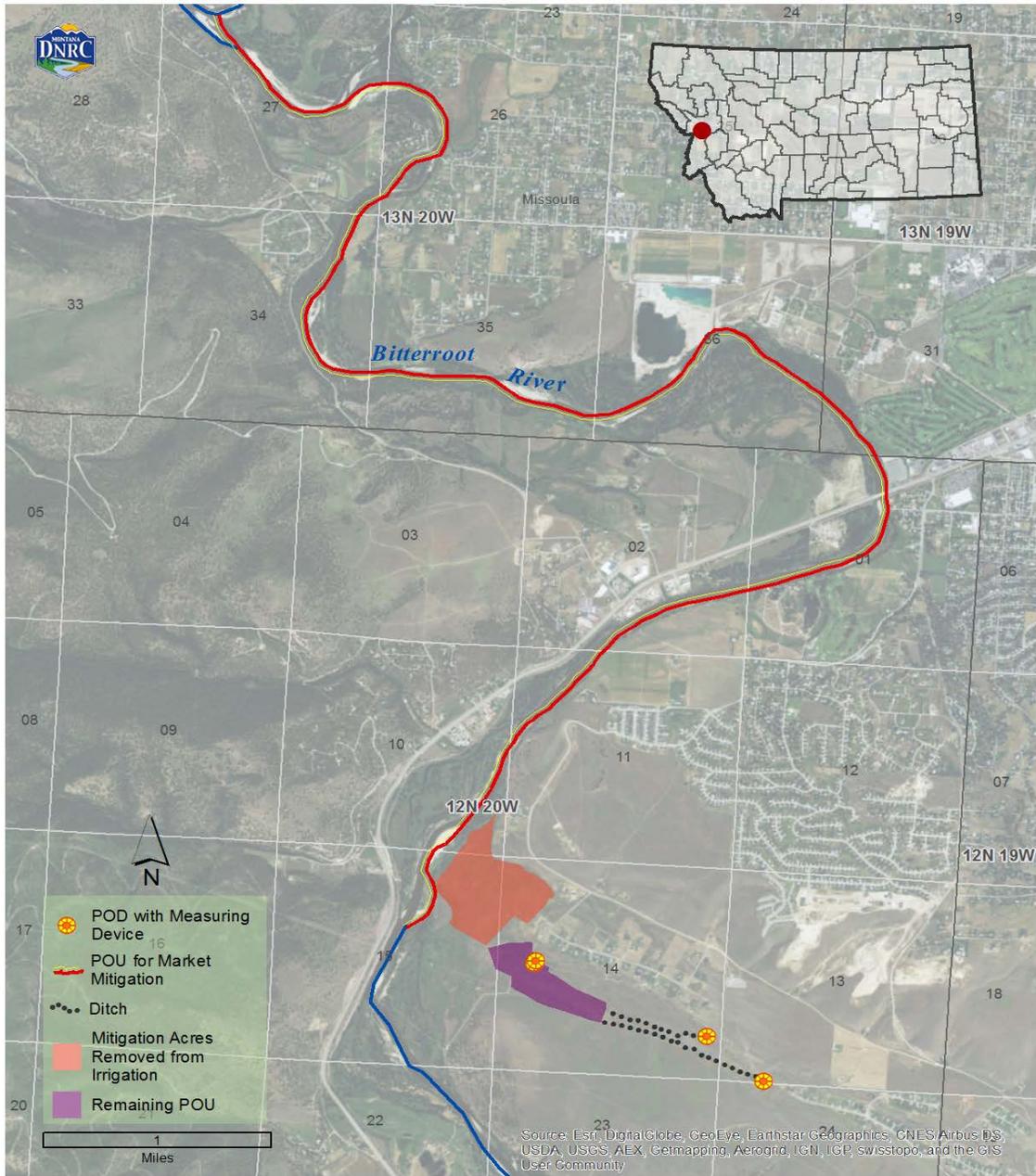
FINDINGS OF FACT

2. This is a change application that proposes to change the purpose and place of use of a set of irrigation water rights with a place of use located in the Miller Creek drainage, a tributary to the Bitterroot River, and generally located near the southerly boundary of the Missoula City Limits. These water rights were the subject of the Applicant’s previous change application number 76H-30063540 which retired 197 acres of irrigation and changed the purpose to mitigation to offset depletions from the Applicant’s permit application number 76H30063539. These applications were submitted simultaneously per the requirements of MCA §85-2-360 for groundwater applications in a closed basin. During public notice of the combined applications an objection was filed by the Montana Department of Fish, Wildlife and Parks (FWP). The Applicant and FWP reached a private agreement resolving the objection that required the Applicant to retire an additional 96.3 acres of irrigation for the purpose of marketing for mitigation. The mitigation water will be used to further offset depletions from the Applicant’s permit application number 76H 30063539. The department issued permit application 76H 30063539 and change application 76H 30063540 on May 6, 2014.

3. For the purpose of this Preliminary Determination water right numbers 76H-105262 00, 105263 00, 105264 00, 105265 00 and 214431 00 are referred to as the Maloney Water Rights. Applicant proposes to change a portion of the Maloney Water Rights, retiring an additional 96.3 acres from the historically irrigated place of use for the new use of marketing for mitigation. The remaining 51.7 acres of the Maloney Water Rights not owned by Mountain Water Company will continue to be used as historically for irrigation.

Map PD-1 inserted below is presented in the Application materials as a depiction of the 96.3 acres no longer irrigated and 51.7 acres that will continue to be irrigated, along with ditches used to serve the 51.7 acres and decommissioned historic headgate(s) where mitigation water will be allowed to remain in Miller Creek.

Map PD-1



4. The place of use for the new purpose of mitigation will be the lower reach of Miller Creek from the historic point of diversion located in the S2SWNW, Section 14, Township 12 N, Range 20W, Missoula County to its confluence with the Bitterroot River and the Bitterroot River from its confluence with Miller Creek to its confluence with the Clark Fork River, a reach of 9.06 miles.

5. To provide the Department annual proof that the mitigation plan is being carried out as described in the application the Applicant will permanently decommission the historic headgate and leave all previously diverted irrigation water in lower Miller Creek. There are no other diversions in this reach of stream ensuring that the mitigation water will reach the Bitterroot River. The Applicant previously agreed to the following condition in the granting of change application number 76H 30063540 and this condition will apply to the subject change:

The Applicant shall provide documentation that lands designated for retirement are no longer irrigated. Documentation of no irrigation may consist of site specific photographs and/or aerial photography. Documentation shall be submitted by November 30 of each year to the Missoula Water Resources Regional Office. Failure to submit reports may be cause for revocation of the authorization.

The Applicant shall measure the amount of water diverted for continued irrigation and the amount of water left in Miller Creek for the purpose of mitigation per the monitoring plan provided in Application to Change a Water No. 76H 30063540. Records shall be submitted by November 30 of each year to the Missoula Water Resources Regional Office and upon request at other times during the year. Failure to submit reports may be cause for revocation of the change authorization. The appropriator shall maintain the measuring devices in proper functioning condition.

§ 85-2-402, MCA, CHANGE CRITERIA

GENERAL CONCLUSIONS OF LAW

6. 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.

7. 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 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).

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

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

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

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.

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).

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 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.

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*).

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.

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

10. 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.

11. 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.

12. 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.

13. 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).

14. 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:

FINDINGS OF FACT

Maloney Water Rights 76H-105262 00, 76H-105263 00, 76H-105264 00,
76H-105265 00 and 76H-214431 00

15. To document historic use of the Maloney Water Rights, the Applicant provided aerial photographs from several years, ditch capacity measurements, Missoula County Water Resource Survey mapping, a report on historical irrigation and affidavits from several past irrigators on the Maloney Ranch. Maloney Water Rights 76H-105262 00, 76H-105263 00, 76H-105264 00, and 76H-105265 00 list the same 413 acre place of use. The place of use for the four Statement of Claims includes lands in Sections 10, 14, 15 and 24, T12N, R20W. Maloney Water Right 76H 214431 00 lists a 373 acre place of use. Water right claim 76H 214431 00 is a high water right, available only during spring runoff, that is supplemental to the ranch's other senior rights and shares the same place of use in Sections 10, 14 and 15.

16. The Maloney Ranch used six ditches to convey water to their claimed 413 acre place of use that was flood irrigated, with the Maloney and Lower Baker ditches being the primary conveyance means used. The Missoula County Water Resource Survey (WRS) map for Township 12 North, Range 20 West shows 150 acres irrigated within the 413 acres claimed. The WRS map is based off a 1955 aerial photograph. Review of the 1955 aerial photograph shows approximately 346 irrigated acres on the Maloney Ranch. The application included a report from December 14, 2009 on historic irrigation, titled "Analysis of Historic Irrigation from Miller Creek" that describes irrigation features on the ground including headgate and ditch locations and historic irrigated acreage based on analysis of aerial photographs from 1940, 1955, 1964 and 1972. Analysis of these historic aerial photographs shows a minimum of 327 irrigated acres on the 1940 aerial photograph to maximum of 355 irrigated acres on the 1964 aerial photograph. For purposes of calculating historic irrigated acres, the Applicant uses an average of the

documented historic irrigated acreage which equals 345 acres. The 197 acres to be changed to mitigation lies wholly within the 345 acres historically irrigated.

17. The Applicant provided a technical memorandum discussing measured ditch capacities with photographs of the six ditches used by the Maloney Ranch. The ditches historically used to serve the 413 acre place of use have a combined capacity of 136.3 CFS, with the main two ditches used by the ranch (Lower Baker and Maloney) having capacities of 37.24 CFS and 38.75 CFS, respectively. The combined claimed flow rate of the Maloney Water Rights is 30 CFS. The Maloney Ranch was the sole user of these ditches with the exception of the Lower Baker ditch which has a total of 17 water rights for a combined flow rate of 36.16 CFS, including the Maloney Water Rights. Affidavits included in the application state that the Lower Baker ditch frequently conveyed 1,100 Miner's Inches, or 28.8 CFS.

18. The Applicant provided a typical diversion schedule for the Maloney Ranch irrigation operation based on the hydrograph for Miller Creek during a normal water year. To define a normal water year, the Applicant took physical stream measurements of Miller Creek at various headgate locations and used this data in conjunction with a regional monthly flow regression equation developed by the USGS to estimate mean monthly flow for Miller Creek. Using the mean monthly flow estimates for Miller Creek, the Applicant was able to estimate the diverted volume of each Maloney Water Right based on priority of the right and the length of time that right was available. The estimation of historic diverted volume using recent flow measurements taken from Miller Creek is appropriate to describe pre July 1, 1973 historic use because the means of diversion and ditches used have not changed since prior to 1973, and the current irrigation practices are the same as the historic irrigation practices.

19. The historic combined diverted volume for the Maloney Water Rights is 3,358 AF, with diversion rates ranging from a low of 5 CFS during August and September to a high of 25 CFS in May. Water was diverted for a maximum of 148 days during the irrigation season with breaks for haying.

20. The Applicant utilized the consumptive use rule found in ARM 36.12.1902 (13) to calculate historic consumptive use. The historic place of use for irrigation is located in Missoula

County, Climatic Area 3. Maximum evapotranspiration based on data from the Missoula airport weather station is 19.45 inches, to which the Applicant applied the 69.5% management factor for Missoula County to arrive at a consumptive use of 1.13 AF/acre ($19.45 \text{ in.} * .695 \div 12 \text{ in.} = 1.13$). The Applicant reported a historic consumptive use of 389.9 AF, which was calculated by multiplying 1.13 AF/acre times the 345 acres historically irrigated. The Applicant provided a consumptive use figure for each water right as is required in ARM 36.12.1902 (10). Based on the typical diversion schedule provided by the Applicant, priority of water rights and monthly evapotranspiration rates obtained from the Natural Resource and Conservation Service IWR program the Applicant calculated historic consumptive use for each of the Maloney Water Rights.

21. I find the following historic use for the Maloney Water Rights:

Table 2: HISTORIC USE

WR # 76H	Source	Priority Date	Diverted Volume	Flow Rate	Total Acres	Consump. Use
105162	Miller Creek	6/1/1877	578 AF	4.19 CFS	345	219.26 AF
105163	Miller Creek	6/7/1878	716 AF	5.19 CFS	345	123.15 AF
105164	Miller Creek	9/1/1878	855 AF	6.25 CFS	345	29.21 AF
105165	Miller Creek	5/1/1889	162 AF	1.25 CFS	345	2.45 AF
214431	Miller Creek	6/30/1973	1047 AF	13.2 CFS	345	15.92 AF
Total			3358 AF	30 CFS	345	389.99 AF

CONCLUSIONS OF LAW

22. 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).

23. 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).

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).

24. 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).

25. 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.

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”).

26. 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).

27. 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.

28. 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.

29. 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. 20)

30. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H 105162 00 of 578 AF diverted volume and 4.19 CFS flow rate with a consumptive use being 219.26 AF. (Finding of Fact Nos. 15 - 21).

31. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H 105163 00 of 716 AF diverted volume and 5.19 CFS flow rate with a consumptive use being 123.15 AF. (Finding of Fact Nos. 15 - 21).

32. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H 105164 00 of 855 AF diverted volume and 6.25 CFS flow rate with a consumptive use being 29.21 AF. (Finding of Fact Nos. 15 - 21).

33. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H 105165 00 of 855 AF diverted volume and 6.25 CFS flow rate with a consumptive use being 2.45 AF. (Finding of Fact Nos. 15 - 21).

34. I find that the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H 214431 00 of 1047 AF diverted volume and 13.2 CFS flow rate with a consumptive use being 15.92 AF. (Finding of Fact Nos. 15 - 21).

Adverse Effect:

FINDINGS OF FACT

35. The Applicant proposes to change a portion of five historic Miller Creek surface water irrigation rights to marketing for mitigation. To provide mitigation water, the Applicant will permanently cease irrigation of 96.3 acres of historically irrigated lands in Sections 14, 15 and 10, T12N, R20W, Missoula County. The retirement of irrigated acreage will provide 90.5 AF of mitigation water to the Bitterroot River annually.

36. The surface water historically diverted from Miller Creek for irrigation of the 96.3 acres will now be left in Miller Creek and be allowed to discharge directly to the Bitterroot River and infiltrate through the streambed into the shallow groundwater aquifer that is tributary to the Bitterroot River. The streambed of Miller Creek is hydraulically disconnected from the groundwater aquifer in the Miller Creek valley, is highly permeable and is known to be a losing reach of stream. The Applicant's mitigation plan and groundwater flow model was reviewed by DNRC hydrogeologist who found that the monthly distribution and timing of effects is reasonable and agreed with the broader concepts and general results from the modeling.

37. Of the 345 acres historically irrigated using these water rights irrigation will continue on 51.7 acres in the lower Miller Creek Valley. This portion of the water right is not owned or controlled by Mountain Water Company. Irrigation water will be diverted to the 51.7 acres using two ditches upstream of the 96.3 acre taken out of production, identified as headgate numbers 3 and 4. The ditch system used to irrigate the 96.3 acres will be decommissioned and the water will stay in the Miller Creek stream channel. There are no other irrigators that use this ditch system that could be adversely affected by the decommissioning of these ditches.

38. Department hydrogeologist, Russell Levens modeled the effects on return flows from discontinued irrigation of the 96.3 acres and presented his findings in a report dated January 25, 2016. Historically irrigation of the 96.3 acres provided up to 326.5 acre-feet of return flows to the shallow groundwater aquifer that is tributary to the Bitterroot River. The loss of these return flows will not result in adverse effect to Bitterroot River water rights reliant on those return

flows due to the loss of return flows being entirely offset by both historically consumed volumes and historically diverted but not consumed volumes of water left instream for mitigation purposes (see table in Finding of Fact No. 52).

39. The historic consumptive use for the irrigation of the 96.3 acres being changed to mitigation water totals 108.8 AF per year (96.3 ac. x 1.13 af/ac). The proposed new consumptive use is 0 AF, with the water previously consumed by crops now being left instream for mitigation.

40. To monitor and record the amount of mitigation water provided on an annual basis, the Applicant proposes to provide annual documentation that the 96.3 acres historically irrigated by the subject water rights is dry. If the Maloney Ranch continues to irrigate the remaining 51.7 acres through the Lower Baker or other ditches, they will install measuring devices to record annual diversion rates and volume used for irrigation of the remaining 51.7 acres. The amount of water used for the purpose of marketing for mitigation under this change will be determined by measuring the amount of water left in Miller Creek at the location of the historic headgate used to irrigate the 96.3 acres. The Maloney Ranch is the farthest downstream irrigator in the Miller Creek valley and owns the senior most rights on the source ensuring that flows measured in the stream that are not diverted for irrigation are available for marketing for mitigation.

CONCLUSIONS OF LAW

41. 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.*, Proposal for Decision, adopted by DNRC Final Order (2005).

42. 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

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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.

43. 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.

44. 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*.

45. 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.

46. The Applicant has proven by a preponderance of the evidence 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.(Finding of Fact Nos. 35 - 40).

Adequate Diversion

FINDINGS OF FACT

47. The proposed marketing for mitigation plan will result in permanent discontinued irrigation of 96.3 acres. The Applicant will permanently abandon the historic headgate and ditch system that served the 96.3 acres irrigated in Sections 10, 14 and 15, T12N, R20W, and leave the water in the Miller Creek channel to provide mitigation water to the Bitterroot River. The remaining two headgates used to irrigate 51.7 acres on the Maloney Ranch will be fitted with measurement devices to allow the operator of the Maloney Ranch to record diversion rates and volumes for irrigation. To document mitigation water left in the stream, the Applicant will compare the amount of water diverted for remaining irrigation on the Maloney Ranch to the amount of water flowing in Miller Creek. The Applicant will report annual irrigation diversion records and annual mitigation volume records to the Department annually.

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

CONCLUSIONS OF LAW

49. 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).

50. 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. (Finding of Fact No. 47 - 48).

Beneficial Use

FINDINGS OF FACT

51. This Change Application is intended to provide marketing for mitigation water to the Bitterroot River. This change to marketing for mitigation was filed to resolve an objection filed by Montana Department of Fish, Wildlife and Parks (FWP) in Application for Beneficial Water Use Permit No. 76H 30063539. In that application the department found that reallocating 390.69 acre feet of historically consumed irrigation water to mitigation satisfied the requirements of MCA 85-2-360, and was sufficient to prevent adverse effect to FWP's instream flow water rights despite the fact that the mitigation plan only provided partial mitigation of depletions. In the objection filed by FWP they argued that the partial mitigation allowed by the department did not prevent adverse effect to their instream flow water rights. Mountain Water Company has agreed to dry up an additional 96.3 acres of historic irrigation to ensure that FWP instream flow water rights will not be adversely affected. The marketing for mitigation change will be implemented when pumping from the groundwater wells authorized in permit number 76H 30063539 reaches 380 acre-feet in one year. When the 380 acre-foot threshold is met the Applicant will permanently retire the 96.3 acres of irrigation, eliminating 108.8 acre-feet of historic consumption.

52. The proposed change will provide 90.5 acre-feet of mitigation water to the Bitterroot River after depletions from lost return flows are replaced through historically diverted but not consumed water is left instream. In months when the diverted but not consumed water is insufficient to replace lost return flows, historically consumed volume must make up the

difference before any mitigation value to the Bitterroot River occurs. The following table provides figures for monthly mitigation amounts provided by the proposed change.

Table 3: WATER AVAILABLE FOR MITIGATION IN THE BITTERROOT RIVER

	Accretion to the Bitterroot River of Consumed Water Left Instream (AF)	Accretion to the Bitterroot River of Non-Consumed Water Left Instream (AF)	Lost Historic Return Flows (AF)	Available For Mitigation
January	0.0	0.0	0.0	0.0
February	0.0	0.0	0.0	0.0
March	0.0	0.0	0.0	0.0
April	0.0	0.0	0.0	0.0
May	4.4	13.2	-16.2	1.4
June	21.9	65.7	-76.1	11.5
July	34.9	104.7	-109.7	29.9
August	32.6	97.8	-94.6	32.6
September	13.3	39.9	-28.5	13.3
October	1.8	5.4	-1.4	1.8
November	0.0	0.0	0.0	0.0
December	0.0	0.0	0.0	0.0
	108.8	326.5	-326.5	90.5

53. The following tables provide beneficial use figures for each individual water right. Flow rate for marketing for mitigation is based on the mitigation acreage retired as a percentage of recognized historic irrigated acres (Ex: $96.3 / 345 = 0.279$) multiplied by the historic flow rate (Ex: $4.19 \text{ CFS} \times 0.279 = 1.17 \text{ CFS}$). Consumptive use is based on the typical diversion schedule provided by the Applicant, priority of water rights and monthly evapotranspiration rates obtained from the Natural Resource and Conservation Service IWR program the Applicant calculated historic consumptive use for each of the Maloney Water Rights (FOF 21). Volume available for marketing for mitigation is calculated by taking the percentage of total historic consumed volume provided by each right and multiplying that figure by the 90.5 AF of mitigation water available to the Bitterroot River (Ex: $56.2\% \times 90.5 \text{ AF} = 50.8791$), with that figure divided by 96.3 acres to arrive at mitigation volume per acre.

Table 4: MARKETING FLOW RATE FOR INDIVIDUAL WATER RIGHTS

Water Right Number	Flow Rate	Marketing for Mitigation Flow Rate
76H 105162	4.19 CFS	1.17 CFS
76H 105163	5.19 CFS	1.45 CFS
76H 105164	6.25 CFS	1.74 CFS
76H 105165	1.25 CFS	0.35 CFS
76H 214431	13.2 CFS	3.68 CFS
Totals	30.08 CFS	8.39 CFS

Table 5: MARKETING VOLUMES FOR INDIVIDUAL RIGHTS

WR Number	Diverted Volume	% of Diverted Volume	Consumed Volume	% of Consumed Volume	Diverted Volume/Acre	Consumed Volume/Acre	Mitigation Volume	Mitigation Volume/Acre
105162	578 AF	17.21	219.26 AF	56.22	1.68 AF	0.64 AF	50.88	0.53
105163	716 AF	21.32	123.15 AF	31.58	2.08 AF	0.36 AF	28.58	0.30
105164	855 AF	25.46	29.21 AF	7.49	2.48 AF	0.08 AF	6.78	0.07
105165	162 AF	4.82	2.45 AF	0.63	0.47 AF	0.01 AF	0.57	0.01
214431	1047 AF	31.18	15.92 AF	4.08	3.03 AF	0.05 AF	3.69	0.04
Total	3358 AF	100	389.99 AF	100	9.73 AF	1.13 AF	90.5	0.98

CONCLUSIONS OF LAW

54. 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.

55. 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);

56. 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.

57. 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 Proposal for Decision, adopted by DNRC Final Order (2005).

58. Applicant proposes to use water for mitigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that 90.5 AF of water requested is the amount needed to sustain the beneficial use. (Finding of Fact No. 51 - 53).

Possessory Interest

FINDINGS OF FACT

59. 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. 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

60. 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.

61. 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.

62. 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. 59)

Salvage Water

63. This Application does not involve salvage water.

Discharge Permit

FINDINGS OF FACT

64. A discharge permit from the Department of Environmental Quality is not required.

CONCLUSIONS OF LAW

65. Sections 85-2-362(3) and 85-2-364, MCA require that an Applicant receive the appropriate water quality permits for a mitigation or an aquifer recharge plan pursuant to Title 75, chapter 5 MCA, as required by §§75-5-410 and 85-2-364, MCA, prior to the grant of

beneficial water use permit application as part of a combined application under § 85-2-363, MCA.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Order, the Department preliminarily determines that Application to Change Water Right Nos. 76H 105162-00, 76H 105163-00, 76H 105164-00, 76H 105165-00 and 76H 214431 should be **GRANTED** subject to the following.

The Department determines that the Applicant may change a portion of the purpose of Statement of Claim No. 76H 105162-00 from irrigation to marketing for mitigation, reducing the place of use for irrigation to 51.7 acres, and providing 1.17 CFS up to 50.88 AF of mitigation water to the Bitterroot River.

The Department determines that the Applicant may change a portion of the purpose of Statement of Claim No. 76H 105163-00 from irrigation to marketing for mitigation, reducing the place of use for irrigation to 51.7 acres, and providing 1.45 CFS up to 28.58 AF of mitigation water to the Bitterroot River.

The Department determines that the Applicant may change a portion of the purpose of Statement of Claim No. 76H 105164-00 from irrigation to mitigation, reducing the place of use for irrigation to 51.7 acres, and providing 1.74 CFS up to 6.78 AF of mitigation water to the Bitterroot River.

The Department determines that the Applicant may change a portion of the purpose of Statement of Claim No. 76H 105165-00 from irrigation to mitigation, reducing the place of use for irrigation to 51.7 acres, and providing 1.25 CFS up to 0.57 AF of mitigation water to the Bitterroot River.

The Department determines that the Applicant may change a portion of the purpose of Statement of Claim No. 76H 214431-00 from irrigation to mitigation, reducing the place of use for irrigation to 51.7 acres, and providing 3.68 CFS up to 3.69 AF of mitigation water to the Bitterroot River.

In the Matter of Application to Change a Water Right No. 76H 30063540 the Department finds the following conditions are necessary to meet the statutory criteria set forth at § MCA 85-2-402 for issuance of a Beneficial Water Use Permit.

1. THE APPLICANT SHALL PROVIDE THE DEPARTMENT WITH DOCUMENTATION THAT LANDS DESIGNATED FOR RETIREMENT ARE NO LONGER IRRIGATED. DOCUMENTATION OF NO IRRIGATION MAY CONSIST OF SITE SPECIFIC PHOTOGRAPHS AND/OR AERIAL PHOTOGRAPHY. DOCUMENTATION SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION.

2. THE APPLICANT SHALL MEASURE THE AMOUNT OF WATER DIVERTED FOR CONTINUED IRRIGATION AND THE AMOUNT OF WATER LEFT IN MILLER CREEK FOR THE PURPOSE OF MARKETING FOR MITIGATION PER THE MONITORING PLAN PROVIDED IN APPLICATION TO CHANGE A WATER NO. 76H 30063540. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPER FUNCTIONING CONDITION.

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 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, the 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 an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the application, the department will grant the combined application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 17th day of June, 2016.

/Original signed by Jim Nave/

Jim Nave, Manager

Missoula Regional Office

Department of Natural Resources and Conservation