

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

APPLICATION TO CHANGE WATER)	PRELIMINARY DETERMINATION TO GRANT CHANGE
RIGHT NO. 76F 30070325 BY BRUCE AND)	
NANCY MENZ)	

On October 1, 2014, Bruce and Nancy Menz through Trout Unlimited (Applicant) submitted Application to Change Water Right No. 76F – 30070325 to change Beneficial Water Use Permit No. 76F- 5851-00 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 March 27, 2015. The Department met with the Applicant’s representative, Meg Casey of Trout Unlimited, on April 23, 2014 to discuss the deficiency letter. The Applicant responded to the deficiency letter with information dated May 6, 2015. The Application was determined to be correct and complete as of December 24, 2015. On April 4, 2016 the Applicant submitted a waiver of the timelines in §85-2-307, MCA. An Environmental Assessment for this Application was completed on May 24, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606
- Attachments –
 - Change to Instream Flow Addendum
 - Change in Purpose Addendum
 - Temporary Change Addendum
 - Aerial photo depicting historic use (1977, 1980)
 - Aerial photo depicting proposed use
 - Photos of the current irrigation system

Information Received after Application Filed:

- Response to deficiency letter dated March 27, 2015 and received by the Department on May 6, 2015
- Waiver of Timelines received by the Department on April 4, 2016

Information within the Department's Possession/Knowledge

- File for Provisional Permit No. 76F – 5851-00
- USGS Gage station data for no. 12339450 and 12339500
- USDA Aerial munbered 1279-26, dated 07/21/1980
- Return Flow Policy Memo dated April 1, 2016
- Change in Method of Irrigation Memo dated December 2, 2015.
- Environmental Assessment dated May 24, 2016.

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 the place of use and temporarily change the purpose of the following Provisional Permit No. 76F – 5851-00, from irrigation to instream flow for the benefit of the fisheries resource in the Clearwater River, tributary to the Blackfoot River. The priority date is June 27, 1975. The maximum flow rate is 1.78 cubic feet per second (CFS) with a diverted volume of 346 acre-feet (AF) from the Clearwater River for the purpose of sprinkler irrigation of 144 acres. The period of diversion is May 1 through October 15. Water is diverted from Clearwater River at a pump site generally located in the SWSENW of Section 4, T14N, R14W, Missoula County. Water diverted from the Clearwater River using the pump is conveyed via steel pipe mainline to a series of lateral hand and wheel lines with impact sprinkler nozzles. The place of use for irrigation is generally located in the NE ¼ and the E2SW of

Section 4, T14N, R14W, Missoula County, approximately 40 miles Northeast of Missoula. The temporary change would be for a period of 10 years.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date	Acres
76F – 5851	Irrigation	1.78 CFS	346 AF	5-1 to 10-15	SWSENW Sec 4, T14N, R14W	Sec 4, T14N,R14W NE NW SW	6/27/1975	144

2. The water right has a 144 acre place of use of which 12 acres is owned by The Department of Transportation (DOT). No change is proposed on 12 acre place of use.

3. There are no supplemental rights used to irrigate the place of use.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the purpose of a portion of the provisional permit to instream flow for fisheries for a temporary period of 10 years and reconfigure the place of use for irrigation to include 7.5 acres irrigated by a center pivot that was not part of the original permitted place of use. The Applicant will retire 64 acres of the 144 acre place of use in Section 4, T14N, R14W, Missoula County, and use the water historically diverted and consumed on those acres for instream flows in the Clearwater River. The Applicant proposes to leave 0.79 CFS instream to benefit the fisheries resource in Clearwater River. The Applicant proposes to protect 0.79 CFS up to 147.2 AF at the historic point of diversion, with 147.2 AF being the Applicant’s historic diverted volume between May 1 and October 15 for the 64 acres being changed from irrigation to instream flow. Downstream of the historic point of diversion, the Applicant proposes to protect 0.79 CFS up to 64.3 AF, with 64.3 AF being the Applicant’s historic consumed volume for the 64 acres being retired during the period of use for instream flow fisheries, which is May 1 through October 15.

5. The protected reach begins at the historic point of diversion- a pump site located in the SWSE of Section 4- T14N, R14W, Missoula County and continues downstream approximately 3.2 miles to the confluence of Clearwater River and the Blackfoot River in the E2SW of Section 16, T14N, R14W, Missoula County.
6. The Applicant will continue to irrigate 68 acres and proposes to change the place of use of 7.5 of those acre to the NWNSE of Section 4, T14W, R14W, which is owned by the State of Montana. The Applicant has secured a lease agreement with Montana, State of Board of Land Commissioners – Trust Land Management Division, License #3063080. Per the Pettibone, 216 Mont. decision, the State will become co-owners of the water right.
7. The proposed change is supported by Montana Fish and Wildlife Service and U.S. Forest Service. Documents and reports submitted by the Applicant from these agencies indicate the importance of increasing instream flow to benefit fishery resources.
8. To ensure the 0.79 CFS is left instream to benefit the fisheries resource, the Applicant will start monitoring for compliance of the lease agreement confirming discontinued irrigation of the 64 acres starting May 1 of each year. As part of the proposed change Trout Unlimited will measure stream flows twice a year in the Clearwater River, likely in August and September to determine whether a need arises to call upstream junior water users for increased flow. In the event a call for water is made stream flow measurements will increase in frequency to a weekly basis to ensure compliance with the call. The following measurement condition applies: “The appropriator shall report to the department the streamflow data collected in implementation of the streamflow measurement plan required by Mont. Code Ann. §85-2-408(1)(b) and described in the change application. Documentation of the location of the measuring points and measurement methodology must be presented with the flow measurement records. The measurement report shall be submitted by November 30 of each year and upon request at other times during the year. Records must be sent to the water resources regional office. Failure to submit records may be cause for revocation of this temporary change authorization.”

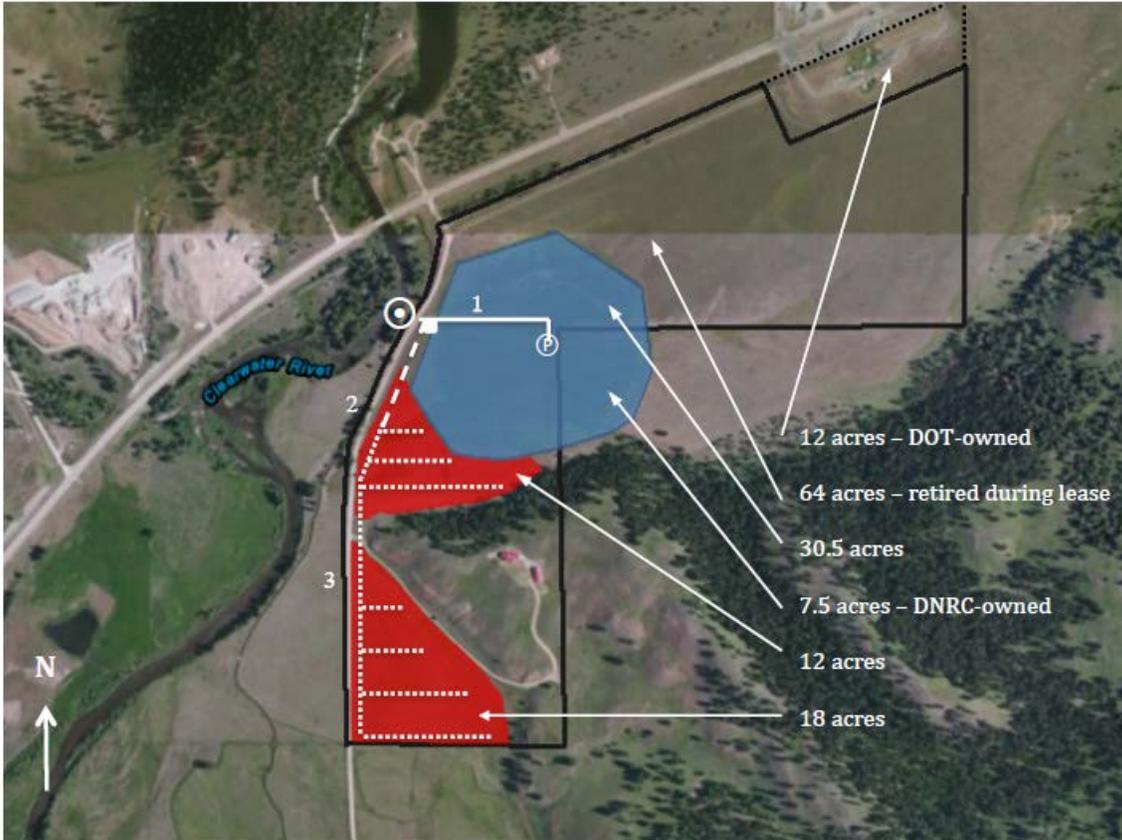
Proposed Protected Reach



Township 14 North Range 14 West, Missoula County

-  Protected reach of proposed change
-  Point of diversion, beginning of protected reach

Preliminary Design Plan & Specifications for Proposed Irrigation System



Section 4 of Township 14 North Range 14 West, Missoula County

- Boundary of Menz property (uncolored area within boundary = 64 acres retired during lease term)
- Current irrigation, includes 7.5 acre DNRC-owned parcel (approx. 38 acres)
- Area to be added to irrigation w/in term of lease (approx. 30 acres, 12 north of driveway, 18 south)
- ⊙ Point of diversion, Cornell Irrigation Co. Diversion Pump
- Ⓟ Nelson R3000 Micro Pivot
- Valve box, controls outflow to southward pipe—currently closed

Line 1 (solid): ~1,000' long, 6" dia. steel; segment of historic pipe; currently in place and in use

Line 2 (dashed): ~750' long, 6" dia. pvc; part of main line to be used w/in 10 yrs; in place, but not in use

Line 3 (dotted): ~3,000 ft' long total, 6" dia. pvc; new infrastructure to be constructed w/in 10 yrs

§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

9. 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.

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

11. 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).

12. 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.

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).

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).

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.

13. 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*).

14. 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.

15. 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).

16. 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.

17. 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.

18. 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).

19. 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

Point of Diversion, Conveyance Facilities and Flow Rate

20. The point of diversion listed for the water right permit is a pump located in the Clearwater River in the SWSEW of Section 4, T14N, R14W, Missoula County. Water is

diverted from Clearwater River to an eight inch steel mainline that connects to a series of lateral pipes used to run hand and wheel lines with impact sprinklers. The Applicant provided a copy of the system design specifications from the Soil Conservation Service dated 1974. The system was designed to operate with a 50 hp pump that is capable of pumping 1.78 CFS. The project was installed per design specifications.

21. An Affidavit from Tom Vannoy dated October 6, 2014 states that in June 27, 1977, Walter and Clara Vannoy diverted from the Clearwater River using a 50 hp irrigation pump.

22. The Soil Conservation Service inspected the system in 1977 and the Applicant submitted a copy of the field notes.

23. Based on the capacity of the originally designed pump and irrigation system the department finds the maximum historic diverted flow rate is **1.78 CFS** (798.9 gpm).

Place of Use, Period of Use

24. The historic use for a provisional permit is defined as the maximum amount of water put to beneficial use by the date the project completion notice was filed with the department. The project completion notice for provisional permit no. 76F-5851-00 was submitted on June 27, 1977. At that time the maximum historic acres irrigated was 144 acres. USDA aerial photograph number 1279-26, dated July 21, 1980, shows 144 irrigated acres.

25. The permitted period of use is May 1 to October 15. During this timeframe the Applicant typically irrigated 14 hours per day for 162 days. The configuration of the fields allowed for the Applicant to harvest hay on one portion of the field while irrigating the remaining acreage. As the other portions of the field were harvested the Applicant was able to continue irrigating previously harvested areas allowing for a continuous diversion of water during the 162 day growing season. The Applicant provided information obtained from Tom Vannoy, nephew of the original applicants (Walter and Clara Vannoy) indicating that from 1973 to 2004, Tom Vannoy assisted with haying each year. Tom also states the Vannoy's started irrigating in May and ran water until late September. This is a typical growing season according to the irrigation requirement for the Potomac weather station. The Department finds the period of use is from May 1 to October 15.

Diverted Volume and Consumed Volume

26. The total historic diverted volume is **333.6 AF** and is based on the permitted flow rate of 1.78 CFS for 14 hours per day during the 162- day growing season for grass hay identified using the Potomac weather station. The Department arrived at a per acre diverted volume by dividing the total diverted volume by the total number of historically irrigated acres. The per acre volume diverted rounded to the tenth equals 2.3 AF/acre ($333.6 \text{ AF} \div 144 \text{ acres} = 2.3 \text{ AF/acre}$).

27. Using the Applicants historic diversion schedule the following monthly diverted volumes were calculated by the Department:

April	May	June	July	August	September	October	TOTAL
8.2	63.8	61.8	63.8	63.8	61.8	10.3	333.5

28. A historic consumptive use volume of 147.2 AF was calculated using the Department’s consumptive use rules found in ARM 36.12.1902 (14) and the following parameters: the net irrigation requirement for hand line irrigation for the Potomac weather station is 14.05 inches per acre; the management factor for Missoula County during the period of 1973 to 2006 is 67.5%; and irrecoverable losses for sprinkler are 10% ($14.05 \text{ inches per acre} \div 12'' = 1.17 \text{ feet per acre} \times 67.5\% \text{ management factor} \times 144 \text{ acres} = 113.8 \text{ AF}$). Historic consumptive use including irrecoverable losses = $113.8 \text{ AF} + 33.36 \text{ AF} = 147.2 \text{ AF}$.

29. I find the following historic use:

WR Permit #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consump. Use	Point of Diversion
76F 5851	6/27/1975	333.6AF	1.78 CFS	Irrigation 144 acres	147.2 AF	SWSENW SEC 4, T14N, R141W

CONCLUSIONS OF LAW

30. 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).

31. 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).

32. 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.

33. 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).

34. 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)

35. 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”).

36. 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)).

37. “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.

38. 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.

39. 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/has not elected to proceed under ARM 36.12.1902. (Finding Of Fact No.26)

40. I find that the Applicant has proven by a preponderance of the evidence the historic use of Beneficial Water Use Permit No. 76F-5851-00 of 333.6 AF diverted volume and 1.78 CFS flow rate with a consumptive use of 147.2 acre-feet. (Finding Of Fact No. 20-29)

Adverse Effect:

FINDINGS OF FACT

41. The Applicant proposes to reconfigure the place of use and change the purpose of use for a portion of provisional permit 76F-5851-00 from irrigation to the purpose of instream flow to increase stream flows enhancing the fishery resource in the Clearwater River. The historic flow rate associated with the retired irrigated acreage changed to instream flow is 0.79 CFS, with a historic diverted volume of up to 147.2 AF and a historic consumed volume of 64.3 AF. Applicant proposes to retain the remainder of the historic diverted volume of 156.4 AF for the continued irrigation of 68 acres. The volume changed to instream flow of 147.2 AF and the volume retained for irrigation of 156.4 AF does not equal the total historic diverted volume of 333.6 AF due to the fact that 12 acres of the historic place of use now belongs to the Department of Transportation (DOT) and is not considered part of this change application.

42. As a normal course of protocol the Department analyzed the disposition of return flows under the proposed change and generated a Return Flow Report. File. However, on April 1, 2016, the Department issued a policy memorandum explaining how it will analyze return flows for all water right change applications from that date forward. Since the policy was issued prior to issuance of the Preliminary Determination in this matter, the Department will follow the April

1, 2016 guidance document. Finding of Fact No. 43 summarizes the Department's analysis under the April 1, 2016 policy.

43. According to Department policy, under the changed conditions return flows will only be reviewed under a limited adverse affect analysis absent a valid objection. For purposes of this Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that is left instream is available during the period of diversion either below the point of diversion or where return flows returned to the source (see Department Policy Memorandum on Return Flows, April 1, 2016). In this instance, both criteria will be met under the proposed change. That is, for the portion of irrigation that remains, return flows will enter back into the source at the same historic location (upstream of the next appropriator), and for the portion converting to instream flow, the non-consumed water will be available for other appropriators during the period of diversion below the point where return flows historically accrued. This will help ensure that downstream water users have similar or greater opportunity to appropriate water than was historically possible. The policy directs no further detailed analysis will be undertaken by the Department prior to objections, provided there will be no enlargement of the amounts of water historically diverted or consumed. It has been determined that there will be no enlargement of the water right in this case. Finding of Fact No.46.

44. If any other water right holder believes they will be adversely affected by a change in the timing and amount of return flows, they may file an objection to the proposed project pursuant to §§85-2-307(3), and -308, MCA.

45. Based on its analysis and guidance provided in policy, the Department preliminarily finds that the changes to return flows resulting from the proposal will not cause an adverse affect because more water will be left instream due to the cessation of irrigation diversions, and there are no other water users to be affected in the protected reach of Clearwater River.

46. Based on the evidence provided by the Applicant and the Department's consumptive use rules found in ARM 36.12.1902 (14), the historic consumptive use associated with this water right was calculated to be 147.2 AF. Of the 68 irrigated acres of continued irrigation on this parcel, 60.5 acres are located within the original place of use and proposed consumptive use was

calculated at 61.71 AF using the 1973 – 2006 management factor of 67.5% for Missoula County. Per the Department’s December 2, 2016 Change in Method of Irrigation Memo, proposed consumptive use for the 7.5 acre new place of use was calculated at 8.89 AF using the 1997 – 2006 management factor of 69.4%. Total proposed consumptive use on the 68 acres owned by the Applicant that will continue to be irrigated is 70.6 AF. The 64.3 AF of consumed volume to be left instream and protected below the historic point of diversion plus the 70.6 AF of consumed volume still dedicated to irrigation and the 12.24 AF associated with the 12 acres owned by DOT is equal to the historic consumptive use of 147.2 AF

47. Department hydrogeologist Russel Levens analyzed the impact that the proposed change outlined in this application would have on the emergence of return flows at the receiving stream reach. The receiving stream reach for return flows from the historic and changed place of use is the Clearwater River beginning adjacent to the upstream extent of the place of use, approximately at the bridge on U.S. Highway 200, and extending to the downstream extent of the place of use approximately at the southwest corner of Section 4, T14N, R14W. Return flows were evaluated by determining monthly volumes of water that infiltrate past the root zone, identifying the receiving stream reach, and modeling the monthly timing of return flows. The timing and location of return flows for historic and changed conditions were determined using the Alluvial Water Accounting System (AWAS) to simulate accretion of return flows to the receiving surface water system. Monthly application volumes are based on a 0.84 CFS application rate, prorated according to the reduction of irrigation from 144 acres to 68 acres, for 14 hours per day during the 162-day growing season for grass hay. Irrecoverable losses are 10% of applied volumes and non-consumed values are calculated the same as for historic irrigation.

48. The proposed change to instream flow will result in an annual loss of 99.5 AF of return flows to the Clearwater River. During the irrigation season the Applicant proposes to leave 147.2 AF of historically diverted volume instream for the fisheries resource. The diverted non-consumed volume left instream during the irrigation season will ensure that junior water users below the historic point of diversion will not experience adverse effect. As a result of diverted non-consumed water being left instream during the irrigation season, the department’s April 1, 2016 Return Flow Policy Memo applies to this application.

49. The applicant will use an open-channel flow meter to measure the streamflow of the Clearwater River twice per year (once in August and September) to determine if a call for water is to be made to increase streamflows at the historic diversion. In the event a call for water is made streamflow measurements will increase in frequency until such time the call can be ceased or the period of diversion and use for instream flow protection ends..

CONCLUSIONS OF LAW

50. 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).

51. 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).

52. 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.

53. 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).

54. 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.

55. 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.

56. 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. 41 - 49)

Beneficial Use

FINDINGS OF FACT

57. Applicant proposes to leave 0.79 CFS of water up to a volume of 147.2 AF instream to maintain or enhance streamflows in the Clearwater River.

58. The rate of 0.79 CFS and volume of 147.2 AF are supported by calculations of historic diverted volume and historic consumptive use including irrevocable losses based on the Department's consumptive use rules found in ARM 36.12.1902 (14).

59. The Applicant cites FWP fisheries studies conducted on the Clearwater River that indicate the stream supports populations of Bull Trout in addition to populations of Brown and

Rainbow Trout. FWP is concerned with periodic dewatering that occurs in the Clearwater River from irrigation diversions and recommends in a 2006 report titled “The Big Blackfoot River Fisheries Restoration Report for 2004 and 2005 that flow restoration in the lower Clearwater River would benefit fisheries in both the Clearwater and Blackfoot Rivers. FWP has initiated streamflow restoration projects in the Clearwater River and the additional 0.79 CFS up to 147.2 AF per year supplied by this instream flow change will help support critical habitat for the Clearwater River. FWP identified the lower 3.5 miles of the Clearwater River as periodically dewatered in their 2005 FWP Dewatering Concern Area list.

CONCLUSIONS OF LAW

60. 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.

61. 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.

62. 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). §85-2-402(2)(c), MCA (FOF Nos. 57 -59)

Adequate Diversion

FINDINGS OF FACT

63. In 2008, the applicant replaced the diversion site's original pump with a Cornell 30 hp pump capable of diverting 0.99 CFS (445 GPM) that is needed for the continuance of the 68 acres. The pump and existing means of conveyance are adequate for continued irrigation between May 1 through October 15. The adequacy of these diversions is evidenced in their continuous use for decades.

64. The proposed change of the water right is to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-402(2)(b)(ii), MCA. This change does not require the implementation of new diversion means as the applicant proposes to leave 0.79 CFS (147.2 AF) instream.

CONCLUSIONS OF LAW

65. 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.

66. 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).

67. 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 #No. 63,64).

Possessory Interest

FINDINGS OF FACT

68. This application is for a temporary change in appropriation right for instream flow to protect, maintain, or enhance stream flows and, under §85-2-402(2)(d)(ii), MCA. The applicant has possessory interest in the property where a portion of the water right will be put to use for irrigation purposes. The Applicant has an active lease agreement with State Lands for the 7.5 acre place of use.

CONCLUSIONS OF LAW

69. 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.

70. This application is for Instream Fishery purposes to maintain or enhance stream flows for the fishery resource and is exempt from the requirement to prove the possessory interest criteria. §85-2-402(2)(d)(ii), MCA. (FOF 68)

Instream Flow Change Requirements 85-2-407 and -408, MCA

FINDINGS OF FACT

71. Applicant proposes to change a portion of irrigation water right number 76F-5851-00 to instream flow for the benefit of the fishery resource in Clearwater River from the historic point of diversion to its confluence with the Blackfoot River, using the temporary change process specific to §85-2-407 and 408, MCA. As proposed by the Applicant, this temporary change would be for a period of 10 years with an option to renew.

Protected Reaches and Flow Rates

72. The protected reach proposed by the Applicants includes a 3.2-mile reach of Clearwater River from the historic diversion in the SWSEW of Section 4, T14N, R14W, Missoula County downstream to the confluence with the Blackfoot River in the E2SW of Section 16, T14N, R14W, Missoula County. Applicant proposes to protect a maximum flow rate of 0.79 CFS. The

Department finds that the flow rate the Applicant proposes to protect is reasonable and supported by the evidence. (F.O.F. No.s 57 - 59).

Protected Volume

73. The Applicant is entitled to protect 147.2 AF of the full diverted volume for the water right at the historic point of diversion.

74. Pursuant to §85-2-408, MCA, the full diverted volume for a water right may be protected instream in the reach of the source from the point of diversion to the point at which any return flows return to the source.

75. The Department calculated historic diverted volume of 333.6 AF and a return flow volume of 186.5 AF for the entire 144 acre irrigated place of use. Return flows generated from the 64 acres taken out of irrigation equals 99.6 AF. The Department Hydrogeologist, Russell Levens, ran a model that determined that the majority of return flows, approximately 90%, would accrete to the Clearwater River from the historically irrigated field and presented his findings in a report titled Return Flow Report dated December 10, 2015. Return flows accreted to the Clearwater River adjacent to the irrigated place of use immediately downstream from the historic diversion.

Plan for Operation and Measurement

76. Applicant's plan for operation and measurement of the instream flows proposed for protection entails the use of an open-channel flow meter by Trout Unlimited who will measure the streamflow of Clearwater River twice annually (once in August and September). The Applicant states that a call on junior water rights during the low-flow season is unlikely, but in the event of a call the Applicant has agreed to increase the frequency of streamflow measurement collection on a weekly basis to limit adverse effect to junior users.

CONCLUSIONS OF LAW

77. A temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use. § 85-2-407(2), MCA

78. The Department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under §§ 85-2-402, -407, and -408, MCA. An application for a temporary change authorization for instream flow under § 85-2-408, MCA, shall:

(a) include specific information on the length and location of the stream reach in which the stream flow is to be maintained or enhanced; and

(b) provide a detailed stream flow measuring plan that describes the point where and the manner in which the stream flow must be measured. (§ 85-2-408(1) (a), (b), MCA)

79. A temporary change authorization under § 85-2-408, MCA, is allowable only if the owner of the water right voluntarily agrees to:

(a) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or

(b) lease a consumptive use water right to another person for instream flow to benefit the fishery resource. (§ 85-2-408(2) (a), (i), (ii), MCA)

80. In addition to the requirements of §§ 85-2-402, and -407, MCA, the Applicant must prove by a preponderance of the evidence that:

(a) The temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the rights of other persons; and

(b) The amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. (§ 85-2-408(3) (a), (b), MCA)

81. Section 85-2-408(7), MCA provides:

The maximum quantity of water that may be changed to maintain and enhance stream flows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in

the lease authorization, may be used to maintain or enhance stream flows to benefit the fishery resource below the existing point of diversion.

Pursuant to the District Court decision in Hohenlohe v. DNRC, Cause No. BDV-2008-750, Montana First Judicial District (June 10, 2009), *aff'd*, Hohenlohe v. DNRC, 2010 MT 203, an applicant in a change in appropriation right proceeding for instream flow can protect the full historic diverted flow rate and volume in certain circumstances. The full historic diverted amount (flow and volume) can be protected to the extent it does not return to the watercourse within the protected reach and it returns to those appropriators who rely on the return flow in accordance with the adverse effect criterion §85-2-402(2)(a), MCA. Hohenlohe, ¶¶42, 67 - 70. The determination under 85-2-408(7) as to the amount protected is within the Department's discretion. Id. at ¶¶37, 39. The Department has the discretion under appropriate circumstances to limit or reduce that portion suitable for instream flow from the amount historically diverted to the amount historically consumed, or a smaller amount, (§85-2-408(7), MCA) and to approve the change under such conditions as the Department considers necessary (§85-2-402(8), MCA). Id. at ¶¶67-69.

82. The Applicant has proven by a preponderance of the evidence that the temporary change authorization will not adversely affect the rights of other persons. (Finding of Fact Nos. 41 - 49)

83. Applicants provided a detailed measurement plan and specific information on the stream reach to be protected. (Finding of Fact No. 76)

84. The Applicant provided sufficient information regarding when the instream flow protection for each water right will be in effect and how the water rights will be administered in a manner that ensures the amount of water protected instream does not exceed the maximum volume and flow rate during the period of use for each water right. Therefore, Department concludes that the Applicant's plan for operation and measurement of instream flow protection for each water right is sufficient as proposed.

Salvage Water

This Application does not involve salvage water

CONDITIONS

FLOW MEASUREMENT AND REPORTING CONDITION

TO ENSURE THE 0.79 CFS IS LEFT INSTREAM TO BENEFIT THE FISHERIES RESOURCE, THE APPLICANT WILL START MONITORING FOR COMPLIANCE OF THE LEASE AGREEMENT TO ENSURE DISCONTINUED IRRIGATION OF THE 64 ACRES STARTING MAY 1 OF EACH YEAR. AS PART OF THE PROPOSED CHANGE TROUT UNLIMITED WILL MEASURE STREAM FLOWS TWICE A YEAR IN THE CLEARWATER RIVER, LIKELY IN AUGUST AND SEPTEMBER. THE FOLLOWING MEASUREMENT CONDITION APPLIES: “THE APPROPRIATOR SHALL REPORT TO THE DEPARTMENT THE STREAMFLOW DATA COLLECTED IN IMPLEMENTATION OF THE STREAMFLOW MEASUREMENT PLAN REQUIRED BY MONT. CODE ANN. §85-2-408(1)(B) AND DESCRIBED IN THE CHANGE APPLICATION. DOCUMENTATION OF THE LOCATION OF THE MEASURING POINTS AND MEASUREMENT METHODOLOGY MUST BE PRESENTED WITH THE FLOW MEASUREMENT RECORDS. THE MEASUREMENT REPORT SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS TEMPORARY CHANGE AUTHORIZATION.”

PRELIMINARY DETERMINATION

Subject to the terms, analysis and conditions in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76F 30070325 should be GRANTED subject to the following.

The appropriator may change a portion of Beneficial Water User Permit No. 76F- 5851-00 from irrigation to instream flow for the benefit of the fishery resource in the Clearwater River for a temporary period of 10 years. From May 1 to October 15 irrigation will occur on 68 out of the 144 historically irrigated acres located in the NE ¼ and the E2SW of Section 4, T14N, R14W, Missoula County, at a flow rate of 0.84 CFS and a diverted volume of 156.4 AF. The appropriator shall no longer irrigate 64 of the 144 acres historically irrigated under the existing water right. A flow rate of 0.79 CFS up to 147.2 AF in volume may be protected at the historic point of diversion, and 0.79 CFS up to 64.3 AF in the protected reach located between the location of the historic pump site in the SWSNW of Section 4, T14N R14W, downstream 3.2 miles to the confluence of the Clearwater River and the Blackfoot River. The appropriator may

protect water for instream flow during the period of May 1 to October 15. This authorization is subject to the conditions outlined in the Conditions section above.

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 9th day of June 2016.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 9th day of June 2016, by first class United States mail.

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